

LEXSEE 2001 Mich. App. LEXIS 2009

WENDY SUZANNE WIITALA, Plaintiff-Appellee, v FORD MOTOR CO., Defendant-Appellant.

No. 214444

COURT OF APPEALS OF MICHIGAN*2001 Mich. App. LEXIS 2009***October 5, 2001, Decided****NOTICE:**

[*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY:

Genesee Circuit Court. LC No. 90-002895-NP.

DISPOSITION:

Affirmed.

JUDGES:

Before: Holbrook, Jr., P.J., and Hood and Neff, JJ.

OPINION:

PER CURIAM.

In this products liability case, defendant appeals as of right from a judgment entered after a jury trial in favor of plaintiff. Both issues raised by defendant on appeal stem from the trial court's imposition of \$546,836.19 in discovery sanctions for violation of the court's January 23, 1992 discovery order. We affirm.

When she was aged 19, plaintiff was involved in an automobile accident that left her a quadriplegic. Plaintiff alleged at trial that her lap and shoulder restraint failed when the 1982 Mercury Lynx she was driving was struck by another vehicle. Plaintiff claimed that she broke her neck when she was thrown across the car and struck the rail above the right-hand door. Plaintiff asserted that the tongue of the belt restraint released when the buckle struck her hip during the crash. Prior to the court's instruction of the jury, the parties entered into a "high-low" agreement that the minimum [*2] award would be \$1,000,000 and the maximum would be \$2,000,000. The jury awarded plaintiff \$12,600,000, and judgment for \$2,000,000 was entered in satisfaction of the jury award.

The January 23, 1992, discovery order reads as follows:

Plaintiff filed a motion to compel defendant Ford Motor Company to produce documents pertaining to inadvertent, unintentional, accidental or inertial openings of seat belt buckles and latch plates. Pursuant to the agreement of counsel reached at the hearing on said motion and placed on the record:

IT IS HEREBY ORDERED that defendant Ford Motor Company shall produce all test reports (including photographs and motion pictures, if any) which specifically relate to testing by or for Ford of seat belt buckles for "inertial" opening or unlatching of seat belt buckle.

IT IS FURTHER ORDERED that Ford Motor Company shall review crash and sled tests conducted by or for Ford with at least one belted dummy and produce all the test reports (including photographs and motion pictures) for all tests in which a buckle was noted to be opened or unlatched at the conclusion of the tests. All costs of reproducing the documentation will be plaintiff's responsibility. [*3]

Negotiations between the parties concerning discovery of this material was protracted. Defendant objected to plaintiff's initial request because it claimed, in part, that it was too broad. Plaintiff agreed to try and come up with language that was more specific in the description of the material being sought, and thereafter drafted a proposed discovery order. Defendant objected to the language in the proposed order as also being overbroad. Next, plaintiff filed a motion to compel, in which she sought entry of the proposed order. Discussions were held between the parties prior to the hearing on the motion. At the conclusion of these discussions, the parties informed the court that they had reached a tentative agreement. Defendant informed the court that it had

agreed to search literally thousands of crash tests, some of which are being done now, and produce or offer to produce those tests which indicate - or which the buckle at the end of the test, a buckle applied to a dummy - obviously they're tests where dummies are used - where the buckle was unlatched at the end of the test, for whatever reason,

... And then Counsel can draw his own conclusions, or his experts can [*4] look at them. If they can figure out that they were released because of an inertial unlatching, fine, we'll argue about that. But I've agreed to do that.

Plaintiff's counsel concurred that this was the substance of the parties' agreement, and subsequently drafted a new proposed discovery order. However, defendant again objected to plaintiff's draft. Defendant then submitted its own proposed order, which, with minor variations, was entered by the court on January 23, 1992.

Near the conclusion of the trial, plaintiff told the court that she had recently learned about a rear-impact crash test (hereinafter test 6076) conducted by defendant that was not produced by defendant, but which plaintiff asserted should have been produced under the last paragraph of the discovery order. Plaintiff asserted that two post-test photographs for test 6076 show that the seat belts had unlatched. Defendant argued that it was not required to produce test 6076 because the written body of the test report did not indicate that a seat belt had come unlatched. Defendant argued that the requirement that it produce "all the test reports (including photographs and motion pictures) for all tests in which a buckle [*5] was noted to be opened or unlatched" meant that it had a duty to produce only those test reports that have a written notation in the report itself that a seat belt had unlatched. Further, defendant argued even if there was some confusion, two letters sent by defendant's counsel to plaintiff's counsel made clear that defendant understood that it only needed to disclose reports in which a written notation appeared. Plaintiff's failure to object to these letters, defendant asserted, meant that she had acquiesced to that meaning.

