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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARK DAVIS,)	
)	
Plaintiff/Appellant,)	2 CA-CV 2008-0036
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
SHANE WILLIAM NOLAN,)	Rule 28, Rules of Civil
)	Appellate Procedure
Defendant/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20055522

Honorable Charles V. Harrington, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Mark Davis appeals from the judgment entered against him in the personal injury action he had filed against appellee Shane Nolan. Davis argues the trial court abused its discretion by excluding a witness's testimony and by denying his motions to continue the trial and for a new trial. Finding no error, we affirm.

Factual and Procedural Background

¶2 On October 13, 2003, Davis and Nolan were involved in a motor vehicle accident. Davis, a motorcycle officer for the Tucson Police Department (TPD), was moving to initiate a traffic stop of another vehicle and using the universal turn lane to pass Nolan's vehicle when the collision occurred. Although Davis had his emergency lights on, he was using his siren only intermittently. In October 2005, Davis sued Nolan, alleging Nolan had caused the collision by "negligently, carelessly, and recklessly controlling his motor vehicle." Davis sought compensatory damages for "personal injuries of a temporary and/or permanent condition, pain and suffering, emotional distress, medical bills, and the inability to engage in normal day-to-day and/or recreational activities."

¶3 Before trial, Nolan moved to exclude the testimony of Alan Baxter, a witness Davis had designated as an expert to "testify as to whether the actions, training, policy and procedures manual (compliance) and traffic laws were reasonably followed by [Davis]." Nolan argued the trial court should preclude Baxter from testifying because Davis had not timely disclosed him as a witness and the late disclosure did not contain enough information to comply with Rule 26.1, Ariz. R. Civ. P. Although the court found Davis had not shown good cause for the late disclosure, it determined that allowing Baxter to testify would not

prejudice Nolan as long as Nolan was able to depose Baxter before trial. The court denied Nolan's motion to exclude Baxter's testimony and ordered Davis to make Baxter available for a deposition.

¶4 During the hearing on that motion in December 2007, Davis stated Baxter had never put his opinion in writing. Baxter stated during his deposition, however, that he had written a "preliminary" report, had delivered it to Davis on March 20, 2007, and had also sent Davis an edited and notarized copy of the report in May. Baxter stated he had not prepared a final report and had not brought a copy of the preliminary report to the deposition, despite Nolan's request that he bring all the documents he had pertaining to the case. Davis interjected that the attorney-work-product privilege protected the report and that he would object on that basis if Nolan asked for it. Baxter explained that he was "not at liberty to bring [the report]" to the deposition because Davis had "classified [the report] as his work product."

¶5 After the deposition, Nolan renewed his motion to exclude Baxter's testimony, asserting Davis's failure to disclose the report prejudiced him. After a hearing, the trial court granted the motion, finding Davis had willfully failed to disclose Baxter's report and that permitting Baxter to testify without having allowed Nolan to examine the report would deny Nolan a reasonable opportunity to prepare to cross-examine Baxter at trial. Thus, the court concluded, Davis's failure to disclose the report was "harmful both to the opposing party and to the justice system." The court also denied Davis's subsequent motion to reconsider its ruling or, alternatively, to continue the trial instead of precluding Baxter's testimony.

¶6 After a three-day trial, the jury returned a verdict in favor of Nolan, and the trial court entered judgment against Davis for costs and jury fees. The court denied Davis’s motion for new trial, and this appeal followed.

Discussion

Sanction

¶7 Davis argues the trial court abused its discretion by excluding Baxter’s testimony as a sanction for Davis’s failure to disclose Baxter’s written report to Nolan.¹ We will not disturb a trial court’s ruling on discovery and disclosure matters absent an abuse of discretion. *Soto v. Brinkerhoff*, 183 Ariz. 333, 335, 903 P.2d 641, 643 (App. 1995); *see also Zimmerman v. Shakman*, 204 Ariz. 231, ¶ 12, 62 P.3d 976, 980 (App. 2003) (“When a motion in limine is used to enforce [discovery rules], it is effectively a request for sanctions under Rule 37(c), Ariz. R. Civ. P. As such, it must be considered and reviewed using the standards of Rules 26.1 and 37(c) and the cases that have applied them.”).

¶8 Davis argues that the trial court’s discretion here was “limited” because excluding Baxter’s testimony “effectively dismissed [his] case.” “The sanction of dismissal is warranted only when the court makes an express finding that a party, as opposed to his counsel, has obstructed discovery, and that the court has considered and rejected lesser sanctions as a penalty.” *Wayne Cook Enters., Inc. v. Fain Props. Ltd. P’ship*, 196 Ariz. 146, ¶ 12, 993 P.2d 1110, 1113 (App. 1999) (citations omitted); *see Austin v. City of Scottsdale*,

¹Davis does not argue he was not required to disclose the report, instead asserting only that the trial court’s sanction was inappropriate.

