HOOSIER LITIGATION BLOG

www.PavlackLawFirm.com

April 29 **2016**

by: Colin E. Flora
Associate Civil Litigation Attorney

Seventh Circuit Examines Sanctions for Abusive Conduct in Discovery

Although we generally discuss issues of substantive law here on the Hoosier Litigation Blog, those who know me can confirm that I'm a procedural junky at heart. This week we look at an interesting procedural aspect of the practice of law through a recent decision from the Seventh Circuit. That issue is the availability to sanction lawyers for iniquitous conduct in litigation. Just over a year ago, we discussed the availability for successful litigants of attorney's fees after a frivolous appeal in Indiana state courts. Today, we discuss a more common problem than frivolous appeals: sanctions for discovery violations. For this discussion, we turn to Judge Joel Flaum's decision in *Houston v. C.G. Security Services*.

The case began as a fairly routine personal injury case:

> In March 2012, Angel Houston sued Hyatt Corporation and the Hyatt Regency Indianapolis for breach of contract, intentional misconduct, and negligence in connection with injuries she sustained after falling at the downtown Indianapolis Hyatt hotel during a hotel-sponsored New Year's Eve party on December 31, 2010. Houston claimed that Hyatt failed to provide a safe and secure environment for the party and that this failure was the proximate cause of her injuries as well as consequential damages arising out of those injuries.

But this post and the appeal is not about Houston's claims against Hyatt, it is about what happened after Houston added a third defendant, C.G. Security Services.

C.G. was hired by Hyatt to handle security at the Indianapolis location. After discovering C.G.'s relationship to Hyatt, Houston expanded her case to allege "that C.G. failed to provide adequate security services and that this failure proximately caused her injuries and damages." From the outside looking in, it seems Houston had a tough case against any of the defendants, C.G. included. Nevertheless, once C.G. became a party to the case–and indeed prior to becoming a party, when it was served with a non-party subpoena–C.G. had a duty to cooperate in discovery.

For those not well versed in course of litigation, a brief overview is in order. The first step is the pleading stage. A party files a complaint outlining its grievances and theories for legal recovery. The complaint is filed with the court and begins the case. The next step is for the complaint to be served on the defendants, whereupon the defendants must either answer the complaint by admitting or denying its allegations or the defendant can seek to have the complaint defeated on procedural grounds. Next, the parties engage in discovery. This is where the parties build the factual details of the case. Discovery allows each party to depose witnesses, obtain documents, inspect places, and ask written questions. It is a vitally important piece to the modern lawsuit.

The problem with discovery is that it requires a great deal of good faith. As students of history will remember from President Andrew Jackson's quip in response to a Supreme Court ruling with which he disagreed–"John Marshall has made his decision, now let him enforce it."–courts do not have a great deal of power to forcefully coerce litigants into obeying their rulings. A judge cannot simply show up to a company's office and demand to see the books. Thus, discovery requires the parties to cooperate and to not act surreptitiously. As a result, when someone is caught practicing in abusive discovery tactics, courts are endowed with broad punitive authority to help ensure that such actions will not be taken in the future. It is the use of that power that led the *Houston* case to reach the Seventh Circuit.

As I said, Houston's case looked like it would be a tough one. Her claims against the Hyatt defendants were dismissed on summary judgment. Her claims against C.G., however, were not resolved so quickly. C.G. like the Hyatt defendants had sought summary judgment, but resolution of the motion was held because Houston had brought three motions for sanctions against C.G. for its actions in discovery. Ultimately, the trial court granted the sanctions and also dismissed the substantive case against C.G. by granting C.G.'s motion for summary judgment. Houston sought $146,000 in attorney's fees and $18,500 in costs. The court awarded a slightly smaller, but no less eye-popping amount: $119,000 in fees and $16,500 in

costs. C.G. appealed.

The first thing to note in the realm of discovery sanctions is that when a trial court is given broad powers–often recognized as inherent powers–the use of those powers are generally given a great deal of deference. This is particularly true when the power is fundamentally one of managing the trial proceedings. In these circumstances, the appellate review is highly constrained. In this circumstance, the appellate court exercises two stages of review. As to the underlying factual determinations meriting the issuance of sanctions, the appellate court "may reverse . . . only if its findings are clearly erroneous." From there, the decision, based upon those facts, to impose sanctions is judged for an abuse of discretion.

On appeal, C.G. argued that the trial court could not impose sanctions because Houston failed to comply with local rules requiring informal resolution of discovery disputes. Typically this requires the attorneys for the parties to hold a "discovery conference." Here, Houston and C.G. had a conference prior to Houston filing the first motion for sanctions, but not before the subsequent motions. The Seventh Circuit disagreed:

> The evidence in the record indicates that Houston's counsel met the meet-and-confer requirements through participation in the May 2013 discovery conference, as well as through email exchanges and calls to opposing counsel. In the context of what the magistrate judge referred to as C.G.'s "obstreperous" conduct and "improper gamesmanship," we cannot accept C.G.'s contention that one discovery conference was insufficient. The record shows that Houston's counsel made various attempts to confer with C.G.'s counsel but that C.G. rebuffed these efforts. Because C.G. was largely responsible for the lack of meeting, the district court did not abuse its discretion in finding that Houston had complied with the procedural prerequisites.