The trial court rejected defendant's arguments:

I find that failure to disclose the results of [test 6076] ... violated the Court's order of January 23rd, 1992 I reject the argument that the language "was noted" refers to a written note. I am of the opinion that the photographs and films which disclose the tongue unlatched falls within the definition of "was noted" and therefore I find that there was an obligation to disclose that test result.

The court also ordered defendant to offer proofs as to its justification for failure to comply at a subsequent hearing, as well as proofs on whether "there aren't other circumstances similar [*6] that may be out there that ... the failure to disclose would be in violation of" the discovery order.

At this subsequent hearing, defendant indicated it would address these two issues within the context of a motion to reconsider. Defendant argued that it did not intentionally violate the court's order because it believed, and still did believe, that the discovery order only called

for the production of reports including written notations of seat belt unlatching. Defendant explained how crash tests were done, the large number of reports that had been created over the years, and its belief that review of photographs from tests not focusing on seat belts would be too subjective. In essence, defendant argued that it would not have agreed to do what the court said it had because such a task would be too onerous. Defendant explained that it believed that under the order it was required to review crash and sled test reports. Then, if there was a written notation in a report of an unlatched seat belt, defendant would then produce that report and any photographs, video, or film included with the report. Indeed, defendant stated that during its initial review of crash and sled test material, [*7] it had not reviewed any photographs. Defendant also stated that it had just completed an exhaustive review of photographs from approximately 7,000 crash tests, and had discovered ten tests where the photographs possibly showed unlatched seat belts. Defendant expressed the hope that this review would supply the type of assurance the court was looking for that no further violation had occurred.

After several more hearings on the matter, the court denied defendant's motion to reconsider. The court rejected defendant's argument that it did not act intentionally because it would not knowingly have agreed to such a wide-ranging review of test documents. In so doing, the court criticized defendant's record keeping procedure, and indicated it found it "offensive" that defendant would use this inefficient procedure to justify its failure to comply.

Before discussing defendant's arguments on appeal, we address plaintiff's assertion that this Court does not have jurisdiction to hear this appeal because defendant's appeal of right was not timely. We disagree. The order from which appeal lies is the final judgment, which was not entered until August 24, 1998. See *People v Vincent*, 455 Mich 110, 123; [*8] 565 NW2d 629 (1997) (observing that a judgment does not become effective until reduced to writing and signed by the court). Because defendant's claim of appeal was timely filed on September 14, 1998, MCR 7.204(A)(1), defendant is entitled to claim an appeal as of right.

Defendant first argues that the trial court erred in interpreting the discovery order and finding that defendant had violated that order. We disagree. The rules applicable to the interpretation and construction of contracts and other written documents also apply to the interpretation and construction of a court order. Where the parties have consented to language used in a discovery order, the goal of our review of that order is to honor the intent of the parties. See *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Construction of

a court order is only permissible if the language of that order is ambiguous on its face. See *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). Whether the court order is ambiguous is a question of law that we review de novo. See *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; [*9] 550 NW2d 228 (1996). Where a court order is ambiguous, construction becomes a question of fact, and extrinsic evidence of the parties' intent may be consulted.

After reviewing the language of the discovery order, we conclude that it is ambiguous. Reasonable minds could differ as to the meaning of the phrase "was noted," and, accordingly, also differ on the obligation imposed. See *Port Huron*, *supra* at 323; *Raska v Farm Bureau Ins Co*, 412 Mich 355, 362; 314 NW2d 440 (1982). Both the interpretation proffered by plaintiff and that by defendant are supported by the common meaning of the transitive verb "noted." For example, "noted" is defined in *The American Heritage Dictionary of the English Language* (3rd ed, 1996), as follows:

1. To observe carefully; notice. See Synonyms at **see**.
2. To make a note of; write down
3. To show; indicate
4. To make mention of; remark [*Id.* at 1237 (footnote omitted).] n1

The second listed meaning does comport with defendant's assertion that they were only required to produce test reports (including photographs and motion pictures) [*10] in which a written notation of an unlatched seat belt is found. However, the third listed meaning states only that the observed event be shown, which could be accomplished just as effectively by depiction on film or videotape, as it could through a written notation. n2

n1 The fact that a dictionary defines "noted" differently does not make it ambiguous. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 208-209 n 8; 476 NW2d 392 (1991). The term is ambiguous because both parties' understanding of the meaning of the term falls within the common and approved usages for the word found in the dictionary, and because each of these meanings is reasonable given the context in which the term is used in the discovery order.

n2 The primary definition does not include any reference to documentation, only to the act of observing or perceiving something. Indeed, the transitive verb "notice," pointed to in that primary definition, is defined as follows:

1. To take notice of; observe See Synonyms at **see**.
2. To perceive with the mind; detect
3. To comment on; mention.
4. To treat with cour-

teous attention. **5.** To give or file a notice of [*The American Heritage Dictionary of the English Language*, *supra* at 1238 (footnote omitted).]