140 Ariz. 579, 581, 684 P.2d 151, 153 (1984) (sanction of dismissal “harsh and not to be invoked except under extreme circumstances”), quoting *Buchanan v. Jimenez*, 18 Ariz. App. 298, 299, 501 P.2d 567, 568 (1972).

¶9 Davis reasons that Baxter’s exclusion determined the outcome of the case because Davis was “forced to rely on the testimony” of another witness, TPD lieutenant Ramon Batista. Batista, who had experience as a motorcycle officer and had been Davis’s supervisor at the time of the accident, testified that Davis had complied with “accepted practice” in using his siren intermittently and in attempting to pass Nolan using the universal turn lane. At the time of the accident, Davis explains, Batista was a subordinate of Nolan’s witness, Pima Community College Chief of Police and former TPD lieutenant Stella Bay. Bay testified that Batista was mistaken and that Davis had not complied with TPD regulations. This, he reasons, made Batista “far less credible” than either Bay or the independent witness, Baxter.

¶10 We recognize that excluding a critical witness in a given case might be tantamount to dismissal. See *Perguson v. Tamis*, 188 Ariz. 425, 429, 937 P.2d 347, 351 (App. 1996) (exclusion of expert witness “essentially terminated the litigation by depriving plaintiffs of an opportunity to establish a *prima facie* case”); see also *Zimmerman*, 204 Ariz. 231, ¶ 23, 62 P.3d at 982 (exclusion of all evidence as sanction effectively dismisses case). Those cases, however, are distinguishable. In *Perguson*, the trial court precluded the testimony of one of the plaintiff’s experts for a violation of uniform practice rules then in effect. 188 Ariz. at 426-27, 937 P.2d at 348-49. Without that witness, the plaintiff was

unable to prove causation, leading the trial court to grant the defendant's motion for summary judgment. *Id.* at 427, 937 P.2d at 349. In *Zimmerman*, the trial court excluded all the plaintiff's witnesses because the plaintiff had not disclosed any of them as required by Rule 26.1. 204 Ariz. 231, ¶¶ 3, 5-6, 62 P.3d at 979. Without witnesses, the plaintiff had no evidence to present, and the trial court consequently granted the defendant's motion to dismiss. *Id.* ¶ 8.

¶11 Unlike the plaintiffs in *Perguson* and *Zimmerman*, Davis was still able to present a prima facie case that Nolan had been negligent, and the trial court had no basis for dismissing Davis's claim or granting summary judgment in favor of Nolan. Moreover, Davis was able to present Batista's testimony that Davis had complied with accepted practice and applicable procedures. He was precluded from calling only his preferred witness, not all witnesses who could testify on his behalf about essentially the same subjects to which Baxter would have testified. The court did not dismiss Davis's claim against Nolan, it merely limited the evidence Davis was permitted to present at trial. Thus, because excluding Baxter's testimony did not "essentially terminate[]" Davis's lawsuit, *Perguson*, 188 Ariz. at 429, 937 P.2d at 351, the trial court's discretion here was not "limited."

¶12 Additionally, the court was not required to find that Davis himself, rather than counsel, had "obstructed discovery" nor that lesser sanctions were inappropriate. *Wayne Cook*, 196 Ariz. 146, ¶ 12, 993 P.2d at 1113. Accordingly, we need not address Davis's related arguments that the trial court erred by failing to consider either "that the non-disclosure of [Baxter's] report was not due to the fault of . . . Davis himself" or "the

possibility of lesser sanctions, such as limiting Mr. Baxter’s testimony to the facts and opinions set forth in his deposition.”² Although it was within the court’s discretion to consider those factors in determining the nature of the sanction, their consideration does not compel a different result.

¶13 The trial court sanctioned Davis pursuant to Rule 37(c), Ariz. R. Civ. P., relying on the factors our supreme court enumerated in *Allstate Ins. Co. v. O’Toole*, 182 Ariz. 284, 896 P.2d 254 (1995).³ The supreme court explained:

The reason for a failure to properly disclose evidence is only one factor [to consider in determining whether discovery sanctions are appropriate]. Others may include, but are not necessarily limited to: the willfulness or inadvertence of a party’s (or attorney’s) conduct, prejudice to either side that may result from excluding or allowing the evidence, the opposing party’s (or attorney’s) action or inaction in attempting to resolve the dispute short of exclusion, and the overall diligence with which a case has been prosecuted or defended.

Id. at 288, 896 P.2d at 258. The trial court focused on two of those factors—Davis’s willful conduct and the prejudice to Nolan. It found Davis had willfully failed to disclose Baxter’s report “based on, perhaps, an erroneous assumption that it’s protected by work product,” and

²Davis does not explain his assertion that limiting Baxter’s testimony to exclude mention of a report Davis had no intention of disclosing can reasonably be called a “sanction” against Davis.

