

FILED June 23 20 21

Candace Fisher
SANDERS COUNTY CLERK OF DISTRICT COURT
BY M. Smith
DEPUTY

MONTANA SEVENTH JUDICIAL DISTRICT COURT, SANDERS COUNTY

<p>ALEXIS NUNEZ, Plaintiff, vs. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Defendants.</p>	<p>Cause No. DV-16-084 ORDER COMPELLING PRODUCTION AND FOR SANCTIONS</p>
<p>WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES, Third-Party Plaintiffs, vs. IVY MCGOWAN-CASTLEBERRY, Third-Party Defendant.</p>	

On May 26, 2021, the Court issued its Order Compelling Production (Doc. 210) in which it explicitly ordered that, "Defendants shall immediately fully respond

to the following discovery requests: Requests for Production 2-8 and Interrogatory No. 1, except for the “erroneous” page containing the name of Anthony Montoya. That page shall be produced to the Court, in chambers, for *in camera* review, by emailing it to the Judge’s clerk at jmckinney@mt.gov.” The plain language of the Requests for Production makes clear that the document to be “immediately” produced is the 10-page document from the CM database.

On June 11, 2021, the Defendants produced a “Notice of Submission” for *in camera* review, not only the one page “erroneous” document described above, but also the 10-page document from their Child Molester (CM) database, which the Court expressly ordered them to immediately produce to Nuñez. Not only did Defendants defy the Court’s order, they asserted that, “[they] do not understand the Court’s May 26, 2018 (sic) Order to compel production...” This statement of confusion defies credulity and is abjectly disingenuous.

The Rules of Civil Procedure provide:

If a party fails to provide information requested in accordance with these rules . . . , the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order the payment of the reasonable expenses, including attorney fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

M.R.Civ.P. 37(c)(1).

The "orders listed in Rule 37(b)(2)(A)(i)-(vi)" include:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party.

M.R.Civ.P. 37(b)(2)(A).

Rule 37(b)(2), M. R. Civ. P., authorizes a district court to sanction a party for failure to comply with a court order compelling discovery, including by dismissal of an action or by entering a judgment by default. In a case involving entry of a default judgment as a sanction, sanctions are appropriate, "where counsel or a party has acted willfully or in bad faith in failing to comply with the rules of discovery or with court orders enforcing the rules, or they have acted in flagrant disregard of those rules." *Kraft v. High Country Motors, Inc.*, 2012 MT 83, ¶ 37, 364 Mont. 465, 276

P.3d 908., ¶ 37 (citation omitted). A showing of prejudice is required for default judgment as a sanction for discovery abuse. See *Eisenmenger v. Ethicon, Inc.*, 264 Mont. 393, 406, 871 P.2d 1313, 1321 (1994); *Estate of Willson v. Addison*, 2011 MT 179, ¶ 28, 361 Mont. 269, 258 P.3d 410.

"The trial judge is in the best position to know . . . which parties callously disregard the rights of their opponents and other litigants seeking their day in court. The trial judge is also in the best position to determine which sanction is the most appropriate." *Linn v. Whitaker*, 2007 MT 46, ¶ 13, 336 Mont. 131, 152 P.3d 1282; *Xu v. McLaughlin Research Inst.*, 2005 MT 209, ¶ 17, 328 Mont. 232, 119 P.3d 100) (citations omitted). In *Richardson*, default judgment was deemed appropriate where the defendant's "willful and bad faith conduct" amounted to a "blatant and systemic" abuse of the discovery process that "undermined the integrity of the entire proceeding." *Richardson*, ¶¶ 65, 68. In that case, the Court determined that the defendant knowingly "concealed the evidence . . . until the eve of trial by asserting baseless objections" to plaintiff's discovery requests and attempted to use the lack of knowledge created by the discovery abuses against the plaintiff. *Richardson*, ¶ 23. The evidence at issue in *Richardson* was one page of significant information concerning the other similar incidents. *Richardson v. State*, 2006 MT 43, 331 Mont. 231, 130 P.3d 634. In *Estate of Willson*, the defendant hospital inadvertently destroyed some medical records that would have otherwise been discoverable in a

medical malpractice case. *Willson*, ¶¶ 27-28. Based on the inadvertence of the destruction, the Court concluded that the defendant did not "blatantly, systemically, willfully and in bad faith violate the rules of discovery." *Willson*, ¶ 28. *Estate of Willson v. Addison*, 2011 MT 179, 361 Mont. 269, 258 P.3d 410. Here, the conduct by the Defendants closely resembles the sanctioned conduct in *Richardson*.

