No. 3--10--0127

Order filed January 12, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

JOHN DOE "1", by his Mother and Next Friend, T.S.; JANE DOE "2", by her Next Best Friend, K.P.; JOHN DOE "2", by his Next Best Friend, S.G.; and JOHN DOE "3", by his Mother and Next Friend, S.S.,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, La Salle County, Illinois,
Plaintiffs-Appellants/ Contemnors-Appellants,	)	No. 01--L--85
v.	)	
DAVID HENRY and KATHY HENRY,	)	
Defendants-Appellees,	)	
(Matthew D. Ports, Contemnor-Appellant).	)	Honorable James A. Lanuti, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.

Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

Held: Where plaintiffs filed a civil complaint against defendants involving acts of sexual assault and the trial court weighed the harm to plaintiffs, the

trial court did not abuse its discretion in granting defendants' motion to compel discovery depositions of minor plaintiffs.

Plaintiffs, John Doe #1, Jane Doe #2, John Doe #2 and John Doe #3, appeal from an order holding plaintiffs' guardians and their attorney in contempt and fining them $100 for their declared refusal to produce the minor plaintiffs for discovery depositions. We vacate the order of contempt and otherwise affirm.

In December 2000, Oglesby police conducted an investigation after receiving complaints from the mother of Jane Doe #2, claiming that David Henry, an eleven-year-old minor, had sexual contact with her daughter in his bedroom closet. During the course of the investigation, three other minors, John Doe #1, John Doe #2 and John Doe #3, stated that they also had sexual contact with David. Shortly thereafter, David was arrested and confirmed to police that he had sexual contact with all four children.

David was placed in a residential facility for juvenile sexual offenders on March 1, 2001, and released on June 8, 2004. While there, David received treatment from clinical counselor, Ryan Weidenbrenner. In his sessions with Weidenbrenner, David revealed that he engaged in sexual conduct with 14 neighborhood children, including plaintiffs.

In 2001, plaintiffs filed a civil complaint against David Henry and his mother, Kathy Henry, seeking damages for personal injuries and medical care expenses they incurred from David's acts

of physical and sexual assault. The complaint alleged that between July 1, 2000, and December 2, 2000, David "placed his penis in the mouth of the plaintiff[s], touched the plaintiff[s] genitals and [had] other unwanted contact" with them. As to Kathy, the complaint claimed that, despite knowing of her son's propensity to engage in sexual contact with minors, she allowed her son to have repeated and unsupervised contact with plaintiffs in her apartment. Plaintiffs further alleged that they suffered severe emotional damage and permanent psychological damage as a result of David's conduct.

On June 9, 2009, defendants filed a motion to compel discovery depositions of the minor plaintiffs. Plaintiffs objected on several grounds, arguing that the depositions would emotionally harm and further traumatize the children and that their depositions were unnecessary because there was sufficient corroborative evidence of David's sexual acts. Plaintiffs relied, in part, on an affidavit of Dr. Renee Dominguez, a licensed clinical psychologist.

In her affidavit, Dr. Dominguez noted that she had not reviewed the specific circumstances of each case and had not yet met the minor victims. However, it was her professional opinion that interviewing the children outside of a supportive, nurturing context would be "unnecessarily psychologically overwhelming" and harmful. Dr. Dominguez emphasized that the children in the lawsuit had all been harmed in different ways. She noted that there were

varied and numerous reactions and that each child dealt with the severe emotional turmoil differently. Child sexual abuse victims often showed signs of posttraumatic stress, poor self-esteem, anxiety and/or depression. She felt that in a deposition setting, the children would be reluctant to disclose their experiences of sexual abuse. Dr. Dominguez ultimately concluded that plaintiffs would sustain serious harm if they were forced to give their depositions.

At the hearing on the motion to compel, the trial court reviewed Dr. Dominguez's affidavit and acknowledged that this was a difficult case. In ruling on the motion to compel, the court stated:

> "I just don't know how [defendants] can defend the case without talking to the people you claim are injured. I mean there's just no way that this case can be presented to a jury. Now, you know, obviously, counsel has got to use some discretion in questioning the witness. I mean these kids may not even remember talking to the police in the year 2000.
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> ***
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> So if you ask them that question and they say I don't remember, then we move on."

The court granted the motion and asked defense counsel to choose a minor plaintiff it wished to depose first. Counsel requested Jane

Doe #2. The court then ordered her deposition with this instruction:

> "Take her deposition and if there's a problem, I mean you want to take it in the courthouse here, fine. Get it on a date when I'm around. If there's going to be a problem. I'll be available, all right? So we can come in here, we can talk about it.... It's very unusual for me to do that but this is a fairly unusual circumstance.... And if there's a problem, you can take a recess and come down and see me and we can talk about it, all right?"