Both of these definitions point to the synonyms for the word "see," which are as follows: "see, behold, note, notice, espy, decry, observe, contemplate, survey, view, perceive, discern, remark." *Id.* at 1633 (emphasis in original).

[*11]

Defendant argues that the reference to "test reports" contained in the paragraph at issue contextually limits the meaning of "was noted." Defendant asserts in its brief on appeal that because "the purpose of the test report [is] to note facts about the test, the most reasonable interpretation of 'was noted' is as a notation in the test report." This argument is flawed. First, it assumes that a test report is comprehensive, i.e., that all observations of import would be memorialized in the text of the report. There is nothing in the record to support the assumption that these reports would be that comprehensive. Further, given that the tests referenced in this paragraph were not done to investigate the inertial unlatching phenomenon (those types of tests were covered by the previous paragraph of the discovery order), it is not unreasonable to conclude that it is probable that such reports would not contain a written notation of an event not under study.

Second, the "was noted" reference comes as an identification of the type of documents—along with "photographs and motion pictures"—that needed to be produced, not as a criteria of production. Such test documents were to be produced [*12] "for all tests in which a buckle was noted to be opened." (Emphasis added.) As the above dictionary definitions show, the unlatching of a seat belt could be noted in various ways at the conclusion of a test, only one of which is by making a written notation of the observation.

It is not clear from the circumstances that defendant actually knew the meaning plaintiff attached to the phrase "was noted," but we believe those circumstances clearly show that defendant had reason to know of plaintiff's interpretation. From the very first, plaintiff's document requests sought a wide range of material related to inertial unlatching. Plaintiff's first discovery request addressing this matter sought "all crash test reports, still photographs, motion picture films, video tape recordings, test requests, memoranda, reports and all documents and materials" that related to the unlatching phenomenon. Further, the first proposed order drafted by plaintiff sought "all documents, studies, test requests, test reports, still photographs, motion pictures, internal memoranda, correspondence and all other documents and materials which relate . . . to any

tests . . . which show or depict inadvertent, unintentional, [*13] accidental or inertial openings of seat belt buckle and latch plate." "It seems proper to regard one party's assent to the agreement with knowledge of the other party's general purposes as a ground for resolving doubts in favor of a meaning that will further those ends, rather than a meaning that will frustrate them." Farnsworth, Contracts, § 7.10, p 513 (2nd ed, 1990).

We also consider it significant that representations made by defendant to both the court and plaintiff actually support plaintiff's position. In a letter dated January 8, 1992, sent by defendant's counsel to plaintiff's counsel that accompanied defendant's draft language for the discovery order, defendant indicated it had agreed to "review a large universe of crash and sled tests" and supply "test documents in which it was noted that the buckle was open or unlatched at the conclusion of the test." (Emphasis added.) This language implies not that defendant was searching for written notations in test reports, but was looking for any document (which could include film or videotape) that recorded an unlatched seat belt.

Defendant's counsel goes on to say that "my agreement which was placed on the record was to review [*14] a large universe of crash and sled tests conducted by Ford with at least one belted dummy and to produce test documents in which it was noted that the buckle was open or unlatched at the conclusion of the test." The only qualifications this statement seems to place on the universe of documents to be examined is that they (1) come from "crash and sled tests," (2) "conducted by Ford," (3) "with at least one belted dummy." The "was noted" qualifier applies to the test documents, not just test reports, identified out of that broad universe of documents. Therefore, contrary to defendant's assertion that this letter shows that plaintiff had acquiesced to defendant's interpretation of the discovery order, we believe the letter was actually in accord with, and thus served to reaffirm, plaintiff's understanding of the discovery order.

Before the court, defendant indicated it had agreed to "search literally thousands of crash tests . . . and produce or offer to produce those tests which indicate— . . . where the buckle was unlatched at the end of the test." This representation does not contain the qualification that defendant would only be searching through written test reports and thereafter [*15] producing only those documents associated with a report that contains a written notation of an unlatched seat belt. Rather, defendant indicated that it was accepting the affirmative duty to engage in a search which purpose was to identify those tests "where the buckle was unlatched at the end." It is reasonable to conclude that defendant's promise to search through crash tests, necessarily includes a promise to search all documents related

to these tests, including film and videotape.

Defendant also argues that in ruling on its motion for reconsideration, the court implicitly accepted defendant's reading of the discovery order when it criticized the way in which defendant compiles its test results. Specifically, defendant asserts that the court's criticism of defendant's failure to always include a written notation of an unlatched seat belt in the test reports would be irrelevant if the court had not accepted defendant's reading of the order. Defendant goes on to argue that given this, the sanction imposed was not for violation of the discovery order, but "for violating the court's personal view of how Ford should keep its ordinary business records."