The Defendants' decision to violate the Court's order and not produce the 10-page document directly to Nuñez as ordered, instead producing it for review *in camera*, claiming that it did not "understand" the Court's Order, was not substantially justified. See, Rule 37(c)(1), M. R. Civ. P., *supra*. Likewise, their decision was not harmless. Rule 37(c)(1), M. R. Civ. P. The Defendants not only delayed production of evidence to Nuñez, it caused additional depletion of scarce judicial time and resources. Moreover, Defendants willfully obstructed discovery after the Court explicitly warned that it, "will not tolerate further obstruction and will consider sanctions for similar conduct in the future." (Doc. 210). The Court has discretion to determine an appropriate sanction for discovery abuse. *Richardson*, ¶65; *Willson*, ¶ 24.

The "principle of 'trial on the merits' weighs against the imposition of a default judgment." *Stokes v. Ford Motor Co.*, 2013 MT 29, ¶ 20, 368 Mont. 365, 300 P.3d 648 (quoting *Richardson*, *supra*, ¶ 68). The sanction must: (1) relate to the extent and nature of the actual discovery abuse; (2) relate to the extent of the prejudice to

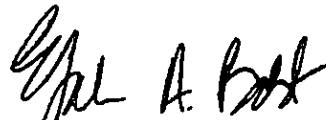
the opposing party which resulted from the discovery abuse; and (3) be consistent with the warning from the Court. *Linn v. Whitaker*, 2007 MT 46, ¶ 20, 336 Mont. 131, 152 P.3d 1282. See also *Culbertson-Froid-Bainville Health Care Corp. v. Stevens*, 2005 MT 254, ¶ 14, 329 Mont. 38, 122 P.3d 431, and *Smith v. Butte-Silver Bow County*, 276 Mont. 329, 339-40, 916 P.2d 91, 97 (1996); *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 81, 303 Mont. 274, 16 P.3d 1002; *Animal Found. of Great Falls v. Mont. Eighth Jud. Dist. Ct.*, 2011 MT 289, ¶ 16, 362 Mont. 485, 265 P.3d 659. Under § 3-1-518, MCA, the Court may also address contempt for noncompliance with its orders. *Animal Found. of Great Falls*, ¶ 18.

Other than default, potential sanctions include assessment of fees and costs, deeming some of Nuñez's claims established, foreclosing Defendants from opposing certain claims, or some combination of the foregoing. Rule 37(c)(1), 37(d)(3), and 37(b)(2)(A)(i) and (ii), M. R. Civ. P. Defendants openly defied the Court's Order, withholding a significant and important document from Nuñez, even though the Court warned them it would sanction continued discovery obstruction. The withholding of this document clearly was intended to prejudice Nuñez's lawyers as they prepared for trial. It also resulted in waste of judicial time and resources. While judgment on liability may be warranted, trial on the merits should be protected where possible. Accordingly, it has considered, and will impose, other sanctions for Defendants' defiance of its Order.

ACCORDINGLY, it is hereby ORDERED:

1. Defendants shall **immediately** produce the ten-page CM database document that the Court ordered produced in its May 26, 2021, Order, **and** the 1 page “erroneous” document to Nuñez.
2. At trial, Defendants shall not suggest, argue, imply, elicit or try to elicit any testimony or offer evidence suggesting that they had no notice that Max Reyes was a pedophile. This prohibition applies during all stages of trial, including, *voir dire*, opening statement, witness examination, closing arguments, objections, and responses to objections.
3. Defendants shall reimburse Nuñez for reasonable costs and reasonable attorneys' fees associated with the Motion to Compel production of the documents at issue.
4. Counsel for Nuñez shall file affidavits attesting to their attorney’s fees and costs associated with the Motion to Compel the above-described documents.

DATED this 17th day of June, 2021.



Elizabeth A. Best
District Court Judge

6/23/21 ~~4148~~
cc: James P. Molloy -via USPS
D. Neil Smith/Ross Leonoudakis -via USPS
Bradley J. Luck/Tessa A. Keller -via USPS
Joel M. Taylor -via USPS
Ivy McGowan-Castleberry -via USPS