From personal experience, I can tell you that the case law is full of authority requiring the meet-and-confer to avoid litigation being dragged into prolonged discovery battles when it could be resolved with a simple phone call. I'm reminded of hearing Judge Altice for Indiana's court of appeals, then a judge in the Marion County Superior Court, admonish out-of-state counsel (not me, my client had been properly dismissed from the case) by asking, "Did you try picking up the phone?" That said, in my experience, where one party has been clearly abusive in discovery, reasonable judges and magistrate judges are loath to allow the meet-and-confer requirement to become a shield. That seems to have been at least partially at play here.

C.G. also argued that it had not acted in bad faith and that its failings in discovery were the result of "bad record-keeping." Mind you, "bad faith or improper purpose" is generally required to obtain discovery sanctions. Nevertheless, the Seventh Circuit found sufficient evidence to support the sanctions:

> For instance, before C.G. was joined as a defendant, Houston served on C.G. a non-party documents subpoena. C.G. never responded to this subpoena. Although Houston did not seek relief for C.G.'s failure to comply with the subpoena, service of the subpoena alerted C.G. to the need to search for and secure documents related to its work for Hyatt at the New Year's Eve party. Nevertheless, C.G.'s initial search as part of its discovery obligations did not take place until at least April 2013, roughly four months after C.G. was added as a party. Furthermore, C.G. did not provide information sought by Houston regarding the security personnel working for C.G. at the party in a timely manner, failed to alert Houston that it could not provide reasonably definitive information about the personnel, and then proceeded to continually change its answers about the personnel. There is also evidence of false or, at best, reckless and evasive testimony offered by at least one of C.G's witnesses, namely Charles Guynn, C.G.'s owner and president. Such conduct does not comport with C.G.'s claim that it did the best it could to provide Houston with accurate, timely information in discovery.

Interestingly, C.G. next argued "that the sanction award was disproportionate to the harm" as evidenced by the outcome of the lawsuit–a summary judgment victory for C.G. This argument is interesting given what a discovery sanction is for. Fundamentally, a sanction is punitive in nature. In the realm of "punitive damages" attached to verdicts, case law says that the damage award cannot be too disproportionately askew with the actual injury suffered or it will violate constitutional due process. Generally, this means that a punitive damages award is compared to the rest of the verdict and then is compared as a ratio, with the general rule of thumb being that the ratio should only rarely edge into the double digits. Here, C.G.'s argument is fundamentally that there would be no verdict for Houston and, thus, any punitive award is out of balance. This would be availing were the award related to C.G.'s conduct outside of litigation. Instead, it is to be measured with the harm its actions caused *in the litigation*. It cannot be said, then, that a reasonable attorney fee, meant to compensate the cost to the plaintiff and her counsel for the time spent dealing with C.G.'s misconduct, is anything other than recovery for the damage itself, even if the nature of the sanctions award is inherently punitive. Put simply, just because it punishes does

not mean that it does not also account for the actual harm suffered.

Lastly, C.G. argued that the fee award itself was excessive. It is important to note that the law is not that a party may obtain any attorney fee it feels like; rather, the party may recover *reasonable* fees. C.G. argued that "the itemized fee statement submitted by Houston's counsel was 'outlandish and replete with overbilling on unrelated tasks.'" Recall that the trial court agreed in part and did not award the total amount requested; it reduced that amount by 100 hours of billed work that it found unrelated. On appeal, the court reviews the amount for an abuse of discretion:

> Our case law provides that the "starting point in a district court's evaluation of a fee petition is a lodestar analysis; that is, a computation of the reasonable hours expended multiplied by a reasonable hourly rate." In the case at hand, the district court properly applied the lodestar analysis and offered a thorough explanation for why the costs, expenses, and time claimed by Houston's counsel were reasonable. At the outset, the district court evaluated the itemized fee statement and excluded entries requesting compensation for tasks it deemed unrelated to discovery. The district court also explicitly addressed and rejected C.G.'s objections to thirteen specific billing entries. Moreover, the district court properly considered Houston's counsel's hourly rate of $250 per hour and determined that it was reasonable based on counsel's twenty-one years of litigation experience, as well as the fact that $250 per hour is counsel's standard hourly rate. Thus, we cannot conclude that the district court abused its discretion in calculating and awarding attorney's fees.

These kind of cases are not wholly unusual, although the amount is a bit greater than usual. So why, then, did we take this thorough look? While these kinds of cases are not unusual in trial courts, they are not very common on appeal. For those of us who spend our days practicing in trial court and dealing with discovery, it is a welcome reminder that abusive conduct in discovery will not be tolerated.

Join us again next time for further discussion of developments in the law.

Sources

- *Houston v. C.G. Sec. Servs.*, ---F.3d---, No. 15-1518, 2016 U.S. App. LEXIS 7473 (7th Cir. Apr. 25, 2016) (Flaum, J.).

- *Houston v. Hyatt Regency Indianapolis*, 997 F. Supp. 2d 914 (S.D. Ind. 2014) (Lawrence, J.)

- Colin E. Flora, *When Appeals Go Bad: Attorney's Fees for Frivolous Appeals in Indiana*, HOOSIER LITIG. BLOG (Apr. 18, 2015).