

**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).

2017 IL App (4th) 160689-U

NO. 4-16-0689

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

April 25, 2017

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

In re: MARRIAGE OF	)	Appeal from
NATHAN NOLAN	)	Circuit Court of
Respondent-Appellant,	)	McLean County
and	)	No. 14F300
JANE SPOONER NOLAN, n/k/a JANE SPOONER,	)	
Petitioner-Appellee.	)	Honorable
	)	Lee Ann S. Hill,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.  
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed, concluding the trial court's award for sanctions pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) was not an abuse of discretion.

¶ 2 In August 2015, the trial court ordered attorney Kimberly Duda to pay opposing counsel, Michelle Mosby-Scott, \$2,225 in attorney fees as a discovery sanction pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), after Duda attempted to utilize Mosby-Scott as an adverse witness in an ongoing custody dispute between Jane Spooner and Nathan Nolan. Duda appeals, asserting the court abused its discretion by (1) finding she violated a discovery order and (2) imposing sanctions. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Petitioner, Jane Spooner Nolan, n/k/a Jane Spooner, and respondent, Nathan Nolan, were engaged in custody proceedings regarding their minor children. Attorney Mosby-Scott represented Jane, while attorney Duda represented Nathan.

¶ 5 Pursuant to an October 2015 order, Nathan's parenting time with one of the children, R.N. (born September 17, 2003), was reserved until R.N. completed counseling for the goal of reconciliation and reunification with Nathan. In April 2016, Nathan filed a motion to modify the trial court's prior order and for immediate resumption of his parenting time with R.N. In May 2016, Mosby-Scott met with R.N. with respect to Nathan's motion. Jane was outside the room when Mosby-Scott met with R.N. and was not privy to their conversation.

¶ 6 In June 2016, Mosby-Scott filed a motion for an *in camera* interview with R.N. with respect to Nathan's motion to modify the custody order. Later that month, Duda, on Nathan's behalf, filed an emergency motion asking the trial court to prohibit Jane from discussing the pending proceedings with the children. Duda also filed a motion to disqualify Mosby-Scott as Jane's attorney, asserting she planned to call Mosby-Scott as an adverse witness regarding her conversations with R.N.

¶ 7 On July 6, 2016, Duda issued a subpoena for Mosby-Scott compelling her to a deposition and attached a rider compelling Mosby-Scott to bring any documents, notes, *et cetera*, involving her discussion with R.N. On July 8, 2016, following a hearing on Nathan's motion to modify custody and the motion to disqualify Mosby-Scott, the trial court entered a brief docket entry that included the following ruling: "Argument on disqualification of counsel taken. Resp[.] motion to disqualify counsel is denied." Neither a copy of the transcript nor a bystander's report from this hearing was provided on appeal.

¶ 8 Immediately following the July 8, 2016, proceedings, Mosby-Scott was served with Duda's subpoena. Mosby-Scott hired an attorney, Scott Kording, to take protective actions regarding the subpoena. On July 19, 2016, Kording filed a motion to quash the subpoena, for a protective order, and for sanctions. Kording's motion was scheduled for a hearing on August 15, 2016.

¶ 9 During the August 15, 2016, hearing, the trial court granted Kording's motion and barred Duda from attempting to depose or conduct other forms of discovery regarding Mosby-Scott. The court recounted events that occurred during the July 8, 2016, hearing, noting it specifically ordered Duda could not make Mosby-Scott a witness. The following exchange occurred between the court and Duda:

"[DUDA]: So neither [Mosby-Scott] or [*sic*] her attorney made any attempts whatsoever to resolve this, nobody called my office and said hey, let's work this out, do you really want to take this deposition, look we are going to bring a motion to quash, we are going to bring this before the judge. Remember, now everybody is talking about well, you know, we were in court and you made it clear. I don't recall you making it clear that [Mosby-Scott] couldn't be a witness in fact. I know you said that we couldn't disqualify her. I don't recall you saying she couldn't be a witness.

