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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
BRIAN PEDERSEN,)	of Lake County.
)	
Petitioner-Appellant and Cross-)	
Appellee,)	
)	
and)	No. 08-D-541
)	
PATRICIA PEDERSEN,)	
)	Honorable
Respondent-Appellee and Cross-)	David P. Brodsky,
Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The trial court abused its discretion by imposing a discovery sanction barring respondent's testimony during her case-in-chief; reversed and remanded for a new trial.

¶ 1 Petitioner, Brian Pedersen, appeals from the judgment of the circuit court of Lake County dissolving his marriage to respondent, Patricia Pedersen. Brian contends that the trial court abused its discretion (1) by awarding maintenance to Patricia; (2) in dividing the marital property; and (3) by enforcing a temporary order to pay a portion of Patricia's attorney fees. Patricia cross-appeals.

Patricia contends the trial court abused its discretion by imposing a discovery sanction barring her testimony in her case-in-chief and only allowing her to testify in rebuttal to what Brian raised during his case-in-chief. We find the trial court abused its discretion in imposing the discovery sanction, and reverse the judgment and remand the cause. Based on our decision, we need not address Brian's appeal.

¶ 2

BACKGROUND

¶ 3 On March 13, 2008, Brian filed a petition for dissolution of marriage. Patricia was then 54 years old and Brian was 57. The parties were married in 1974 and had three children, all of whom were emancipated at the time the trial court entered the judgment dissolving the parties' marriage. Both parties testified to having various maladies and on-going medication regimens. Patricia had multiple sclerosis. Brian had diabetes, a heart stent due to corroded arteries, and high blood pressure. Brian and Patricia started a marina business, known as "Pedersen Marine, Inc.," in 1987 in Antioch, Illinois, on land owned by Brian's father, Alfred Pedersen. During the marriage, the parties' income and lifestyle were provided for by the operation of the marina, gifts from Brian's parents, and advances Brian was allowed to take against his future inheritance from his father's estate.

¶ 4 Numerous motions and petitions were filed by each party during the dissolution proceedings. Patricia also retained three law firms to represent her over the course of the proceedings. On March 19, 2010, the trial court entered a case management order which, in part, required each party to disclose lay witnesses by April 30, 2010.

¶ 5 The trial commenced on November 30, 2010. In his opening statement at trial, Patricia's attorney set forth what he expected the evidence to show, including repeated references to testimony by Patricia. At the end of the second day of trial, on December 3, 2010, Patricia's attorneys

confirmed that they were going to call Patricia to testify at the next trial date. The trial resumed on March 4, 2011. Following the conclusion of the testimony of Brian's last witness, Patricia's attorney moved for a five minute recess prior to calling Patricia to testify. When trial resumed, Brian rested his case-in-chief and Patricia's counsel sought to call Patricia as a witness. Brian's counsel then produced and tendered *instanter* a motion to bar Patricia's testimony because she had not been disclosed in her interrogatories as a witness. Patricia's counsel did not have with him the file containing the interrogatories and noted the interrogatories were prepared by Patricia's prior counsel. The trial court ruled Patricia could testify in rebuttal only, pending further proof that she had been disclosed as a witness. Patricia then testified in rebuttal.

¶ 6 Trial resumed on April 26, 2011. Patricia's attorneys asked that the court reconsider its sanction barring her direct testimony. They asserted that the failure to disclose Patricia had been inadvertent and that Brian was not prejudiced since Brian had disclosed Patricia as his witness. Brian's counsel claimed "surprise" because he had not been able to depose Patricia. The trial court denied the motion to reconsider and trial continued.

