

NOTICE

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2011 IL App (5th) 100164-U

NO. 5-10-0164

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

| | | |
|---|---|-------------------|
| OHIO SECURITY INSURANCE COMPANY, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Bond County. |
| |) | |
| v. |) | No. 05-MR-30 |
| |) | |
| RASLER PLUMBING COMPANY, an |) | |
| Illinois Corporation, and BEVERLY |) | |
| RASLER, Individually and as Special |) | |
| Administrator of the Estate of Randy G. |) | |
| Rasler, Deceased, |) | Honorable |
| |) | John Knight, |
| Defendants-Appellees. |) | Judge, presiding. |

JUSTICE DONOVAN delivered the judgment of the court.
Justices Welch and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held:* In a bad-faith counterclaim filed by the employer and the spouse of the deceased employee against the employer's workers' compensation insurer, the trial court did not err finding that documents generated in the underlying workers' compensation case are not protected by the work-product privilege in the pending bad-faith case; and the trial court did not abuse its discretion in finding the insurer in civil contempt and imposing sanctions for the contemptuous behavior.

¶ 2 The plaintiff, Ohio Security Insurance Company (Ohio Security), filed a declaratory judgment action in the circuit court of Bond County against the defendants, Rasler Plumbing Company, an Illinois corporation, and Beverly Rasler, individually and as special administrator of the estate of Randy G. Rasler, deceased (collectively, the Rasler defendants), and it sought an order declaring that the decedent, Randy Rasler, had executed a corporate officer's exclusion and that he was not covered under the workers' compensation policy

issued to Rasler Plumbing. The Rasler defendants filed a counterclaim against Ohio Security and alleged that Ohio Security acted in bad faith in refusing to pay the death benefit awarded to Beverly Rasler by the Illinois Workers' Compensation Commission (Commission). During the course of discovery, Ohio Security claimed that certain documents sought in discovery were protected by the attorney-client privilege and the work-product privilege. The trial court determined that the documents were not privileged and ordered Ohio Security to produce them. Over the course of several months, Ohio Security continued to raise objections and refused to produce the documents despite three additional orders compelling production. Nearly 18 months after the original order compelling production of the contested documents, Ohio Security asked to be held in civil contempt so that it could immediately appeal the court's discovery orders. The trial court found that Ohio Security was in wilful civil contempt and imposed monetary sanctions. On appeal, Ohio Security claimed that the contested documents were protected by attorney-client and work-product privileges and that the trial court erred in ordering it to produce them. Ohio Security further claimed the trial court abused its discretion in imposing sanctions where it acted in good faith in seeking a contempt finding so that it could obtain immediate appellate review and asks that the contempt findings and sanctions be vacated. We affirm.

¶ 3

I. BACKGROUND

¶ 4 The declaratory judgment action and the bad-faith counterclaim arose from an underlying workers' compensation claim. A summary of the proceedings, beginning with that case, will provide context to the issues in the appeal.

¶ 5

A. The Workers' Compensation Action

¶ 6 On October 22, 2004, Randy Rasler was killed while he was performing an extrahazardous duty that arose out and in the course of his employment with Rasler Plumbing Company. At that time, Randy was the president of Rasler Plumbing and an employee of the

company. Randy was survived by his spouse, Beverly Rasler. Beverly was also a corporate officer and an employee of Rasler Plumbing. At the time of Randy's death, Rasler Plumbing had workers' compensation insurance coverage under a policy issued by Ohio Security. Rasler Plumbing had purchased the policy through an agent named Larry Martin.

¶ 7 In June 2005, Beverly filed a claim for a death benefit under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)), and the case was set for a final hearing on all issues on September 6, 2005. A notice of the scheduled hearing was sent to Ohio Security. The case was called for hearing on September 6, 2005, but no one appeared on behalf of the respondent, Rasler Plumbing. The arbitrator reset the case for a final hearing on November 1, 2005, and notice was sent to Ohio Security. Once again, no one appeared on behalf of Rasler Plumbing. The arbitrator found that the respondent failed to appear despite proper notice, and the case was tried in a default hearing. After the presentation of evidence, the arbitrator took the matter under submission.

