

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

MATTHEW S. BRENNEN AND LISA R. : IN THE SUPERIOR COURT OF
BRENNEN, HIS WIFE : PENNSYLVANIA

v.

JASON A. SMITH, D.O. AND TRI- :
COUNTY UROLOGY ASSOCIATES, INC. : No. 1054 WDA 2025

Appellants

Appeal from the Order Entered July 22, 2025
In the Court of Common Pleas of Fayette County Civil Division at No(s):
1783 of 2019

BEFORE: McLAUGHLIN, J., KING, J., and BENDER, P.J.E.

MEMORANDUM BY McLAUGHLIN, J.:

FILED: October 26, 2026

Alan S. Baum, Esq., Michael Wiesemann, Esq., and Baum O'Connor Cullen Chmiel, P.C. ("Trial Counsel") appeal from the order imposing sanctions against them. Trial Counsel claim the court abused its discretion in imposing monetary sanctions on Trial Counsel in the form counsel fees. We affirm.

Trial Counsel were counsel for Jason A. Smith, D.O., and Tri-County Urology Associates, Inc., (collectively "Defendants") who were defendants in a medical malpractice action filed by Matthew and Lisa Brennen.

Before initiating the malpractice action, Matthew executed an authorization of release of protected information seeking his medical records. **See** Pl's Em. Mot. for Sanctions, filed Dec. 12, 2022, at Ex. A. The request sought records of office visits, inpatient records, outpatient records, progress notes, and "[v]asectomy – all details from surgery." **Id.** Tri-County provided

12 pages of medical records. **Id.** at Ex. B. In January 2019, the Brennens' counsel sent an authorization requesting full and complete medical records, "including but not limited to telephone messages" **Id.** at Ex. C. Tri-County sent 11 pages of records. **Id.** In August 2019, the Brennens' trial counsel sent a second request, and received no response. **Id.** at Ex. D. The Brennens' counsel then filed the complaint, after which Trial Counsel entered an appearance.

In response to the Brennens' first set of interrogatories, where the Brennens asked Dr. Smith to "provide a complete Bates-stamped copy of the medical record of Plaintiff," Dr. Smith stated, "See medical records produced by Tri-County[]." **Id.** at Ex. E. Dr. Smith submitted the same response to the requests for production of documents that sought medical records. **Id.** In response to interrogatories, both Dr. Smith and Tri-County stated "not applicable" to the interrogatory asking whether they believed there were any errors or omissions in the medical records relevant to the claims. **Id.** at E. In response to Defendants' request for production of documents, the Brennens produced a CD containing the medical records previously provided to them by Tri-County. **Id.** at Exh. F. Defendants did not supplement their discovery responses.

Nine days prior to trial, during the cross-examination of the Brennens' expert witness, Trial Counsel referenced a phone note that the Brennens had not previously seen. **Id.** at ¶ 29. Trial Counsel said the phone note had been in the medical chart. **Id.** Three days later, Trial Counsel delivered to the

Brennens' counsel the medical record referenced at the deposition, which was labeled "phone note." **Id.** at ¶ 31. The "phone note" purported to be a memo of a conversation between a Tri-County employee and a "lady," in which they discussed Matthew's pain.¹ **Id.** The phone note had not been mentioned at any other deposition. The following day, Trial Counsel produced a 41-page medical record. **Id.** at ¶ 34.

On December 9, 2022, the Brennens filed an emergency motion for sanctions, seeking default judgment against Defendants or that Defendants be precluded from using the additional medical records at trial and requested sanctions against Trial Counsel. Pl.'s Em. Mot. for Sanctions, filed Dec. 9, 2022, at ¶¶ 49-51. The court heard argument, where Trial Counsel stated they believed the records had been produced. N.T., Dec. 9, 2022, at 20. The court entered an order continuing the trial and stating the trial court would consider a request by the Brennens for any additional expenses incurred and indicated

¹ The phone note stated:

LADY CALLED FOR PT, STATING HE HAD VAS DONE BY SMITH TWO DAYS AGO DONE AT ELITE, SHE SAID HE WAS FINE YESTERDAY DIDN'T HAVE TO TAKE A PAIN PILL OR ANYTHING UNTIL TODAY BECAUSE HE IS IN EXTREME PAIN NOW. .. [SIC] SHE WAYS [SIC] HIS LEFT TESTICLE IS HIGH UP AND THERE IS PAIN IN HIS STOMACH, SHE ALSO SAID THAT THERE WAS A COMPLICATION AND SMITH HAD TO MAKE A BIGGER INCISION TO FIND THE VAS DEF. SHE WANTS SOMEONE TO CALL HER TO TELL HER WANTS [SIC] NORMAL AND WHATS [SIC] TO LOOK OUT FOR? (Phone number listed but excluded for privacy)

Pl.'s Em. Mot. for Sanctions, filed Dec. 12, 2022, at Exh. I.

it would consider an award of counsel fees, if incurred. Order, Dec. 9, 2022.

It provided:

[A]s a remedy for the failure of the defendants', or, counsel's to have at a minimum negligently delayed furnishing complete copies of all medical records previously requested, it is hereby ORDERED that plaintiffs' costs incurred for investigation or further discovery; obtaining any updated medical report or reports; supplemental video depositions for use in discovery purposes, or, for use at trial; including any costs incurred for rescheduling expert witnesses or other witnesses for trial shall be paid by the defense.

In addition, the Court will consider awarding counsel fees to Plaintiffs' counsel for all hours incurred pursuant to this ORDER.

. . .

Plaintiff [sic] may petition for any and all other expenses attributable to defendants', or, counsel's conduct.

Id.

After trial, the Brennens filed a motion to confirm sanctions seeking \$150,907.83 in fees and costs.² They attached documents related to the costs and fees and affidavits in support. Defendants filed a motion for post-trial relief. They also filed a motion for reconsideration of the December 2022 sanction order.³ The motion for reconsideration argued that the Brennens had

² The motion to confirm sanctions stated the court had authority to issue sanctions under Rule 4019 and 42 Pa.C.S.A. § 2503. Motion to Confirm Sanctions, filed July 25, 2024, at ¶ 5.

³ The trial court describes the procedural history of the motion for reconsideration as follows:

(Footnote Continued Next Page)

not requested the documents from Tri-County, the party who possessed the records, and therefore argued there “ha[d] been no failure to make discovery.” Motion for Reconsideration, filed July 1, 2024, at ¶ 30. They maintained Defendants “neither concealed nor negligently failed to produce documents previously requested during discovery. The documents at issue were not in the possession of Dr. Smith, the only defendant who was requested to produce them.” ***Id.*** at ¶ 32.

The court held a hearing. At the hearing, Defendants were represented by new counsel, who continues to represent them on appeal. Trial Counsel also was present. Neither Defendants nor Trial Counsel objected to the

On December 15, 2022, Attorney Allan Baum filed in the Office of the Prothonotary of Fayette County, Pennsylvania, a Motion for Reconsideration. [T]he published (and available online) Rule of Civil Procedure for Fayette County require counsel to provide a copy of a motion to the Court Administrator to be listed for argument in Motions Court with the assigned judge ***See*** F.C.R. 203.3. [Trial counsel] failed to do so.¹ The Motion for Reconsideration of our December 9, 2022 Order sat idly by in the Prothonotary’s Office.²

¹ On June 27, 2024, after the jury verdict, [trial counsel] e-filed with the Prothonotary a (second) motion to reconsider our Order of December 9, 2022.

² Nor did [trial counsel] provide a courtesy copy of the Motion to Reconsider to this Court, by regular mail, email or any other means.

Trial Ct. Op., filed Nov. 25, 2025, at 8 (“Defendants’ Appeal Rule 1925(a) Op.”).

affidavits and exhibits or presented any evidence.⁴⁴ At the hearing, Trial Counsel reiterated the claim that the Brennens sought the medical records only from Dr. Smith and there was no discovery violation and claimed he justifiably believed all records had been produced. N.T., Oct. 24, 2024, at 80-92. He claimed his conduct and the conduct of his clients was not willful or intentional. ***Id.*** at 83. Trial Counsel further claimed the Brennens were not prejudiced and there was no negligence. ***Id.*** at 83, 86. Counsel for Defendants argued there was no prejudice because the court continued the trial and argued a sanction should not occur without a violation of a court order or rule. ***Id.*** at 112.