¶ 7 When Patricia's counsel attempted to have Patricia testify as to her financial affidavit, Brian's attorney objected, arguing that it was not rebuttal testimony. Patricia's counsel then made an offer of proof as to what Patricia would have testified to if the sanction had not barred her testimony. Among other things, Patricia affirmed the information contained in her financial affidavit and the fact that she had no income apart from temporary maintenance. She identified proposed exhibits depicting the services available at the marina and the slips available for \$1,495 and \$1,695. She identified an asset that had been sold by Brian and testified that she had not received the proceeds from the sale. She identified and testified to a written IOU and an agreement from Brian to pay her

\$65,000. Patricia testified that, despite the parties' 2005 and 2006 tax returns and that Brian claimed he had no income those years on his tax returns, they were able to take vacations. Patricia noted the deplorable condition of the marital home where Brian currently was living. She testified that a custom pool table that cost several thousand dollars was missing. Patricia further testified that in late 2010, she had to begin selling the diamonds and other precious stones, which she had received as gifts during the marriage, for rent and other expenses. At the end of the offer of proof, counsel requested that the various exhibits be made part of the offer of proof.

¶ 8 On August 14, 2011, the trial court entered its written judgment of dissolution. In relevant part, it found that the marital estate consisted of a marital residence, the marina business, and personal automobiles. The residence was listed for sale at \$499,999, and was indebted by a \$125,650 home loan, a \$20,440 home equity line of credit, and a \$40,000 lien in favor of Brian's mother, Florence Pedersen, which was incurred August 14, 2009.

¶ 9 The court noted that the parties had agreed that the marina was marital property owned equally by them, but they were at odds over what property was included in the marital business. Although Brian acknowledged that 19% of the land on which the marina was located was marital, Brian asserted that the business consisted only of the entity, and did not include the land, buildings, and boat slips essential to its operation. Brian estimated that the value of the marina was \$100,000. Patricia estimated the value to be \$4.5 million, which included the entirety of the land on which the marina was located, the building, and the boat slips.

¶ 10 The trial court noted that it was not presented with sufficient evidence with which to value the many assets of the marital and non-marital estates at issue. The court was not presented with an appraisal of the marital home, and the parties' estimates proved insufficient for purposes of arriving

at an estimate of the marital home's value. The parties did not submit evidence of comparable sales, the lot size, or the neighborhood in which the home was located, only that the home was on the market and listed for sale at an asking price of \$499,999. Similarly, the court did not have any evidence upon which to render an accurate valuation of the marina business or the land on which it was located.

¶ 11 The court concluded, in part, that the intermingling of the marital and non-marital interests in the marina, the parties' marital finances, and Brian's monetary advances from his father's estate resulted in a loss of identity between Brian's and Patricia's marital interest and Brian's inherited non-marital interest, and deemed the property transmuted to marital property. Accordingly, the court ordered the proceeds from the sale of the marital residence to be divided equally after payment of the home loan and the line of credit. Brian was responsible for the payment of his mother's \$40,000 lien against the home out of his share of the proceeds of the sale of the home. The proceeds from the sale of the marina were to be divided one-third to Patricia and two-thirds to Brian. Each party was responsible for their own credit card debt, medical bills, and any of the remaining unpaid fees to their own attorneys. Brian was responsible for the debt to the trust and to his mother. Both parties were barred from receiving maintenance.

¶ 12 Upon the parties' motions to reconsider, and based on newly discovered evidence, the trial court modified the judgment as follows: (1) the court vacated the portion of the order directing the sale of the marina, finding that neither Brian nor Patricia owned anything other than the business itself and 19% of the land upon which sits; (2) the parties were to divide equally their 19% portion of the marina land and their ownership interest in the marital business; and (3) Brian was to pay Patricia indefinite maintenance in the amount of \$3,000 per month. The court further clarified that

Brian was to remain responsible for paying Patricia's counsel \$35,000 in interim attorney fees. All other aspects of the judgment and order remained in full force and effect.

¶ 13 Brian timely appealed and Patricia timely cross-appealed. We consolidated the appeals for review.

