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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SHELLY DURBIN,

Plaintiff and Appellant,

v.

FORD MOTOR COMPANY,

Defendant and Respondent.

A137289

(Solano County
Super. Ct. No. FCS 028866)

Plaintiff Shelly Durbin was injured in a single vehicle auto accident on June 15, 2006, when she was ejected from a passenger seat in a 2003 Ford Explorer Sport that rolled over multiple times. The driver of the vehicle had a blood alcohol level of .30. Durbin sued Ford, alleging causes of action for product and strict liability. After a jury was impaneled, Durbin stipulated to judgment for Ford, asserting that rulings on discovery matters and in limine motions precluded any chance of her prevailing in the case. Durbin contests these rulings on appeal from the stipulated judgment.

We hold that the court did not abuse its discretion when it imposed an issue, rather than a terminating, sanction on Ford for discovery abuse. Since we conclude that the discovery sanction was not erroneous, we need not consider the in limine rulings, which are contested only to show the alleged sanction error was prejudicial. The judgment is affirmed.

I. BACKGROUND

A. Introduction

In May 2012, with a trial date set for July 31, Durbin moved for terminating or other sanctions based on Ford's alleged failure to provide discovery, and for an order requiring production of documents Ford produced in a Texas case. The discovery violations concerned Ford's decision to remove a protective rollover canopy from the design of the Explorer Sport, and Ford's document retention policy. Durbin contends that the court abused its discretion when it granted the motion only in part, and merely imposed an issue sanction involving the decision to remove the canopy. Durbin argues that the prejudice she suffered as a result of this ruling was compounded by rulings on motions in limine involving expert testimony.

B. Discovery Involving the Rollover Canopy

Durbin learned that the Explorer Sport was originally designed to have an air canopy intended to provide protection in rollover accidents, but the canopy was removed from the design before production started. Durbin served deposition notice number six seeking information about the reason for the change. Ford's designated witness at the deposition, William Ballard, admitted that he had not done any work involving the canopy, and did not know how Ford searched for documents relating to the canopy.

In October 2010, Durbin moved to compel further testimony and production of documents pursuant to deposition notice number six. The documents sought included minutes of meetings about the canopy, documents regarding the canopy from Ford's "concern" files that recorded problems in vehicle design and construction, and documents from TRW, the canopy's manufacturer. The motion indicated that TRW worked with Ford for two years to integrate the canopy into the Explorer Sport, but no document authored by TRW had been produced. Ford's opposition stated that its production was complete as to these matters. Ford said it had conducted a reasonable search for meeting minutes and concern files involving the canopy and had located no "responsive" documents. As for the TRW documents, Ford stated, among other things, "TRW is the business record keeper, not Ford."

The court's tentative ruling on the motion stated: "With FORD's representation that it has produced all responsive documents generated and still retained as to the meeting minutes in question, by the company which designed and tested the safety canopy, and that it has no 'concern' files regarding the canopy, this part of Plaintiff's motion is denied. Should it later be determined that FORD has failed to produce responsive documents in its possession, control or custody, or has intentionally destroyed responsive documents to avoid production, Plaintiff may pursue the remedies identified in Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1, 11-14." The *Cedars-Sinai* case noted that "potent" sanctions are available for discovery violations, including monetary, issue, and terminating sanctions. (*Id.* at p. 12.)

In its June 2011 final ruling on the motion, the court changed course and granted the motion to compel as to deposition notice number six. The court ordered Ford to produce documents, and a witness to further testify, about the canopy. Ford objected on the grounds that it had already produced a witness regarding the canopy, and either produced all responsive documents, or represented that there were no such documents. Ford argued that the tentative ruling was proper, and acknowledged that, as the tentative ruling provided, it would be subject to sanctions described in *Cedars-Sinai* if it had destroyed or failed to produce documents concerning the canopy.

After a July 2011 hearing on Ford's objection, the court filed an order stating that the motion as to deposition notice number six would be denied if Ford submitted a statement "verifying that Ford has conducted a diligent search and a reasonable inquiry in response to Plaintiff's request for test or test related materials from TRW regarding air curtain (i.e., Safety Canopy) deployment tests conducted at TRW's facility by TRW, and that no such documents are in the possession or custody of Ford." Ford submitted such a statement, and the motion was denied.

Months later, in May 2012, Ford produced documents regarding the canopy. These documents included meeting minutes and documents generated by TRW. Durbin represents in her brief that Ford did not respond to her requests for a deponent on these

documents, which were sent on May 18, 22, and 24. However, on May 25, Ford sent Durbin a letter agreeing to a deposition on the documents.