THE COURT: Well, Ms. Duda, I'll say something here. You did a lot of talking and very little listening when you were

here last time. So—I was very clear that you cannot make her a witness in this [matter].

[DUDA]: Just for the record, Your Honor, it's our position that we are not making her a witness. She made herself a witness by talking to the child.

THE COURT: And I told you last time we were here, I mean we went through this, we had a very long hearing on that and I told you she didn't.

[DUDA]: So I understand your ruling[,] Judge, your prior ruling. Um, but discovery is really broad and we need to know, she knows something about this trial that we don't know."

¶ 10 In response, Kording presented a July 20, 2016, letter he sent to Duda, outlining the legal flaws in her request, suggesting she abandon her attempts to depose Mosby-Scott, and encouraging her to call him to "work this out." According to Kording, Duda never responded.

¶ 11 At the conclusion of the hearing, the trial court entered an order prohibiting Duda from pursuing Mosby-Scott as an adverse witness or otherwise attempting to access her work product. The court also ordered Duda to pay discovery sanctions pursuant to Rule 219(c) in the amount of \$2,225, with said amount representing Mosby-Scott's attorney's fees incurred in challenging the improper subpoena.

¶ 12 This appeal followed.

¶ 13 **II. ANALYSIS**

¶ 14 On appeal, Duda asserts the trial court abused its discretion by imposing sanctions pursuant to Rule 219(c). Rule 219(c) outlines the consequences when a party refuses to comply

with discovery and other pretrial orders. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). We will not overturn the court's decision to impose sanctions under Rule 219(c) absent an abuse of discretion. *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 68, 880 N.E.2d 1033, 1043 (2007).

¶ 15 "The purpose of imposing sanctions is to coerce compliance with court rules and orders[.]" *R.M. Lucas Co. v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102955, ¶ 26, 963 N.E.2d 274. "In determining whether a sanction was warranted, a reviewing court must consider the conduct that gave rise to the sanction order and the effect of that conduct on the parties." *Id.*

¶ 16 Duda's argument consists generally of two parts. First, Duda argues there was no discovery order in place preventing her from deposing Mosby-Scott until August 2016. In other words, Duda contends the trial court did not enter any discovery orders preventing her from pursuing Mosby-Scott as a witness at the July 8, 2016, hearing. Second, Duda argues that any failure to comply with a discovery order was not unreasonable.

¶ 17 Duda first asserts the trial court's July 8, 2016, order was not a discovery order pursuant to Rule 219(c) because the written docket entry contains no order barring Duda from seeking discovery, *i.e.*, seeking to depose Mosby-Scott and calling her as an adverse witness. However, at the August 2016 hearing, the court reminded Duda it made an oral ruling at the July 8, 2016, hearing barring her from treating Mosby-Scott as an adverse witness.

¶ 18 Duda failed to provide us a transcript or bystander's report of that hearing, a transcript which would easily clarify the court's order on review. It is the appellant's duty to provide the reviewing court with the necessary transcripts or bystander's report to resolve the appellant's claims on appeal. *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 39, 31 N.E.3d 311; Ill. S. Ct. R. 323(a) (eff. Dec. 13, 2005). Therefore, any doubts

arising from an insufficient record will be construed against the appellant. *In re Marriage of Abu-Hashim*, 2014 IL App (1st) 122997, ¶ 15, 14 N.E.3d 524.

¶ 19 Absent evidence to the contrary, we must assume the trial court's statement during the August 2016 hearing—that its July 2016 oral order expressly prohibited Duda from pursuing Mosby-Scott as a witness—was an accurate recollection of events. Accordingly, we conclude the trial court entered a discovery order on July 8, 2016, prohibiting Duda from pursuing Mosby-Scott as a witness.