¶ 14 ANALYSIS

¶ 15 We first address Patricia's argument that the trial court abused its discretion by barring her testimony in her case-in-chief, as resolution of this issue necessarily moots the arguments raised by Brian in his appeal. The trial court sanctioned Patricia because Patricia's prior attorney failed to list her as a witness or list her purported testimony in response to Brian's interrogatories. Illinois Supreme Court Rule 213(f)(1) (eff. Sept. 1, 2008) provides that, upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must identify the subjects on which the lay witnesses will testify. The trial court barred her testimony pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), which provides, in relevant part, that if a party unreasonably fails to comply with discovery rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just.

¶ 16 A trial court has broad discretion in determining whether to impose sanctions under Rule 219 for a party's failure to comply with discovery requests. *Ashford v. Ziemann*, 99 Ill. 2d 353, 368 (1984); *The Department of Transportation v. Mainline Center, Inc.*, 38 Ill. App. 3d 538, 540 (1976). The exercise of such discretion will not be disturbed unless an abuse is apparent. *Mainline Center*, 38 Ill. App. 3d at 540; *Perimeter Exhibits, Ltd. v. Glenbard Molded Binder, Inc.*, 122 Ill. App. 3d 504, 514 (1984). Discovery sanctions are appropriate when noncompliance with discovery requests is unreasonable and amounts to "a deliberate and pronounced disregard for the rules and the court."

Wagner v. City of Chicago, 254 Ill. App. 3d 842, 850 (1993); *Ford v. City of Chicago*, 132 Ill. App. 3d 408, 415 (1985). Six factors that our courts have considered in determining whether an appropriate sanction has been invoked are (1) the surprise to the opposing party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. *Athans v. Williams*, 327 Ill. App. 3d 700, 703 (2002).

¶ 17 Brian asserts that he was prejudiced by Patricia's failure to comply with discovery because he did not know she would be testifying or to what she would be testifying. Brian claims that he did not take Patricia's deposition because she was not disclosed as a witness and therefore counsel could not prepare for cross-examination. We fail to see how Brian did not know Patricia would be testifying at trial. The record clearly shows that Patricia's counsel stated as much in his opening statements, on the second day of trial, and three months later when trial resumed, just prior to Patricia taking the stand in her case-in-chief. Brian's counsel received interrogatory answers from Patricia in late March 2009, and yet waited almost two years before filing the motion *in limine*. See 19th Judicial Cir. Ct. R. 5.02 (Dec. 1, 2006) (motions *in limine* shall be presented to the court not later than opening statements in bench cases, unless the grounds became known subsequent to the deadline or for other good cause).

¶ 18 Moreover, we find it unreasonable for Brian to assert that he did not know the subject matter of Patricia's testimony. At the hearing on her motion for temporary maintenance, Patricia testified about her financial condition. She also filed several motions with numerous exhibits attached regarding her medical expenses, her claim of dissipation, and enforcement of the temporary maintenance order. Brian's counsel could have been permitted to take Patricia's deposition, as there

was ample time to accomplish this. The objection to Patricia's testimony was raised on March 4, 2011, and the trial did not proceed again until April 26, 2011.

¶ 19 Brian maintains that the sanction imposed, prohibiting Patricia from testifying in her case-in-chief, was not a "drastic" sanction and none of her claims or defenses regarding maintenance were precluded or adversely affected by the exclusion of her testimony. Patricia argues, and we agree, that she was clearly prohibited from presenting her claim for maintenance. Among other matters, Patricia was not permitted to refer to her financial affidavit that set forth her income and needs, and she could not testify regarding her employment history, her medical condition, the trust agreements, the promissory notes, other documents noting Brian's income in excess of what he claimed, the identification of signatures, income from the marina, an IOU, the disparity between income reported on tax returns and the standard of living during the marriage, that a mortgage had been taken against the marital residence without her permission, and lack of income. Patricia was prohibited from testifying regarding deeds relating to the marina, the manner in which it was owned, the services available at the marina, the prices for which slips were available, the condition of the marital residence, and the degree to which Brian had dissipated the assets and personal property. This evidence was relevant to Patricia's present and future earning capacity in seeking maintenance and to the apportionment of marital and non-marital property assigned to the party seeking maintenance (see 750 ILCS 5/504(a)(1) (West 2010)), and may well have assisted the trial court in reaching a more reasoned decision concerning the amount of maintenance awarded to Patricia.