In July 2025, the trial court granted in part the motion to confirm sanctions and awarded \$60,010 in fees and \$2,147.83 in costs. It stated the fees were “necessitated by at least negligent failure of the defendant[] or[] counsel to provide full and complete medical records during discovery in a timely manner prior to trial.” Order, July, 17, 2025. The court found that “while [it] may suspect nefarious conduct by” the defendants or their counsel “[it] do[es] not believe that the record will support a finding of knowing, deliberate dilatory, obdurate, or vexatious conduct but the record does support at least the negligent conduct by one or more defendants[] or[] counsel, or their staff

⁴⁴ Baum stated that he believed the hourly rate charged was excessive, but that he “had no evidence to present to dispute the reasonableness.” N.T., Oct. 24, 2024, at 116-17. He stated he did not want to cross-examine anyone on the charges or amounts. ***Id.*** at 117.

employees, in failing to timely produce.” **Id.** It then stated that it “believe[d] the partial relief granted herein, and; that provided by Order of December 9, 2022; and the exclusion of the untimely evidence were a sufficient remedy.” **Id.** Trial Counsel filed this appeal.⁵

Trial Counsel raises the following issue:

Did the trial court abuse its discretion in imposing monetary sanctions in the form of [the Brennens’] counsel fees on [Trial Counsel], where it is unclear from the order against whom sanctions are being imposed and for what conduct, there is no evidence or a finding of bad faith or sanctionable conduct, [the Brennens] took no discovery in connection with their request for sanctions and trial was continued, and there is no evidence of prejudice to [the Brennens] or justification for the amounts imposed?

Trial Counsel’s Br. at 6.

Trial Counsel claim that in the emergency motion for sanctions, the Brennens sought default judgment against Dr. Smith and Tri-County or that Dr. Smith and Tri-County be precluded from using the additional medical records at trial. They note that in the court’s December 2022 order, the court did not cite its basis for sanctions on counsel, noting it imposed counsel fees “as a remedy for the failure of” the defendants or counsel “to have at a minimum negligently delayed furnishing complete copies of all medical records.” **Id.** Br. at 20 (quoting Order, Dec. 9, 2022). They point out the court also continued the trial, even though the Brennens had not requested a continuance.

⁵ Defendants also filed an appeal, which we address in a separate memorandum. That appeal is docketed at 1050 EDA 2025.

Trial Counsel also discusses the July 2024 motion to confirm sanctions, which referenced Rule 4019 and 42 Pa.C.S.A. § 2503 as authority for the sanctions. They note 42 Pa.C.S.A. § 2503 allows the award of counsel fees for dilatory, obdurate, or vexatious conduct or actions that are arbitrary, vexatious or in bad faith. They cite the July 2025 order where the court found it did not believe the “record will support a finding of knowing, deliberate[,], dilatory, obdurate, or vexatious conduct.” ***Id.*** at 21 (quoting Order, Dec. 9, 2022). They note the court sanctioned Defendants and Trial Counsel due to “negligent conduct by one or more defendants[,], or counsel, or their staff employees, in failing to timely produce all pertinent medical records.” ***Id.*** They claim the order also imposed two sanctions for the same conduct – fees and the exclusion of untimely evidence.

Trial Counsel points out the order does not reference Rule 4019 and the Rule 1925(a) opinion does not cite authority to award counsel fees for an attorney’s conduct during discovery, noting the opinion only refers to a court’s “discretion to impose monetary sanctions for discovery violations.” ***Id.*** at 21 (citing Trial Ct. Op., filed Nov. 25, 2025 (“Sanctions Rule 1925(a) Op.”)).

Trial Counsel claims that the only basis for the award of fees under Rule 4019 is 4019(g).⁶ They claim Rule 4019(g) requires the use of a two-step procedure before imposing sanctions, which was not followed here.

⁶ Trial Counsel notes Rule 4019(a)(1) provides for a sanction order where a party fails to make discovery or to obey a court order respecting discovery. *(Footnote Continued Next Page)*

Trial Counsel also claims discovery sanctions should be remedial, not punitive, but that here it was punitive and went beyond equalizing the parties.