That same day, Durbin moved for sanctions. The motion alternatively requested striking of Ford's answer and entry of a default judgment against Ford, striking of Ford's answer on liability and a trial on damages alone, an issue sanction as to the canopy, or monetary sanctions. The proposed issue sanction for the canopy would "establish[] that it was technologically feasible for Ford to have designed and manufactured the subject 2003 Ford Explorer Sport with an air canopy, and the benefits of such a design would substantially outweigh the costs and risks of that design."

Ford opposed the motion, arguing among other things that the canopy documents "are not helpful to Plaintiff; they are simply cumulative evidence helpful to Ford showing that Ford paid TRW substantial sums to attempt to incorporate a Safety Canopy in the subject vehicle, which ultimately could not feasibly be installed given the vehicle's configurations and other issues. . . . Beyond that, Ford took an additional good-faith step and offered a witness to answer any questions Plaintiff may have about the newly-produced documents. But Plaintiff declined this offer, instead choosing to falsely accuse Ford of having made the offer after receiving Plaintiff's sanctions motion."

The court found that sanctions against Ford were warranted because it "only recently produced meeting minutes documents relevant to the safety canopy issue, despite a request within a deposition notice served 2 years ago for production of all safety canopy related documents." Ford's counsel offered only "a vague, incomplete and unsatisfying explanation for this belated production" The court wrote:

"Plaintiff's counsel argued that FORD's response even now provided no assurance that FORD had produced all responsive meeting minutes documents within its possession. He noted gaps in time for the meeting minutes documents that had been produced, and topics raised at one meeting for follow-up that were then not addressed in the subsequent meeting minutes produced after some of these gaps in time. He asserted that markings on the produced documents showed that FORD had produced these same meeting minutes documents in earlier cases, years prior to the July 2011 representations

by FORD's counsel that FORD had diligently searched for meeting minute documents and had found none to produce in this case. He claimed that FORD had and has had for many years a searchable database of electronically stored documents (scanned through OCR technology), which would have enabled FORD to easily search its database for these meeting minutes documents. [¶] FORD's counsel did not meaningfully dispute any of these claims."

The court elaborated on the significance of the documents:

"The meeting minutes documents ultimately produced by FORD contained discussion of a production problem with the safety canopies designed for this model, having to do with the fragmentation of the plastic being used. The focus of Plaintiff's probe for the minute meeting documents was clear: Plaintiff sought to establish that FORD's decision not to provide a safety canopy for the 2003 Ford Explorer Sport was related solely to cost, and not to design impossibility. [¶] At hearing, FORD's counsel had argued that the ultimate decision not to make the safety canopy available for this model was made because of those fragmentation problems. Plaintiff's counsel had argued that the gaps in time between the meeting minutes documents only recently produced by FORD, as well as certain admittedly vague entries in them, suggest that FORD and TRW (designer and manufacturer of the safety canopy) were changing the plastic, and were optimistic that this would fix the fragmentation problem, and had even costed out the solution. . . .

"Even if FORD has in its possession, custody or control additional responsive meeting minutes documents, that it has not yet produced here, it is possible that those documents would contain no additional evidence suggestive of cost as the only reason for FORD's decision not to provide a safety canopy for this model. It is also possible that these unproduced documents might suggest the reason for the safety canopy decision was a fusion of both fragmentation and cost. However, it is also a possibility that any responsive but still unproduced meeting minute documents would clearly support, or even conclusively establish, Plaintiff's assertion that cost was the sole reason for that decision."

The court was “mindful of the range of possible sanctions available to address a misuse of the discovery process, and share[d] the general reluctance to impose serious types of sanctions unless lesser types of sanctions have been tried, and have been found ineffective.” However, it concluded that “FORD’s unexplained delay in the production of the meeting minutes documents requires something more from this court than merely ordering further production, additional searches be made by FORD for responsive documents, and/or monetary sanctions.” Fords offer to allow a further deposition “did not ensure that FORD would not obtain an undeserved edge from its delayed production of the newly produced meeting minutes documents, nor would it ensure that FORD has even now diligently searched for and produced all responsive meeting minutes documents.”

The court thus imposed “an issue sanction, to preclude FORD from arguing at trial that employment of the safety canopy was impossible, and permitting Plaintiff to assert instead that this decision was made on the basis of cost. FORD shall still be allowed to present evidence and ultimately argue to the jury that the absence of a safety canopy on the subject vehicle was not a cause or contributing factor to the subject accident, or to the injuries claimed by Plaintiff, as well as to present evidence and argue as to the comparative fault of Plaintiff and/or the driver of the subject vehicle, and to contest the injuries and damages Plaintiff may claim at trial.”