³*O’Toole* addressed former Rule 26.1(c), Ariz. R. Civ. P. 182 Ariz. at 285, 896 P.2d at 255. That rule “was deleted effective December 1, 1996. On that same date, amended Rule 37(c)(1) became effective, codifying [*O’Toole*’s] holding.” *Link v. Pima County*, 193 Ariz. 336, n.2, 972 P.2d 669, 672 n.2 (App. 1998).

that allowing Baxter to testify without Nolan’s having had an opportunity to examine the report would deny Nolan a reasonable chance to prepare for cross-examination.

¶14 Davis asserts his failure to disclose the report cannot be categorized as willful “within the meaning of the [*O’Toole*] factors” because it “instead was based upon a good faith albeit mistaken belief that the report was privileged” by the attorney-work-product doctrine. *See Ariz. Indep. Redistricting Comm’n v. Fields*, 206 Ariz. 130, ¶ 39, 75 P.3d 1088, 1100 (App. 2003) (“[T]he work-product privilege is designed to protect mental impressions and theories of attorneys or other client representatives concerning actual or prospective litigation.”); Ariz. R. Civ. P. 26(b)(3) and (4). Davis cites no authority, however, and we find none, holding that intentional conduct based on a good-faith mistake of law is not “willful” under *O’Toole*. Indeed, Davis cites no authority defining that term in any context.

¶15 We recognize that, in some circumstances, conduct based on an error of law is not considered willful. *See, e.g., Home Builders & Suppliers v. Timberman*, 75 Ariz. 337, 344, 256 P.2d 716, 720 (1953) (in breach of contract action, “wilful and deliberate” breach “must be distinguished from a breach . . . committed knowingly, if the result of negligence, error of judgment, mistake of fact or law”). And other jurisdictions have stated that excluding a witness’s testimony due to a disclosure violation is only appropriate when the party has acted in bad faith. *See, e.g., Jacobs v. Chatwani*, 922 A.2d 950, 962 (Pa. Super. Ct. 2007) (“bad faith or willful disobedience of the rules”); *Peluso v. Barton Auto Dealerships, Inc.*, 155 P.3d 978, 980 (Wash. Ct. App. 2007) (“unconscionable conduct”), quoting *Burnet v. Spokane Ambulance*, 933 P.2d 1036, 1041 (Wash. 1997).

¶16 Davis, however, has provided no support or explanation, either in the trial court or on appeal, for his belief that Baxter’s report was privileged, and we find no authority supporting a good-faith argument to that effect. *See Emergency Care Dynamics, Ltd. v. Superior Court*, 188 Ariz. 32, 33-34, 37, 932 P.2d 297, 298-99, 302 (App. 1997) (party must disclose communications with testifying expert); *see also* Ariz. R. Civ. P. 26(b)(4)(A) (“A party may depose any person who has been identified as an expert whose opinions may be presented at trial.”). And, even if Davis held his belief in good faith, Rule 26.1(f) requires him, as part of mandatory disclosure, to claim the privilege as to the report “expressly” and support the claim with “a description of the nature of the document[] . . . that is sufficient to enable other parties to contest the claim.” Besides failing to follow the rule, Davis also misled the trial court and Nolan about the existence of the report—conduct he has never adequately explained. Under these circumstances, we cannot say the trial court abused its discretion in finding Davis had willfully failed to disclose the report.

¶17 Davis next contends that allowing Baxter to testify would not have prejudiced Nolan. He suggests that, because Nolan deposed Baxter, he had sufficient information with which to cross-examine him at trial. Davis relies primarily on *Bryan v. Riddell*, 178 Ariz. 472, 475-76, 875 P.2d 131, 134-35 (1994), in which our supreme court reversed a trial court’s decision to exclude a party’s expert witnesses as a sanction for the party’s failure to comply with Rule 26.1. The supreme court in *Bryan* noted the trial court there had “apparently failed to take into account the significant amount of information disclosed

through deposition testimony,” because most of the excluded experts had been deposed. *Id.* at 476-77, 875 P.2d at 135-36.

¶18 We find *Bryan* distinguishable. There, although the party failed to comply with Rule 26.1, the bulk of the information the rule requires to be disclosed was ultimately provided to the opposing party through other discovery devices.⁴ *See id.* Thus, the supreme court concluded, “discovery was essentially complete.” *Id.* at 477, 875 P.2d at 136. In contrast, here, it is unknown whether the information in Baxter’s report was consistent with his deposition testimony or whether the report contained information helpful to Nolan’s defense. Without seeing the report, the trial court was unable to determine whether Nolan had been sufficiently informed by the extant disclosure and discovery to be able to cross-examine Baxter effectively.