¶ 20 Our holding in *Athans* supports Patricia's claim. In *Athans*, the defendant was barred from testifying in support of his defense against a small claims action because his answer to plaintiff's interrogatories seeking an identification of the witnesses who would testify at trial, and the subject

of their testimony, stated only first and last names, and nothing concerning what would be the subject matter of the testimony. *Athans*, 327 Ill. App. 3d at 701. We noted that the defendant's answers to other interrogatories notified the plaintiff as to the subject matter of the testimony and that there were no objections to the interrogatories prior to trial until the defendant took the stand. Accordingly, we concluded that it was unreasonable for plaintiff to claim that he had been taken by surprise as to the subject matter of the testimony. *Id.* at 703-04.

¶ 21 We further concluded that the trial court abused its discretion by barring the defendant's testimony. Assuming a discovery violation had occurred, we observed that an appropriate sanction by the trial court would have been to limit the defendant to testifying to those facts that were previously disclosed in discovery. Because the trial court's exclusion of the defendant's testimony directly impacted the trial court's judgment amount, we reversed the judgment and remanded the cause for a new trial. *Id.* at 704-05.

¶ 22 In *Mainline Center*, an appraisal witness was barred from testifying as a sanction under Rule 219(c) due to the plaintiff's failure to disclose the witness. The jury was, as a result, left with only the defendant's version of the extent of damages in the condemnation proceeding. The plaintiff's successor attorney did not possess the trial court's discovery order and was unaware of it until the defendant moved to exclude witnesses. The plaintiff's attorney was willing to continue the trial to provide time to disclose the information at issue. *Mainline Center*, 38 Ill. App. 3d at 540-41. The appellate court concluded that the sanction imposed was not justified by the type of noncompliance demonstrated and was an abuse of discretion. *Id.* at 541.

¶ 23 Illinois Supreme Court Rule 213 was enacted to facilitate full and complete disclosure of witnesses and their testimony in advance of trial and to eliminate prejudice and surprise when new

witnesses and testimony are adduced at trial without prior disclosure. The Committee Comments under paragraph (k) state that Rule 213 “is intended to be a shield to prevent unfair surprise but not a sword to prevent the admission of relevant evidence on the basis of technicalities.” Ill. S. Ct. R. 213(k) (adopted March 28, 2002). The purpose of the rule is to allow for a trial to be decided on the merits. See *Maffet v. Bliss*, 329 Ill. App. 3d 562, 578 (2002) (Cook, J., specially concurring). The severity of a sanction should be circumscribed by the conduct of the offending party. *Mainline Center*, 38 Ill. App. 3d at 541.

¶ 24 Here, the better practice would have been for Patricia’s attorneys to have disclosed Patricia as a witness in the interrogatory answers. However, as in *Athans* and *Mainline Center*, given that Brian was put on notice that Patricia would be testifying and the subject matter of Patricia’s testimony, that the failure to disclose the witness appeared inadvertent, that no objections were raised as the case moved forward, and that it is difficult to imagine how Brian’s counsel could have been surprised that a spouse would testify in a dissolution trial especially, when Brian’s counsel listed Patricia as his witness, we hold the sanction of prohibiting Patricia from testifying in her case-in-chief was an abuse of discretion. Because the sanction may have impacted the trial court’s award of maintenance, the judgment must be reversed and the case remanded for a new trial. See *Athans*, 327 Ill. App. 3d at 704-05.

¶ 25 Accordingly, the judgment of the circuit court of Lake County is reversed, and the cause is remanded to the trial court for further proceedings consistent with the opinion of this court.

¶ 26 Reversed and remanded.