C. Discovery Regarding Ford’s Document Retention Policy

Durbin served deposition notice number five for testimony and documents concerning Ford’s document retention policy, including “any Suspension Orders applicable to any part of [the subject vehicle].” Ford declined to furnish a deponent, but offered to produce “the relevant document retention manual for the subject vehicle,” which would “provide[] all information that would be elicited through the deposition of a person most qualified on the document retention policy with respect to the subject vehicle.” Ford refused to produce any suspension orders—“categories of documents required to be maintained beyond periods set out pursuant to Ford’s records management

program”—on the grounds of attorney client-privilege and work product immunity. Ford provided a privilege log for these withheld documents.

Durbin sought to enforce deposition notice number five in her May 2010 motion to compel, arguing among other things that the suspension orders were not privileged. The court reviewed the suspension orders in camera, and determined that they were protected by the attorney-client privilege. However, the court ruled that Durbin was “permitted to discover what Defendant’s employees are actually doing with respect to collecting and preserving documents beyond the normal retention period required by Defendant Ford’s document retention policy manual.” Durbin was also permitted to “ascertain the types and categories of suspension-order documents Ford employees were instructed to preserve and collect,” and to “discover what specific actions the employees were instructed to undertake to that end.” The court ordered Ford to provide a deponent on those issues, and Ballard was again deposed in September 2011.

In her May 2012 sanctions motion, Durbin argued that Ballard “was wholly unprepared to provide testimony, and was instructed not to answer questions regarding issues the Court expressly found discoverable.” The court denied sanctions in connection with Ballard’s testimony on the ground that Durbin had “failed to file any motion to compel responses to deposition questions or production of a different person for deposition.”

D. Discovery of Documents in the Texas Case

Durbin’s counsel learned from Lee Brown, attorney for the plaintiff in *Jones v. Ford Motor Company, et al.*, Dallas County, Texas, 68th Judicial District, Cause No. 07-12617-C (*Jones*), that Ford had produced documents in *Jones* that were allegedly relevant in Durbin’s case, including documents generated by TRW concerning the canopy. A sharing protective order was entered in *Jones* that permitted Brown to share confidential documents produced by Ford with other attorneys prosecuting similar cases, and Durbin’s counsel signed on to the protective order on February 1, 2012.

On March 28, Brown’s office sent Durbin’s counsel an email stating: “Attached is the deposition of Bill Ballard. Ford still argues the protection on the documents you will

need to follow up with them for copies.” On that date, Durbin served Ford with a request for production of all documents Ford produced in *Jones*, and “all documents attached to the deposition of William Ballard on August 7, 2008.” On May 2, Ford refused the request on the ground that the documents sought were irrelevant “particularly because *Jones v. Ford* involved a 2002 model year 4-door U152 platform Explorer and the subject vehicle is a 2003 model year 2-door U207 platform Explorer. Beyond this, Ford states that no test or test related materials from TRW regarding the air curtain (i.e. Safety Canopy) static deployment tests on the 2003 Ford Explorer Sport conducted at TRW’s facility by TRW were produced in the matter of *Jones v. Ford* that have not already been produced herein.”

According to Durbin’s opening brief, “[a]t an ex parte hearing on May 7, 2012, this issue was brought to the trial court’s attention. The trial court indicated that the trial court wanted to hear the issue related to the TRW documents, and set a briefing schedule, with Plaintiff to have filed the Motion by May 11, 2012.” The transcript of the May 7 hearing is not included in the appellate record, and no citations to the record are provided. We presume “the Motion” refers to a motion to compel production of the documents produced in *Jones*.

On May 7, Durbin’s counsel faxed Ford’s counsel a letter alleging that Ford had objected to Durbin’s receipt of documents under the *Jones* protective order. Counsel further alleged that Ford had produced documents in *Jones* that were “generated by TRW from the exact time period that the subject vehicle was under development.” Counsel said “it would be very easy for you to prove that I am wrong. You merely need to write me a letter stating that Ford does not object to Mr. Brown providing documents to this office under the *Jones v. Ford* protective order. If you did not produce any TRW documents, I will be proven wrong.”

On May 10, Ford’s counsel faxed a response stating, among other things that the May 7 letter “incorrectly states that Ford has objected to you getting documents subject to a sharing protective order in the *Jones v. Ford* case from Lee Brown. As long as you sign the sharing protective order applicable to those documents and agree to abide by the

terms of the protective order (and apparently you have), you are free to obtain those documents from Lee Brown.”