Plaintiffs filed a motion to reconsider and a motion for a determination of unavailability pursuant to section 8--2601 of the Code of Civil Procedure (Code) (735 ILCS 5/8--2601 (West 2008)). Plaintiffs attached the July 2009 affidavit of Dr. Dominguez, as well as a report from her subsequent evaluation of Jane Doe #2. In that report, Dr. Dominguez noted that Jane Doe #2 initially presented as resistant to participating in the interview but otherwise appeared competent and well adjusted. Jane Doe #2's mother was with her during the evaluation process. Both reported that Jane Doe #2 was functioning well within home, at school and in peer relationships. It appeared that she experienced adjustment difficulties for a short period of time after her victimization. Currently, Jane Doe #2 and her mother denied that she was

experiencing elevated levels of distress related to the assault. Dr. Dominguez concluded that, given Jane Doe #2's defensive style of response, additional collateral information was needed to assess her emotional development.

After considering arguments by counsel, the trial court refused to find Jane Doe #2 unavailable under section 8--2601. In reaching its decision, the court stated, "this is discovery. It is not a trial. And the Court is put in a very difficult position. Yes, I can imagine it would be harmful or very disturbing to her to have to go back over this. I can understand that." The court further noted that it was "trying to strike some kind of balance here because I realize, you know, that this could be traumatic on somebody." The trial court denied plaintiffs' motion to reconsider and order plaintiffs to produce Jane Doe #2 for deposition within 30 days.

Plaintiffs' mothers and plaintiffs' attorney refused to produce Jane Doe #2 for deposition. On January 20, 2010, the trial court held plaintiffs and counsel in contempt of court and fined them $100 "to allow the plaintiffs to appeal this Court's 7/23/09 and 11/10/09 orders in a good faith attempt to allow the appellate court to review this Court's holding regarding producing the minor plaintiff for deposition."

ANALYSIS

I

Plaintiffs argue that the trial court abused its discretion when it failed to consider the serious harm they would suffer if they were forced to give their depositions. They claim that Supreme Court Rule 201(c)(1) requires the trial court to weigh a party's need for the information against the harm incurred by the person providing it. Plaintiffs maintain that, in this case, the potential for psychological harm is so great that the motion to compel should have been denied.

The object of discovery procedures is disclosure, and the right of any party to a discovery deposition is "basic and fundamental." *Slatten v. City of Chicago*, 12 Ill. App. 3d 808 (1973). However, that right is limited to disclosure of matters that are relevant to the subject matter involved in the pending action. Ill. S. Ct. R. 201(b)(1) (eff. July 1, 2002); *Pemberton v. Tieman*, 117 Ill. App. 3d 502 (1983). Nevertheless, the trial court is accorded great latitude in determining the scope of discovery. *Pemberton*, 117 Ill. App. 3d at 504-05. The concept of relevance is broader for discovery purposes than for purposes of the admission of evidence at trial, since discovery includes not only what is admissible at trial but also that which leads to what is admissible at trial. *Id.* The powers vested in the trial court require a careful exercise of its discretion to balance the needs of seeking the truth against the needless harassment of a party litigant. *Cedric Spring & Associates, Inc. v. N.E.I. Corp.*, 81

Ill. App. 3d 1031 (1980). A reviewing court will not interfere with the trial court's discovery rulings absent a manifest abuse of discretion. *Computer Teaching Corp. v. Courseware Applications, Inc.*, 199 Ill. App. 3d 154 (1990).

Supreme Court Rule 201 gives a trial court the authority to supervise all or any part of any discovery procedure. Ill. S. Ct. R. 201(c)(2) (eff. July 1, 2002). The rule makes it clear that discovery procedures were designed to be flexible and adaptable to the infinite variety of cases and circumstances appearing before the trial court. *Atwood v. Warner Electric Brake & Clutch Co.*, 239 Ill. App. 3d 81 (1992). To that end, Rule 201(c)(1) permits the court to issue a protective order as justice requires. Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2002). Specifically, the rule provides:

> "[t]he court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." *Id.*

Here, the emotional damage suffered by plaintiffs is a central issue in the cause of action. Plaintiffs have alleged that they each suffered severe and permanent emotional injuries as the result of David's conduct and Kathy's negligent supervision. Plaintiffs' expert acknowledged that the minors have been harmed in different

ways. Dr. Dominguez opined that child victims of sexual abuse may experience posttraumatic stress symptoms, general behavior problems, poor self-esteem, anxiety symptoms and/or depression. Thus, if plaintiffs in this case suffered permanent harm, defendants are entitled to discover the nature and extent of their individual injuries.

Plaintiffs argue that anything they would say in a deposition has already been provided in other forms of viable trial evidence. However, the record before us suggests otherwise. The underlying facts regarding the severity and frequency of the alleged acts and any long-term effects those acts may have had on minor plaintiffs are still issues to be explored in pre-trial discovery. Here, the depositions requested are of plaintiffs themselves, and the information sought directly relates to the subject matter of plaintiffs' complaint. The trial court did not manifestly abuse its discretion in granting defendants' motion to compel discovery. See *Pemberton*, 117 Ill. App. 3d at 505-06.

Plaintiffs argue that pursuant to Supreme Court Rule 201(c)(1) the trial court has the discretion to order a protective order to prevent undue harm to the parties. Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2002). They claim that the trial court abused its discretion by failing to consider that factor when it ordered the depositions.