¶ 8 On November 4, 2005, Kevin Leahy, an attorney hired by Ohio Security, entered his appearance on behalf of Rasler Plumbing. On or before November 15, 2005, Leahy filed a motion to reopen the record. The motion was heard on November 15, 2005. During the hearing, Leahy initially challenged the validity of the notice. Leahy asked the arbitrator to reopen the record for the limited purpose of contesting coverage, but he also asked for a brief continuance in order to review the case to determine whether there were other relevant defenses. Following arguments of counsel, the arbitrator denied the motion. The arbitrator specifically found that Ohio Security had been given proper notice and "sat on their hands." On November 23, 2005, the arbitrator issued a decision and awarded a death benefit to Beverly. Attorney Leahy filed a petition for review before the Commission. The Commission affirmed the arbitrator's decision to deny the motion to reopen the record, finding that the respondent had "ample notice of the scheduled hearing and chose to do

nothing." The Commission also affirmed the award. The decision was not appealed.

¶ 9

B. The Declaratory Judgment Action

¶ 10 While the workers' compensation case was pending, Ohio Security filed a declaratory judgment action in the circuit court of Bond County against Beverly Rasler and Rasler Plumbing (the Rasler defendants). Ohio Security sought an order declaring that Randy was not covered under the workers' compensation policy issued to Rasler Plumbing. Ohio Security alleged that on January 7, 2004, Randy signed a corporate officer's declination-of-coverage form and that the form was sent to it and provided written notice that Randy had elected to decline workers' compensation coverage for himself.

¶ 11 The Rasler defendants filed an answer and therein denied that Randy had signed a declination-of-coverage form or had otherwise declined coverage. The Rasler defendants also filed a counterclaim against Ohio Security and therein claimed that Ohio Security had acted in bad faith in refusing to pay the benefits awarded in a final decision by the Commission. The Rasler defendants alleged, in part, that Ohio Security had breached its special duty to its insured to settle a legitimate claim, that Ohio Security hired an attorney named Kevin Leahy to represent Rasler Plumbing in the workers' compensation action but directed Leahy to act adversely to the interests of Rasler Plumbing, that Ohio Security asserted a coverage defense that was based upon a fraudulent act of its agent, and that Ohio Security refused to offer Rasler Plumbing the option to have an attorney of its own choosing to represent its interests in the workers' compensation action.

¶ 12 During the period for discovery, Larry Martin, the agent from whom Rasler Plumbing secured the workers' compensation policy, was deposed. Martin testified that he had signed Randy's name on the declination-of-coverage form. Martin admitted that he did not have written authorization from Randy to sign the form on Randy's behalf. Martin stated that he could not recall a conversation in which Randy authorized him to sign the form. The parties

filed cross-motions for a summary judgment on the coverage issue. During the motion hearing, Ohio Security acknowledged that Randy had not signed the declination-of-coverage form and that Randy's signature had been forged by Larry Martin. Following the hearing, the trial court entered a summary judgment in favor of the Rasler defendants and against Ohio Security. The court determined that the declination-of-coverage form had been executed by an agent of Ohio Security and that the form was not in compliance with section 3(17)(b) of the Act, which requires a corporate officer to provide to the insurance carrier a written notice of his decision to withdraw himself from workers' compensation coverage (820 ILCS 305/3(17)(b) (West 2004)). The court found that in absence of a valid election to withdraw, coverage should be provided. Ohio Security appealed. This court affirmed the summary judgment in favor of the Rasler defendants. *Ohio Security Insurance Co. v. Rasler Plumbing Co.*, No. 5-07-0176 (2009) (unpublished order pursuant to Illinois Supreme Court Rule 23 (eff. May 30, 2008)).