Durbin’s May 25 motion included among the possible requested sanctions production of all documents Ford produced in *Jones*. The memorandum of points and authorities in support of the sanctions motion recounted the parties’ communications regarding the *Jones* documents up to Ford’s May 10 letter agreeing that Durbin could obtain documents that were subject to the *Jones* protective order. The memorandum then states: “Because of this change in circumstances, and because the documents would potentially confirm or disprove the claims that would be made in the motion, Plaintiff’s counsel could not file the Motion by the [May 11] deadline, but instead needed to wait for the new documents.”

The memorandum goes on to indicate that the *Jones* documents were ultimately unavailable from attorney Brown: “Plaintiff has also since learned that Mr. Brown, upon seeking to retrieve the file from storage in the *Jones v. Ford* case to provide Plaintiff the documents, learned that there had been an Addendum to the Sharing Protective order in that case that had required Mr. Brown to return his documents to Ford after the case settled. (Exhibit 49.) Thus, Mr. Brown is unable to provide the documents from that case.” Exhibit 49 is a copy of the addendum to the *Jones* protective order. The addendum excepts from the protective order documents that “contain information of a highly sensitive proprietary and/or commercial nature,” and directs that these “non-sharing” documents be returned to Ford or destroyed when the case is over.

The court declined to order production of the *Jones* documents, stating that “plaintiff presented no evidence that any formal discovery was propounded in this case for those documents.”

The subject of the *Jones* documents resurfaced in Durbin’s motion in limine to exclude testimony of a Ford expert witness, Karen Balavich. She planned to testify that even if the protective canopy had been installed on the Explorer Sport, it would not have prevented Durbin from being ejected from the vehicle during the accident. The motion in limine was based on Ford’s failure to produce the general performance requirements for

the canopy that Ford had adopted for the 2002.5 Explorer. Durbin argued that the performance requirement should have been produced in this case, and would likely have been produced in *Jones*. Durbin observed that the sanctions ruling incorrectly stated that she had propounded no formal discovery for the *Jones* documents. Durbin asked that Balavich's opinion be excluded, or alternatively that production of the *Jones* documents be ordered. When the in limine motion was argued, the court acknowledged that Durbin had made a formal request for discovery of the *Jones* documents, but declined to order Ford to produce them.

E. In Limine Rulings

The court denied Durbin's motion to preclude Balavich from testifying.

Ford filed a motion in limine to preclude Durbin's expert, Peter Dill, from testifying that her seatbelt unlatched due to a defect in the design of the seatbelt buckle, and that the safety canopy, if installed, could have prevented her from being ejected from the vehicle. Ford argued that these opinions should be excluded because they were conclusory, or based on speculation or conjecture. The court granted the motion.

II. DISCUSSION

Durbin contends that it was an abuse of discretion for the court to impose anything less than terminating sanctions for Ford's discovery violations. "The trial court has broad discretion in selecting discovery sanctions, subject to reversal only for abuse." (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 992 (*Doppes*)). "The discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. . . . If a lesser sanction fails to curb misuse, a greater sanction is warranted: continuing misuses of the discovery process warrant incrementally harsher sanctions until the sanction is reached that will curb the abuse. 'A decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.' " (*Ibid.*)

Durbin relies on cases that have upheld terminating sanctions after lesser sanctions proved ineffective. (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161,1169–1172 [terminating sanction after monetary sanctions were imposed]; *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1233, 1240–1241 [same]; *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, 1615–1616 [same]; *Morgan v. Southern Cal. Rapid Transit Dist.* (1987) 192 Cal.App.3d 976, 984 [terminating sanction after “[o]rders to answer and monetary sanctions had been tried twice without success”], disapproved on another ground in *Schwab v. Rondel Homes, Inc.* (1991), 53 Cal.3d 428, 434; *Stein v. Hassen* (1973) 34 Cal.App.3d 294, 297–298, 302 [terminating sanction after “complete defiance” of orders imposing monetary sanctions]; *Valley Engineers Inc. v. Electric Engineering Co.* (9th Cir. 1998) 158 F.3d 1051, 1054 [terminating sanctions after “[w]arnings were given and monetary sanctions were imposed” for violation of “one court order after another”]).

All of the cases Durbin relies upon are distinguishable because Ford was not previously sanctioned. Moreover, the issue in these cases was whether terminating sanctions were reasonable, and the issue here is whether they were compelled as a matter of law. *Doppes* is the only reported case where it was held to be an abuse of discretion *not* to impose terminating sanctions, what the court conceded was an “extraordinary” conclusion. (*Doppes, supra*, 174 Cal.App.4th. at p. 971.) Extraordinary circumstances like those in *Doppes* are not present here.