Trial Counsel next argues that the order was “inappropriately ambiguous” as to who the court sanctioned. ***Id.*** at 28. They point out that the December 2022 order did not make a definitive determination as to who should be sanctioned, citing the failure of the “defendants or counsel” to have “at a minimum negligently delay[ed] furnishing” all medical records. They point to similar language in the July 2025 order. They claim that in the Rule 1925(a) opinion, the court stated it could not determine who should be sanctioned. They argue the court abused its discretion and abdicated its responsibility to create an appropriate remedy.

Trial Counsel next claims the trial court did not apply the ***Breary*** factors.⁷ They claim that a court is afforded discretion in fashioning remedies,

They claim that under Rule 4019(c), sanctions for a violation of Rule 4019(a)(1) may include that facts be deemed established, barring claims or evidence, striking pleadings, or entry of judgment non pros. They further note that under Rule 4019(d) through (h) an aggrieved party can recover reasonable counsel fees and expenses for a discovery violation, but allege those sections deal with requests for admission, depositions, and motions filed in bad faith. Trial Counsel fails to mention Rule 4019(c)(5), which allows sanction order “with regard to the failure to make discovery as is just.” Pa.R.Civ.P. 4019(c)(5).

⁷ Courts apply the following factors when deciding whether to award monetary sanctions:

- (1) the prejudice, if any, endured by the non-offending party and the ability of the opposing party to cure any prejudice;
- (2) the noncomplying party’s willfulness or bad faith in

(Footnote Continued Next Page)

but that a court must select a punishment that fits the crime. They claim the court sanctioned Defendants and Trial Counsel because it believed someone was negligent and that the Rules do not authorize an award of counsel fees against an attorney for a negligent oversight.

Trial Counsel next argues that where there is no bad faith, a court cannot issue a sanction unless there was prejudice, and claim the order and Rule 1925(a) opinion do not discuss prejudice. Trial Counsel notes the court declined to enter judgment against Defendants for the violation and rather continued trial to permit the Brennens to consider the documents. They argue the continuance and exclusion of the note cured any prejudice. They argue that when they learned the Brennens did not have the documents, they immediately turned them over, and argue that no attorney should fear sanctions for supplementing document production.

Trial Counsel further argues the court found there was no evidence of willfulness or bad faith. They note the additional material favored Defendants, not the Brennens.

Trial Counsel notes that the court also excluded the note, and therefore argue the monetary sanctions were an inappropriate punitive measure. They

failing to provide the requested discovery materials; (3) the importance of the excluded evidence in light of the failure to provide the discovery; and (4) the number of discovery violations by the offending party.

City of Phila. v. Fraternal Order of Police Lodge No. 5 (Breary), 985 A.2d 1259, 1270-71 (Pa. 2009) (citations omitted).

also claim that they committed no discovery violations and allege the order and opinion are silent as to discovery violations.

Trial Counsel next claims the amount of sanctions (\$62,156.83) was an abuse of discretion. They argue the court did not explain its reasoning for the calculation. They claim the court stated it “culled through the list and eliminated those activities the [c]ourt believed to be unrelated to the continuance” but did not explain how it did this. ***Id.*** at 35. They point to law that says a trial court cannot as a discovery sanction award general counsel fees incurred during trial. They say only fees incurred as a direct result of the violation should be imposed. They claim that “[w]ithout further explanation from the trial court, it is impossible to determine whether the trial court inappropriately awarded counsel fees for trial preparation.” ***Id.*** at 36.

“[T]he specific sanctions imposed under Pa.R.C.P. 4019 for violation of discovery rules are left to the sole discretion of the trial court.” ***SLT Holdings, LLC v. Mitch-Well Energy, Inc.***, 217 A.3d 1248, 1251 (Pa.Super. 2019) (quoting ***Christian v. Pennsylvania Fin. Resp. Assigned Claims Plan***, 686 A.2d 1, 5 (Pa.Super. 1996)). “[C]ourts are afforded great discretion in fashioning remedies or sanctions for violations of discovery rules and orders.” ***City of Phila. v. Fraternal Order of Police Lodge No. 5 (Breary)***, 985 A.2d 1259, 1269 (Pa. 2009).

Rule 4019 provides, in relevant part:

(a)(1) The court may, on motion, make an appropriate order
if

(i) a party fails to serve answers, sufficient answers or objections to written interrogatories under Rule 4005;

. . .