¶ 13 *C. The Bad-Faith Claim & Discovery Disputes*

¶ 14 During the pendency of the aforementioned appeal, discovery continued as to the bad-faith claim. As part of its discovery requests, the Rasler defendants filed a request for production of documents, including information on Ohio Security's employee bonus compensation program (the bonus information) and documents contained in the workers' compensation file of attorney Kevin Leahy, including communications between Leahy and Ohio Security (the Leahy documents). When Ohio Security failed to respond to the discovery requests, the Rasler defendants filed a motion to compel. The trial court, without a hearing, considered and granted the motion to compel. Ohio Security did not file a motion to vacate that order. It did not offer to tender documents for an *in camera* inspection. It did not request to be held in contempt so that it could immediately appeal the discovery order. Instead, it filed objections to the requests for production of the Leahy documents and the

bonus information. Ohio Security specifically claimed that the Leahy documents were protected by attorney-client and work-product privileges and were not discoverable. The Rasler defendants filed another motion to compel. Following a hearing, the trial court entered a second order compelling Ohio Security to produce the requested documents. Ohio Security did not produce the Leahy documents and bonus information as ordered. Instead, it filed objections similar to those previously filed. With regard to the Leahy documents, Ohio Security filed a motion for a protective order and indicated that it would produce the documents upon entry of the order. After hearing additional arguments on the discovery issues, the trial court entered a protective order covering the Leahy documents and ordered the discovery to be supplied within 14 days. Ohio Security did not produce the Leahy documents. Instead, it filed a privilege log and therein itemized and described the nature of the Leahy documents. The Rasler defendants filed another motion to compel and requested sanctions pursuant to Illinois Supreme Court Rule 219 (eff. July 1, 2002). During the hearing, the trial court determined that the Leahy documents were not protected by work-product or attorney-client privilege. The court denied the motion for sanctions but granted the motion to compel, and it ordered Ohio Security to produce the Leahy documents and the bonus information within 14 days. Upon the entry of that fourth order compelling the production of documents, Ohio Security requested to be held in contempt.

¶ 15 In an order entered March 8, 2010, the trial court found that Ohio Security was in wilful civil contempt for refusing to produce the Leahy documents and the bonus documents, and it imposed sanctions pursuant to Supreme Court Rule 219. The court noted that Ohio Security had admitted that it failed to comply with the court's earlier orders compelling production of documents, that the scope of Ohio Security's obligation to produce had been at issue for more than 18 months, and that Ohio Security should have made known at an earlier time that it intended to seek a finding of contempt in order to seek appellate review

of the discovery orders. The court imposed a sanction of \$35 per day for each day that the Leahy documents were not produced, a sanction of \$35 a day for each day that the bonus information was not produced, and a sanction of \$5,000 to cover the attorney fees incurred by the Rasler defendants as a direct result of Ohio Security's unreasonable delay in challenging the propriety of the discovery orders.

¶ 16 Following the entry of the contempt order, Ohio Security produced some employee bonus information and filed a motion to vacate the contempt order. It also offered for the first time to produce the Leahy documents to the trial court for an *in camera* inspection. During a hearing on March 30, 2010, the court vacated only that part of the civil contempt sanction that dealt with the bonus documents, and it took the balance of the motion to vacate under advisement. Ohio Security filed a notice of appeal. A few days later, Ohio Security filed an amended motion to vacate the contempt order and withdrew its offer to produce the Leahy documents for an *in camera* inspection. Ohio Security then filed an amended notice of appeal. On April 9, 2010, the court stayed the contempt penalties not previously vacated until further order of the court because of the present appeal.

¶ 17

II. ANALYSIS

¶ 18 On appeal, Ohio Security claimed that the Leahy documents were protected by the attorney-client privilege and the work-product privilege and that the trial court erred in ordering production of those documents. Ohio Security further claimed the trial court abused its discretion in imposing sanctions where it acted in good faith in seeking a contempt finding so that it could obtain immediate appellate review of the propriety of the orders compelling discovery of the Leahy documents.

¶ 19 Initially we note that two significant matters arose during the oral arguments before this court. Ohio Security conceded that the attorney-client privilege did not protect the Leahy documents from disclosure in the pending bad-faith case, and it explicitly abandoned

that argument. Accordingly, we will not consider that issue in this decision. In addition, Ohio Security made an oral offer to produce the Leahy documents under seal for an *in camera* inspection by this court. We instructed counsel for Ohio Security to submit the request in a written motion with legal authority supporting its request, and we advised counsel for the Rasler defendants that he would be given time to respond to any motions filed by Ohio Security. Ohio Security filed its motion seeking leave to file the Leahy documents under seal for purposes of an *in camera* inspection, the Rasler defendants filed a response, and the motion was taken with the case.