The defendant in *Doppes* was “ ‘repeatedly ordered to provide full and complete discovery’ ” and “ ‘steadfastly failed to do so[,]’ ” a “ ‘history [that was] chronicled in Plaintiff’s numerous discovery motions.’ ” (*Doppes, supra*, 174 Cal.App.4th at p. 971.) The trial court initially imposed monetary sanctions and appointed a discovery referee. The defendant violated four of the referee’s discovery directives. “The discovery referee, in an abundance of caution and with exercise of great moderation, recommended denying *Doppes*’s request for terminating sanctions and instead recommended giving the jury a special instruction as a form of issue sanctions. [¶] The trial court did not abuse its discretion in approving the discovery referee’s report and recommendation. However, in

the middle of trial, it was learned [the defendant] still had not complied with discovery orders and that [the defendant's] discovery abuses were worse than originally known. . . . [A]t that point, the trial court erred by not imposing terminating sanctions against [the defendant].” (*Id.* at p. 971.)

Nothing of the sort is present here, where there was one motion to compel and one motion for sanctions. The trial court could reasonably find there was only a single, not multiple, grounds for sanctions in this case—Ford’s unexplained delay in producing documents it said it could not locate when the motion to compel was heard.

Compelling production of documents is not a statutory sanction, and no basis for ordering production of documents in *Jones*, the Texas case, was shown. Ford resisted Durbin’s broad initial demand for all documents produced in *Jones*, but later agreed to her more limited demand for documents covered by the protective order in the case. Durbin’s claim that she could not obtain those documents rested primarily on statements in her points and authorities that were not evidence. The only evidence she presented in support of that claim was the addendum to the protective order, which did not require that all documents subject to the order be returned to Ford or destroyed after the case was over. The addendum applied only to documents deemed to contain highly sensitive proprietary information. Thus, it is not apparent why Durbin could not obtain the documents she wanted in the *Jones*, and there was no evidence that Ford prevented Durbin from obtaining them.

The court also had a reasonable ground to deny sanctions for Ford’s alleged production of an inadequate deponent on its document retention policies. Durbin failed to move to compel satisfactory testimony about those policies. Durbin argues that she was not required to move to compel because she had already made a motion to compel to obtain a deposition on the subject. She contends that “requiring a second motion to compel makes no sense. Court orders must be self executing, and to hold that where a party refuses to comply with an order the other party must seek a second order to obtain compliance before seeking sanctions would only reward a party for their misconduct, and compound the work courts must do in enforcing discovery obligations.” We might agree

that multiple motions to compel should be unnecessary if they involve the same issues, but the issues in Durbin's initial motion to compel were different from those that would have been presented in the second. The first motion concerned whether suspension order documents were privileged and whether any testimony about document retention policies was warranted. The second motion would have concerned the adequacy of the testimony given. Durbin thus has no persuasive justification for failing to make the second motion.

Sanctions were justifiable for Ford's belated production of minutes of meetings concerning the safety canopy, but that single discovery violation in no way compelled terminating sanctions. Despite the lengthy pattern of discovery violations in *Doppes*, imposition of issue rather than terminating sanctions before trial was not an abuse of discretion. (*Doppes, supra*, 174 Cal.App.4th at p. 971.) Terminating sanctions were required only when yet further violations came to light during the trial. Terminating sanctions are reserved for "extreme situations." (*Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799; *Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, 1524 [such sanctions "are severe and are to be used sparingly"].) The trial court could reasonably find that no extreme circumstances required terminating sanctions, and that lesser issue sanctions were appropriate.

The court's order showed that it appreciated the significance of the documents Ford belatedly produced, and recognized the possibility that additional such documents were being withheld. Durbin argues that the issues sanction the court imposed with those considerations in mind was "toothless," but whether a stronger issues sanction would have been appropriate has no bearing on whether terminating sanctions were required.

Durbin contends that in limine rulings on expert testimony were erroneous, but the alleged errors are not urged as independent grounds for reversal of the judgment, they are claimed only to have compounded the prejudice caused by the decision on the motion for sanctions. But if terminating sanctions were required, then the subjects of expert testimony were immaterial. In any event, since we conclude that the court did not err when it declined to impose terminating sanctions, we need not decide whether the error

would have been prejudicial. Accordingly, no discussion of the in limine rulings is necessary.

III. DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.