(viii) a party or person otherwise fails to make discovery or to obey an order of court respecting discovery.

. . .

(c) The court, when acting under subdivision (a) of this rule, may make

(1) an order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing in evidence designated documents, things or testimony, or from introducing evidence of physical or mental condition;

(3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or entering a judgment of non pros or by default against the disobedient party or party advising the disobedience;

(4) an order imposing punishment for contempt, except that a party may not be punished for contempt for a refusal to submit to a physical or mental examination under Rule 4010;

(5) such order with regard to the failure to make discovery as is just.

. . .

(g)(1) Except as otherwise provided in these rules, if following the refusal, objection or failure of a party or person to comply with any provision of this chapter, the court, after opportunity for hearing, enters an order compelling

compliance and the order is not obeyed, the court on a subsequent motion for sanctions may, if the motion is granted, require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order of compliance and the order for sanctions, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

. . .

(3) If the motion for sanctions is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Pa.R.Civ.P. 4019.

The trial court held a hearing to address all pending post-trial motions, and found that Trial Counsel did not challenge the fees submitted by the Brennens or present any evidence. Sanctions Rule 1925(a) Op. at 7. The court found that although it could not identify a party who deliberately falsified the production of documents, Defendants and Trial Counsel had multiple opportunities to correct the record and did not do so. ***Id.*** at 9. It noted that whether unintentional neglect or intentional attempt to gain a tactical advantage, Trial Counsel had the entire medical record and continually maintained it had been provided to the Brennens. ***Id.*** It pointed out that Defendants and Trial Counsel never provided an explanation as to why or how the entire medical record had not been produced. ***Id.*** at 9-10. The court found it had discretion to impose monetary sanctions for discovery violations and

pointed out no one presented testimony as to who should be responsible for payment of the sanction. ***Id.*** at 10.

The court noted that in its “extensive service on the bench, it ha[d] never encountered a situation where more than half of the discovery in a case was not disclosed and was handled in such a negligent manner.” ***Id.*** It found the late disclosure prejudiced the Brennens. ***Id.*** It concluded that in “the absence of evidence to the contrary,” it believed “the responsibility of the sanctions should be born between” Tri-County and Trial Counsel. ***Id.*** It reasoned Tri-County was the offending party that first created and failed to correct the wrong, as it was the entity that employed the person who sent the 11 and 12 page records and signed an affidavit attesting they were complete. ***Id.*** It further reasoned that Trial Counsel had the entire record and failed or neglected to provide it even though requested. ***Id.***

Here, Trial Counsel and their client violated Rule 4019(a)(i) and (viii) and therefore the court properly awarded fees and costs as a sanction under Rule 4019(c)(5). That subsection of the rule permits the court to enter an “order with regard to the failure to make discovery as is just.” Pa.R.Civ.P. 4019(c)(5).⁸ Moreover, we conclude the court properly awarded sanctions

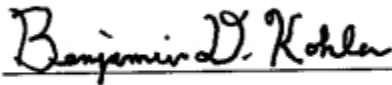
⁸ Unlike Rule 4019(g), Rule 4019(c)(5) does not require a motion to compel discovery before the issuance of a sanction. ***See Weist v. Atlantic Richfield Co.***, 543 A. 2d 142, 145 (Pa. Super. 1988) (citing ***Griffin v. Tedesco***, 513 A. 2d 1020, 1023 (Pa.Super. 1986)).

against both Tri-County and Trial Counsel, as both were responsible for the discovery violation. The court did not abuse its discretion.

Further, Trial Counsel waived their claim the court did not properly apply the **Breary** factors because they did not raise such a claim in the trial court.⁹ Trial Counsel also did not raise in the trial court any claim based on the trial court's failure to cite a rule on which the sanctions were based. They therefore waived the issue. In addition, Trial Counsel waived their challenge to the amount of fees, as they did not challenge the amount of fees sought in the trial court.¹⁰

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 10/26/2026

⁹ We note that Trial Counsel argues they did not act intentionally and that the Brennens were not prejudiced, but did not otherwise reference or discuss the factors.

¹⁰ Further, although the trial court referenced the preclusion of the note in its sanctions order, the note was precluded because it was hearsay, not as a sanction.