¶ 20 Upon review of the motion, the response, and the trial court record, it is clear that the Leahy documents were never presented to the trial court for an *in camera* inspection. Ohio Security offered to produce the documents under seal for an *in camera* inspection, but that offer came only after the trial court had issued the contempt findings and monetary penalties against Ohio Security, and then, just a few days later, the offer was withdrawn. Illinois Supreme Court Rule 329 provides that a party may supplement the record on appeal to include omissions, to correct errors, and to settle controversies as to whether the record accurately reflects what occurred in the trial court. Ill. S. Ct. R. 329 (eff. Jan. 1, 2006). But a party may only supplement the record with documents that were actually before the trial court. *Radosevich v. Industrial Comm'n*, 367 Ill. App. 3d 769, 772, 856 N.E.2d 1, 4 (2006). The Leahy documents were not presented to the trial court for an *in camera* inspection, and they were not otherwise made a part of the record in the circuit court. Therefore, Ohio Security's motion is denied.

¶ 21 A contempt proceeding is an appropriate method for testing the correctness of a discovery order. *In re D.H.*, 319 Ill. App. 3d 771, 773, 746 N.E.2d 274, 276 (2001). When a party appeals a contempt order that was imposed for violations of a discovery order, the discovery order is subject to review. *In re D.H.*, 319 Ill. App. 3d at 773, 746 N.E.2d at 276.

If the discovery order is found to be invalid, then the contempt order must be reversed. *In re D.H.*, 319 Ill. App. 3d at 773, 746 N.E.2d at 276. A discovery ruling is ordinarily reviewed for an abuse of discretion, but a ruling on whether sought-after material is protected from discovery by a recognized privilege is subject to *de novo* review. *In re D.H.*, 319 Ill. App. 3d at 773, 746 N.E.2d at 276.

¶ 22 Ohio Security contends that the trial court erred in finding that the Leahy documents were not work product and were discoverable in the pending bad-faith action. In Illinois, we have taken a narrow approach to the discovery of an attorney's work product. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 196, 579 N.E.2d 322, 330 (1991). Because the work-product privilege protects rights outside of the discovery process and runs counter to the overriding considerations of discovery, *i.e.*, ascertaining the truth and expediting the disposition of the litigation, the application of the privilege is strictly construed. *Waste Management*, 144 Ill. 2d at 196, 579 N.E.2d at 330; *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966).

¶ 23 Illinois Supreme Court Rule 201(b)(2) addresses work product and states in pertinent part, "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. S. Ct. R. 201(b)(2) (eff. July 1, 2002). Under Supreme Court Rule 201(b)(2), ordinary work product that does not disclose conceptual data is discoverable, and core work product, which consists of materials that are generated in preparation for litigation and that reveal the mental impressions, opinions, or trial strategy of an attorney, is subject to discovery upon a showing of impossibility of securing similar information from other sources. *Waste Management*, 144 Ill. 2d at 196, 579 N.E.2d at 329-30.

¶ 24 The Leahy documents were generated in the underlying workers' compensation case. Attorney Leahy entered his appearance on behalf of Rasler Plumbing, thereby representing