We reject this argument. Not [*16] only is defendant's assertion that it was sanctioned for its record keeping a non sequitur, but the premise underlying its argument is meritless. While the court did criticize defendant's record keeping procedure, it did so in the context of a prior hearing where defendant was offering its justification for failure to comply with the discovery order through the framework of a motion to reconsider. In this context, it is clear that the court's criticism was a rejection of the justification offered by defendant that plaintiff's understanding of the discovery order would have required an overly burdensome search of test records. In essence, the court concluded that it was disingenuous for defendant to argue that the discovery plaintiff wanted was too onerous, when it was defendant who had made it so. Thus, contrary to defendant's assertion, the court's observations were not irrelevant.

Given these circumstances, we conclude that the trial court's construction of the discovery order was reasonable and accurate. Consequently, the trial court did not err in holding that defendant had violated that order. n3

n3 Although we believe this extrinsic evidence is dispositive, we also find it significant that it was defendant who supplied the language that served as the basis for the discovery order finally entered by the court. While a portion of defendant's draft was removed at plaintiff's request (an airbag exclusion), the rest of defendant's proposed language was adopted. Thus, any ambiguity should be resolved contra proferentem against defendant. See *Transitional Learning Community at Galveston, Inc v United States Office of Personnel Mgt*, 220 F3d 427, 431 (CA 5, 2000)

[*17]

Defendant also argues that the trial court abused its discretion in imposing the \$546,836.19 discovery sanction. We disagree. The trial court identified two basic

purposes underlying its award of discovery sanctions: (1) to "provide a deterrent to repetition of such conduct" and (2) vindication of its judicial authority. We believe each of these is a legitimate purpose underlying the imposition of discovery sanctions. See *National Hockey League v Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643; 96 S Ct 2778; 49 L Ed 2d 747 (1976)(observing that dismissal of an action "must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction but to deter those who might be tempted to such conduct in the absence of such a deterrent").

Defendant's argument on appeal seems to focus more on the actual amount of the sanction, rather than on the appropriateness of imposing one in the first place. To the extent that defendant does argue that the sanction was not warranted, defendant's focus seems to be based on the assumption that the purpose of the sanction was remedial or [*18] compensatory. However, as we just noted, these were not the goals identified by the court as justifying the imposition of this sanction. The court did consider those costs incurred by plaintiff since the mediation, but it did not do so with the understanding that in order to make plaintiff whole, plaintiff should be awarded those costs incurred by plaintiff since that point in the proceedings.

In determining the appropriateness of a discovery sanction, Michigan trial courts should consider the following non-exhaustive list of factors:

(1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery requests ..., (3) prejudice to the [other party], (4) actual notice to the [other party] and the length of that notice, (5) the party's history of intentional delay, if any, (6) the party's compliance with the orders of the court, (7) the party's attempt to cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 633; 506 NW2d 614 (1993).]

We believe the record supports the trial court's implied finding [*19] that defendant's discovery violation was willful. At the very least, defendant acted at odds with plaintiff's interpretation of the discovery order, even

though defendant had ample reason to know of plaintiff's understanding. Additionally, the record shows that defendant did not comply with the trial court's order to reexamine its records for the information sought in order to cure the effects of defendant's violation. By its own admission, defendant failed to reexamine the sled test records. The fact that it may have been hard to comply in the time available does not excuse this second violation of the court's orders, especially given that the lack of time was caused by defendant's own failure to timely comply with the January 23, 1992, discovery order, which had been entered over three years prior to trial.

We are also not persuaded by defendant's argument that the test documents uncovered after the violation were irrelevant because all but one involved buckles other than that found in plaintiff's car. Plaintiff's request for documentations was "reasonably calculated to lead to the discovery of admissible evidence." MCR 2.302(B)(1). Further, given that defendant took the position [*20] at trial that inertial unlatching is simply a "parlor trick," we believe the evidence was relevant in that it directly countered this assertion, helped to illustrate the scientific principles underlying the phenomenon, and also went to the issue of defendant's notice that such events can occur.

We also see no abuse of discretion in the size of the sanction. See *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). The size helps to assure that the twin goals of general and specific deterrence are met. We also do not find it unreasonable to calculate the award from the time of mediation, given that discovery was conducted up to that point. As the trial court observed, "theoretically, the case was to be ready for trial when presented to the mediators." We also agree with the trial court that it is reasonable to conclude that the evidence could have had an effect on the mediation award, which could have significantly impacted the course of this litigation.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Harold Hood

/s/ Janet T. Neff