¶ 20 Alternatively, Duda contends, even if the trial court imposed a discovery order on July 8, 2016, the order was not clear or specific. See *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 55, 979 N.E.2d 383 (sanctions appropriate where the trial court's order was clear and specific). Duda states the court's docket entry, the only written order from that date, failed to apprise her that she could not pursue Mosby-Scott as a witness. This argument overlooks the legal principle that an oral order controls where there is a conflict between the court's oral and written orders. *In re Tr. O.*, 362 Ill. App. 3d 860, 868, 840 N.E.2d 1263, 1269 (2005). Again, absent evidence to the contrary, we must assume the court entered an oral order at the July 2016 hearing that expressly prohibited Duda from pursuing Mosby-Scott as a witness. During the August 2016 hearing, the court noted the parties discussed this topic at length during the July 2016 hearing, which would have provided specific guidance for Duda. Without a record of the July 2016 proceedings before us, we presume the trial court's order was clear and specific.

¶ 21 Moreover, the docket entry demonstrates the trial court denied Duda's motion to disqualify Mosby-Scott. Duda acknowledged during the August 2016 hearing that she recalled the court denied her motion to disqualify. The grounds for the motion to disqualify were based on the fact that an attorney cannot serve as a witness in the same case. See *People v. Koen*, 2014

IL App (1st) 113082, ¶ 39, 6 N.E.3d 354 (an attorney is precluded from acting as a witness and advocate in the same case). Thus, even if we considered only the docket entry, the court's order denying Duda's motion to disqualify Mosby-Scott necessarily meant she could not be treated as a witness in this case.

¶ 22 The next issue is whether Duda's failure to comply with this order was unreasonable. Duda asserts she did not recall the trial court's order prohibiting her from pursuing Mosby-Scott as a witness as an excuse for ignoring the court's order. The court was in the best position to determine Duda's credibility, and it found her excuse lacking. See *In re Marriage of Bates*, 212 Ill. 2d 489, 515, 819 N.E.2d 714, 728 (2004) (the trial court is in the best position to determine the credibility of witnesses). Specifically, the court noted, at the July 2016 hearing, it engaged in a lengthy discussion explaining why Duda could not call Mosby-Scott as a witness. In other words, from the court's point of view, Duda was well aware the court prohibited her from attempting to depose Mosby-Scott or otherwise obtain her work product.

¶ 23 Duda contends the issuance of the subpoena did not demonstrate a refusal to comply with discovery rules because she had the right to obtain any evidence relevant to the parties' custody dispute pursuant to Illinois Supreme Court Rule 201(b)(1) (eff. July 30, 2014). This argument misses the point. The trial court entered an order prohibiting Duda from pursuing Mosby-Scott as a witness, but Duda disregarded the order and continued down her path to secure Mosby-Scott as a witness. Duda repeats the argument that Nathan had a right to know whether Mosby-Scott influenced, coached, or manipulated R.N. without any evidence to suggest Mosby-Scott engaged in such unethical behavior. Duda also repeats, without any citation to authority, her claim that Mosby-Scott made herself a witness by interviewing R.N. Even if Duda's arguments had merit, the appropriate avenue for addressing those issues is through appeal or by

filing further motions in the trial court; disregarding the court's order was not an appropriate method for raising those issues.

¶ 24 Where a party unreasonably fails to comply with a trial court's discovery order, the court may award reasonable attorney fees to the other party. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). We note Duda does not contest the amount of the attorney fees, merely the imposition of the sanction as punitive. The purpose in awarding sanctions is "to effect discovery, not to punish the uncooperative party." *Zimmer v. Melendez*, 222 Ill. App. 3d 390, 395, 583 N.E.2d 1158, 1162 (1991). Here, the sanctions imposed by the trial court were not punitive in nature. Rather, they reimbursed Mosby-Scott for the attorney fees she expended in challenging Duda's improper subpoena, which is a permissible sanction under Rule 219(c).

¶ 25 We therefore conclude the trial court did not abuse its discretion by finding Duda unreasonably failed to comply with its July 8, 2016, order and awarding Mosby-Scott reasonable attorney fees in the amount of \$2,225.

¶ 26 III. CONCLUSION

¶ 27 Based on the foregoing, we affirm the trial court's judgment.

¶ 28 Affirmed.