¶19 Moreover, had Davis provided the report in response to Nolan’s motion to exclude Baxter’s testimony, Davis might have been able to demonstrate that his prior failure to disclose the report did not prejudice Nolan. But it is disingenuous for Davis to now argue Nolan was not prejudiced after Davis had failed to take advantage of the best opportunity to prove that fact by simply disclosing the report. The trial court did not abuse its discretion by concluding Davis’s failure to disclose Baxter’s report prejudiced Nolan.

⁴Of particular importance in *Bryan* was that Arizona’s new disclosure rules, which “represented a significant change in the way relevant information was to be exchanged by litigants,” “had been in effect for just over a month when these parties were required to submit their disclosure statements.” *Id.* at 476, 875 P.2d at 135. The supreme court also noted that the trial court’s decision “eliminat[ed] virtually all of plaintiffs’ key witnesses.” *Id.* at 477, 875 P.2d at 136. That situation was not present here, as we noted above. Davis was essentially able to present the desired evidence through Batista’s testimony.

¶20 Davis also suggests excluding Baxter’s testimony was inappropriate because Nolan had not deposed Baxter when he was first disclosed “but instead waited until less than two weeks [remained] before trial to attempt to preclude Mr. Baxter’s testimony.” Although Davis had disclosed Baxter as an expert witness on March 5, 2007, that disclosure did not comply with Rule 26.1(a)(6) because it did not include “the subject matter on which the expert [was] expected to testify, the substance of the facts and opinions to which the expert [was] expected to testify, a summary of the grounds for each opinion, . . . and the name and address of the custodian of copies of any reports prepared by the expert.” It was reasonable for Nolan to wait to depose Baxter until Davis had complied with Rule 26.1—which Davis never did. Davis’s November 19 “disclosure statement of expert witnesses’ opinions” stated only that Baxter would “testify as to whether the actions, training, policy and procedures manual (compliance) and traffic laws were reasonably followed by [Davis].” Even if this skeletal information meets the requirement of Rule 26.1(a)(6) to provide the “substance of the facts and opinions to which the expert is expected to testify,” it does not state the required grounds for those opinions. Ariz. R. Civ. P. 26.1(a)(6). Finally, even assuming Nolan should have deposed Baxter sooner, that does not change the fact that Davis was required to disclose his report and failed to do so—even when confronted with a motion to exclude Baxter’s testimony on that basis. Thus, for all the reasons stated above, we conclude the trial court did not abuse its discretion in excluding Baxter’s testimony.

Continuance

¶21 Davis asserts the trial court abused its discretion by denying his motion to continue the trial. He contends that, had the trial been continued, he could have disclosed the report and Nolan would have had adequate time to evaluate it and conduct any additional depositions necessary. *See Zimmerman*, 204 Ariz. 231, ¶ 17, 62 P.3d at 981 (postponement of trial may cause prejudice to opposing party occasioned by untimely disclosure to “disappear or be significantly reduced”). We note, however, that in his motion to continue, Davis did not state he had disclosed the report nor did he offer to disclose it. He instead argued only that a continuance would be “a more appropriate sanction” that would provide Nolan “sufficient time to prepare” for trial.

¶22 In denying Davis’s motion to continue, the trial court noted that it had previously continued the trial due to Davis’s failure to disclose other relevant evidence, that the case had been pending for twenty-six months, that Davis had initially told the court and Nolan there was no written report, that Davis still had not disclosed the report, and “that the current situation is a result of [Davis’s] failure to disclose.” The record supports these observations, and they are more than adequate to justify the court’s discretionary denial of Davis’s motion. *See In re Estate of Kerr*, 137 Ariz. 25, 29, 667 P.2d 1351, 1355 (App. 1983) (“A motion for continuance is directed to the discretion of the trial court and will not be reversed absent an abuse of discretion.”). Davis cites, and we are aware of, no authority requiring a trial court to postpone trial in lieu of imposing appropriate sanctions against a

party who has willfully failed to comply with the discovery rules. The court did not abuse its discretion here.

New Trial

¶23 Last, Davis’s argument on appeal that the trial court abused its discretion by denying his motion for a new trial is based entirely on his claim that the court should not have excluded Baxter’s testimony. Because the court did not abuse its discretion in excluding Baxter’s testimony, neither did it do so in denying Davis’s new trial motion. *See White v. Greater Ariz. Bicycling Ass’n*, 216 Ariz. 133, ¶ 6, 163 P.3d 1083, 1085 (App. 2007) (denial of new trial motion reviewed for abuse of discretion).

Disposition

¶24 We affirm the jury’s verdict in favor of Nolan and the judgment against Davis for costs and jury fees.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge