

ORIGINAL

FILED
COURT OF CLAIMS
OF OHIO

IN THE COURT OF CLAIMS OF OHIO

2013 NOV 27 PM 3: 25

LYNDSEY HOWELL

Plaintiffs

v.

OHIO UNIVERSITY POLICE
DEPARTMENT

Defendants

CASE NO. 2013-00001

MAGISTRATE HOLLY T. SHAVER

**DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND
MOTION TO COMPEL DISCOVERY AND MOTION FOR SANCTIONS**

Defendant Ohio University Police Department respectfully asks this Court to deny Plaintiff's Second Motion to Compel and Motion for Sanctions for failure to comply with Civ.R. 37 and because Plaintiff's disagreement with the substance of discovery responses is not a basis for sanctions.

Plaintiff asserts that the University injured her and is liable for that injury, and therefore any discovery response or pleading stating otherwise is misleading, frivolous, and sanctionable, but the University is entitled to a trial before liability is determined. In any event, Plaintiff's counsel did not attempt to address the issues raised in this second Motion as required by Civ.R. 37 before seeking sanctions, and therefore it must be denied on that basis as well.

I. Plaintiff's counsel has not attempted to resolve the issue before seeking this Court's involvement as required by Civ.R. 37.

Under Civ.R. 37, a party is required to make reasonable attempts to resolve discovery disputes before seeking redress from the Court. Plaintiff did not do so in this case.

The rule states, in pertinent part:

Before filing a motion authorized by this rule, the party shall make a reasonable effort to resolve the matter through discussion with the attorney, unrepresented party, or person from whom discovery is sought. The motion shall be

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accompanied by a statement reciting the efforts made to resolve the matter in accordance with this section.

Civ.R. 37(E). In this case, no such efforts have been made—no phone calls, no letters and (as indicated by counsel’s letterhead) no emails or faxes. The second Motion does not indicate either what efforts have been made (none) or why they could not be made, as the rule requires. Instead, Plaintiff filed a second Motion simply because Plaintiff believes that the University should admit liability and that undersigned counsel has violated ethical rules and rules of discovery in denying the same.

The failure to make reasonable efforts to resolve a discovery dispute and to recite those efforts in a motion is grounds enough to deny that motion outright. *Stephenson v. Grant Hosp.*, 10th Dist. No. 11AP-253, 2011-Ohio-5622; *Deutsche Bank Nat. Trust Co. v. Doucet*, 10th Dist. No. 07AP-453, 2008-Ohio-589. Although it might be unlikely that a letter or two would suffice to encourage the University to admit liability—which it seems is the only response that Plaintiff will accept—the many issues identified in Plaintiff’s 39-page memorandum may have been reduced by some communication. Plaintiff’s failure to make any attempt at all, and failure to recite those attempts or explain why they would be futile, requires that the second Motion be denied.

Accordingly, Plaintiff’s second Motion must be denied for failure to comply with civ.R. 37(E).

II. Sanctions are not justified simply because Plaintiff disagrees with the substance of the University’s discovery responses.

Plaintiff is misguided in asking this Court to sanction the undersigned attorney simply because Plaintiff asserts that the University is liable for her injuries and that any discovery response denying liability is therefore inappropriate, wrong, and unethical. Liability is a matter for trial, not pretrial discovery motions.

As this Court is aware, Plaintiff asserts that the University's police officer broke her thumb when she was arrested for drunk driving on a cold and icy night, January 21, 2012, in Athens, Ohio. Some time after her arrest, she complained of pain in her hand, and eventually learned that she had a fractured thumb. According to her second Motion, it seems, the only possible cause for her broken thumb—when she was drunk on an icy night—was the arresting officer's negligence. The arresting officer, however, did not encounter any trouble in cuffing her and states that he did not act in any way that could have caused the injury of which the Plaintiff complains. The University denies liability simply because the arresting officer did not cause her injury. She wants this Court to decide, before a trial on the merits, that there is no possible way that she could have injured herself while intoxicated prior to the encounter and only discovered her pain as she sobered up.

In her 39-page memorandum, it seems Plaintiff goes over every single discovery response and argues with them, but only one or two examples are needed to show why Plaintiff's second Motion has no merit. Plaintiff challenges the University's defense that Plaintiff's negligence may have contributed to her injuries, and on pages 30-1 of her memorandum asserts that because nothing is revealed in the police report that would show her injury, the arresting officer must have been the cause of her injury and therefore discovery responses not admitting as much are wrongful and unethical and sanctionable. This, of course, assumes that she was in fact injured by the arresting officer and not some other incident while she was intoxicated that icy evening. This Court should wait until trial to determine the cause of her injury, rather than assume liability in order to decide a discovery dispute. In another example, Plaintiff asserts at page 33 of her memorandum that an interrogatory response regarding the defense of assumption of the risk is wrong and unethical because "No one ... assumes the risk of having their thumb broken by submitting to the authority of the police."

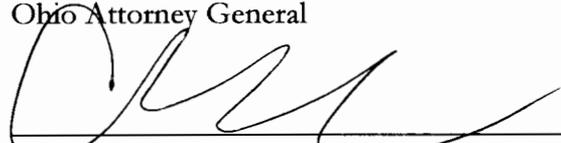
While in theory that may be true, it is not conclusive that her intoxicated behavior before the arrest, walking and/or driving or engaging in other activities while intoxicated on an icy night, might not have qualified as the assumption of the risk of an injury prior to the encounter.

Because the second Motion requires a finding of liability to form the basis of the sanctions sought, it must be denied. The University denies that it caused the Plaintiff's injuries even though it does not know how they may have been caused. Liability should be determined at a trial, and the University is entitled to assert its defenses.

Accordingly, the second Motion should be denied.

Respectfully submitted,

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Ohio Attorney General



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CERTIFICATE OF SERVICE

On November 27, 2013, a copy of this document was served via regular mail on the following:

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