We believe the trial court appropriately considered the

harmful impact on plaintiffs and approached their depositions with sensitivity. In granting the motion to compel, the trial court restricted counsel's access to plaintiffs by asking counsel to choose one plaintiff to depose first, rather than allowing counsel to depose all four plaintiffs. The trial court instructed counsel to take the minor's deposition at the courthouse, so that if any problem arose, the court would be available to handle the issue. The court also strongly urged defense counsel to use discretion in questioning the witness. In ruling on the motion to reconsider, the court further noted that it was trying to "strike some kind of balance" because the depositions would be "traumatic." These comments reflect that the trial court struggled with the sensitive nature of the discovery depositions and issued an order with protective measures as provided under Supreme Court Rule 201(c)(1). Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2002).

We find that the court did not abuse its discretion in allowing the depositions to proceed in the manner instructed. The rules of discovery provide for the trial court to supervise the process, and the trial court here properly did so.

II

Next, plaintiffs claim that under section 8--2601 of the Code they were "unavailable" and assert error in the trial court's failure to conduct a hearing before ordering Jane Doe #2's discovery deposition.

Section 8--2601(a) states:

> "An out-of-court statement made by a child under the age of 13 describing any act of child abuse or any conduct involving an unlawful sexual act performed in the presence of, with, by, or on the declarant child, or testimony by such of an out-of-court statement made by such child *** is admissible in any civil proceeding if: (1) the court conducts a hearing outside the presence of the jury and finds the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the child either: (i) testifies at the proceeding; or (ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement." 735 ILCS 5/8--2601 (West 2008).

Section 8--2601 is the civil counterpart to section 115--10 of the Code of Criminal Procedure. 735 ILCS 5/8--2601(a) (West 2008); 725 ILCS 5/115--10 (West 2008). It contemplates that the issue of sexual misconduct against a child may be relevant in a civil proceeding and allows a party to introduce as evidence a child's hearsay statements regarding the abuse. *In re Marriage of Rudd*, 293 Ill. App. 3d 367 (1997). However, two procedural conditions must be satisfied before those statements are admissible. First, the court must conduct a hearing to determine whether the time,

content, and circumstances of the statements provide sufficient safeguards of reliability. 735 ILCS 5/8--2601(a)(1) (West 2008). Second, the statements must be corroborated by the child's testimony or, if the child is unavailable, other evidence of the act which is the subject of the statements. 735 ILCS 5/8--2601(a)(2) (West 2008).

After reviewing the specific language of the Code, we conclude that the trial court was not required to conduct an "unavailability" hearing pursuant to section 8--2601 before compelling the minor plaintiffs to appear for their discovery depositions. Section 8--2601 mandates that before a child's statement is admissible, the court must conduct a hearing "outside the presence of the jury" to determine whether the proffered statement is reliable. 735 ILCS 5/8--2601(a)(1) (West 2008). Section 8--2601 also contemplates use of the hearsay statements as trial "evidence" and imposes an unavailability determination if the child does not testify. 735 ILCS 5/8--2601(a)(2) (West 2008). This plain language of the statute, as drafted by the legislature, demonstrates that section 8--2601 concerns the admissibility of a child's out-of-court statements as evidence at trial; it does not govern whether a child is available for purposes of a discovery deposition.

The case law applying section 8--2601 and section 115--10 supports our interpretation. Numerous civil and criminal cases

discuss "unavailability" determinations in relation to the use of child hearsay statements at trial proceedings. *In re Marriage of Gilbert*, 355 Ill. App. 3d 104 (2004) (order of protection hearing); *Rudd*, 293 Ill. App. 3d at 374 (visitation proceeding); *People v. Coleman*, 205 Ill. App. 3d 567 (1990) (criminal trial); *People v. Back*, 239 Ill. App. 3d 44 (1992) ("proceeding" as used in section 115--10 refers to trial proceeding, not other pretrial matters). Our research has disclosed no case law applying section 8--2601(a) in discovery proceedings. We recognize that if this case proceeds to trial, an unavailability determination would be necessary before admitting the minors' out-of-court statements should plaintiffs refuse to testify. See 735 ILCS 5/8--2601(a), (b) (West 2008); see also *People v. Stechly*, 225 Ill. 2d 246 (2007). However, the trial court is not required to conduct a section 8--2601 hearing at the discovery stage of a case.

For these reasons, plaintiffs have failed to show that the trial court abused its discretion in ordering that Jane Doe #2 be produced for a discovery deposition or that she was unavailable under section 8--2601 of the Code. Under these circumstances, the trial court acted properly in finding plaintiffs and counsel in contempt for refusing to comply with the discovery order. However, because their action was a good faith effort to permit appellate review of the question presented, the order finding them in contempt is vacated. Ill. S. Ct. R. 366(a)(5); see also *Computer*

Teaching Corp., 199 Ill. App. 3d at 158.

CONCLUSION

The order of the circuit court of La Salle County finding plaintiffs and counsel in contempt is vacated, and the judgment is otherwise affirmed.

Affirmed in part and vacated in part.