Darin DUNLAP, a Minor, by FIRST STATE BANK OF CONWAY, as Guardian of his Estate, and by his Father and Next Friend, Randall T. DUNLAP *v.* Thomas BUCHANAN

87-13 735 S.W.2d 705

Supreme Court of Arkansas
Opinion delivered September 14, 1987
[Supplemental Opinion on Denial of Rehearing
October 19, 1987.*]

1. DISCOVERY — DUTY OF RESPONDING PARTY TO SUPPLEMENT RESPONSE UNDER CERTAIN CIRCUMSTANCES. — ARCP Rule 26(e)(2)(B) provides that a party is under a duty to supplement a response to discovery when the responding party "knows that the response though correct when made is no longer true and circumstances are such that a failure to amend the response is in substance a knowing concealment"; this language gives the trial court considerable latitude to excuse failure to supplement when the response to an answer changes, and it requires at least passive concealment before imposition of a sanction.

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*Glaze, J., concurs.

2. DISCOVERY — ALLOWANCE OF SUPPLEMENTATION OF RECORD — PROPRIETY. — The trial court did not abuse its discretion in ruling that records supplementing appellee's response to questions asked in discovery proceedings were admissible where the proof indicated that the response was truthful when made, the need to change the response was the result of trial developments, and there was no proof of passive concealment by the appellee.

Appeal from Conway Circuit Court; *Charles H. Eddy*, Judge; affirmed.

The McMath Law Firm, P.A., by: *Phillip H. McMath*, for appellants.

Friday, Eldredge & Clark, by: *Phillip Malcom* and *Calvin J. Hall*, for appellee.

ROBERT H. DUDLEY, Justice. Appellant, a severely retarded child, filed suit alleging obstetrical malpractice by appellee, a medical doctor specializing in family practice. Appellant alleged that he was injured during birth because of appellee's negligent use of forceps and his failure to perform a cesarean section. Additionally, it was alleged that appellee was negligent in the neonatal management of appellant. After an extended trial the jury returned a verdict in favor of the appellee. The single assignment of error on appeal is that the trial court erred in admitting four records into evidence. We find no abuse of discretion in the ruling and affirm the judgment.

Sixteen months before the trial the appellant asked the appellee by interrogatory to identify "all exhibits the defendant intends to introduce. . . ." Appellee responded that he intended to introduce appellant's various medical records. At the close of the appellant's case-in-chief, the appellee supplemented the response by notifying the appellant and the court that he would seek to introduce four medical records, other than appellant's records, in the presentation of his case. Appellant objected to the admission of the four additional records because they were not listed in the original response.

[1] ARCP Rule 26(e)(2)(B) provides that a party is under a duty to supplement a response to discovery when the responding party "knows that the response though correct when made is no longer true and circumstances are such that a failure to amend

the response is in substance a knowing concealment." This language gives the trial court considerable latitude to excuse failure to supplement when the response to an answer changes, and it requires at least passive concealment before imposition of a sanction. D. Newbern, *Arkansas Civil Practice and Procedure*, § 17-3.

The trial court conducted a hearing before allowing the appellee to introduce the records. The proof at that hearing is summarized as follows:

First, during cross-examination of one of appellant's medical experts, the witness stated that it was unusual for a baby's head to present in a left occipital anterior position with the head crowning. After that answer was given the appellee called the medical records clerk of the hospital where appellant was delivered and obtained a record which showed that many babies present in a left occipital anterior position. Appellee sought to introduce that record to show lack of experience by appellant's expert.

Second, in his case-in-chief the appellant questioned the reason appellee came back to the hospital to see appellant at 11:00 p.m., after receiving a call from a nurse at 6:00 p.m. concerning appellant's condition. In his deposition the appellee had said he did not know why he was at the hospital at that time. During the trial the appellee recalled delivering another baby about that time and then remembered that was the reason he was at the hospital. The appellee then obtained the medical records of the other mother and baby and sought to introduce that record to prove the reason he visited appellant at 11:00 p.m.

Third, in his discovery deposition the appellee testified that he could not perform a cesarean section by himself. At trial it developed that appellant interpreted the statement to mean appellee was incompetent to perform such an operation. The appellee strongly disputed appellant's interpretation, and, during appellant's case-in-chief, obtained a hospital record showing that he was the operating surgeon for a cesarean section only two days after appellant was born and at that time also obtained the hospital's by-laws which provided that an operating surgeon must have a qualified physician assistant during major surgery. Appellant sought to introduce those records to show that appellee was

competent to perform the surgery, but that the operation required two doctors, one for the mother and one for the child.

[2] At the conclusion of the hearing the trial judge ruled that the records should not be excluded from evidence solely as a result of any sanction under Rule 26(e). As can be seen from the summary of the hearing, the proof indicated that the response was truthful when made and the need to change the response was the result of trial developments. Under the circumstances, the supplementation was seasonably made. There was no proof of passive concealment by the appellee, and the trial court did not abuse its discretion in its ruling.

Affirmed.