that he was protecting the mutual interests of Ohio Security and Rasler Plumbing. The record indicates that the Leahy documents were, in the first instance, generated for the mutual benefit of Ohio Security and Rasler Plumbing in resolving the workers' compensation claim and thus would not be considered as protected work product in the subsequent controversies between those parties. There is no question that Ohio Security and Rasler Plumbing became adverse parties with separate interests when Ohio Security filed the declaratory judgment action against Rasler Plumbing and asserted a coverage defense that was based upon a document forged by one of its agents. The adversarial relationship likely intensified when the Rasler defendants filed the bad-faith counterclaim against Ohio Security. In each of these actions, questions arose as to the validity of Randy Rasler's purported signature on the corporate officer's declination-of-coverage form and the legitimacy of the coverage defense claimed by Ohio Security. In addition, the mental impressions, trial strategies, and the actions of attorney Leahy and the nature and content of his communications and consultations with Ohio Security were placed at issue. There does not appear to be any source outside of Leahy's files where the mental impressions and trial strategies of attorney Leahy and the nature and content of his communications with Ohio Security, which are at issue in the bad-faith case, might be obtained. The sought-after information is relevant to and will serve to expedite a resolution of the issues in the pending bad-faith action. The trial court did not err in finding that the Leahy documents are not protected work product in the bad-faith case, and it did not err in ordering Ohio Security to produce them. See *Waste Management*, 144 Ill. 2d at 197-200, 579 N.E.2d at 330-31.

¶ 25 Ohio Security also contends the trial court abused its discretion in imposing sanctions where it acted in good faith in seeking a contempt finding so that it could obtain immediate appellate review of the propriety of the orders compelling discovery of the Leahy documents.

¶ 26 Supreme Court Rule 219 gives a trial court the discretion to impose sanctions,

including an award of attorney fees and expenses, monetary penalties, and the striking of pleadings, upon any party who unreasonably refuses to comply with any provisions of the discovery rules or any orders entered pursuant to those rules. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 120, 692 N.E.2d 286, 289 (1998). The purpose of imposing sanctions is not to punish, but to effectuate compliance with discovery rules and orders. *Shimanovsky*, 181 Ill. 2d at 123, 692 N.E.2d at 291. The decision to impose a particular sanction under Rule 219(c) is within the discretion of the trial court and will only be reversed for a clear abuse of discretion, such as where the sanctioned party's conduct was not unreasonable or where the sanction is unjust or disproportionate to the offense. *Shimanovsky*, 181 Ill. 2d at 120, 692 N.E.2d at 289. Once the trial court has imposed the sanction for noncompliance with a discovery order, the sanctioned party has the burden to establish that its noncompliance was reasonable or justified by extenuating circumstances or events. *Hartnett v. Stack*, 241 Ill. App. 3d 157, 173, 607 N.E.2d 703, 714 (1993). To determine whether noncompliance was unreasonable, the trial court should consider whether the offending party's conduct was characterized by a deliberate and pronounced disregard for discovery rules or order and the importance of the information to the party seeking the discovery. *Hartnett*, 241 Ill. App. 3d at 173, 607 N.E.2d at 714.

¶ 27 In this case, the record shows that Ohio Security refused to produce the requested documents for 18 months, despite four court orders directing it to produce those documents. It was only after the entry of a fourth order compelling production of the contested Leahy documents that Ohio Security sought to be held in civil contempt so that it could seek appellate review of the propriety of the discovery orders. Ohio Security has not offered any reason why it waited more than 18 months to request the contempt finding. Ohio Security has not shown that its delay was reasonable or justified by some extenuating circumstances or events. Though Ohio Security employed an accepted method to test the underlying

discovery order, the lengthy delay in seeking to pursue that option was unreasonable and without justification. Additionally, the communications between Leahy and Ohio Security were one of the pivotal parts of the bad-faith claim. The trial court's determination that Ohio Security's conduct was contemptuous is supported by the record. The trial court's decision to hold Ohio Security in civil contempt and to impose sanctions is supported by the record and is not an abuse of discretion.

¶ 28 Ohio Security challenged the trial court's conclusion that its behavior was contemptuous, but it did not challenge the specific sanctions imposed. The record shows that the imposition of \$5,000 in attorney fees and a sanction of \$35 for each day that Ohio Security refuses to produce the Leahy documents are just and proportionate sanctions. We note that the trial court's award of attorney fees was less than the amount submitted by the Rasler defendants. We also note that the trial court stayed the daily sanction during the pendency of this appeal, and we believe that was appropriate under the circumstances.

¶ 29 III. CONCLUSION

¶ 30 Accordingly, the decision of the trial court is affirmed. The case is remanded to the trial court for further proceedings, including the calculation of *per diem* penalties that have accrued up through the date of the stay.

¶ 31 Affirmed; cause remanded.