IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., **Plaintiff,** **v.** **NATIONAL REVIEW, INC.,** ***et al.*****,** **Defendants.**	**2012 CA 008263 B** **Judge Alfred S. Irving, Jr.**

ORDER DENYING DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE AND RAND SIMBERG'S MOTION TO ALTER OR AMEND JUDGMENT

Before the Court is *Defendants Competitive Enterprise Institute and Rand Simberg's Motion to Alter or Amend Judgment*, filed on February 15, 2024.[1] Defendants note that on May 5, 2020, they prevailed on a motion to compel discovery from Plaintiff Michael E. Mann, Ph.D., and, by order dated June 22, 2020, obtained an award of $9,588.64 in fees and costs. Defs.' Mot. ¶ 1. They represent that Dr. Mann has not yet paid the amount. Defendants further note that the February 9, 2024 *Final Judgment Order* this Court entered following the jury's verdict in this case "did not include the sanctions award[.]" *Id.* ¶ 2. Citing Rule 60(a) of the Superior Court Rules of Civil Procedure and *Cowan v. Youssef*, 687 A.2d 594, 598 (D.C. 1996), Defendants request that the Court correct its "omission," reduce the sanctions award into a judgment amount, and amend the *Final Judgment Order* to include the sanctions award alongside the existing damages award. Defs.' Mot. ¶¶ 3-4; *see also* Defs.' Reply 1 (Mar. 5, 2024) (noting Court of Appeals in *Cowan* did not disturb trial court's amending judgment to include earlier discovery sanctions award).

[1] The term "Defendants" refers collectively to both CEI and Mr. Simberg.

On February 29, 2024, Plaintiff Michael E. Mann, Ph.D., filed a *Response,* "tak[ing] no position" on Defendants' request to reduce a sanctions award "to a separate judgment now or later," while objecting to "changing or altering the February 9, 2024 Final Judgement [sic] Order reflecting the decision of the jury and their verdict form[.]" Pl.'s Resp. 1.

The Court will deny Defendants' *Motion*.

Under Rule 60(a), a party may move for a trial court to "correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Super. Ct. Civ. R. 60(a). The Court of Appeals has explained:

> This rule applies only to errors that are clerical or arise from oversight or omission; errors of a more substantial nature are to be corrected under [different rules]. The mistake cannot "be one of judgment or even of misidentification, but merely of recitation . . . mechanical in nature." *Dura-Wood Treating Co. v. Century Forest Indus.*, 694 F.2d 112, 114 (5th Cir. 1982). "Rule 60(a) may be relied on to correct what is erroneous because the thing spoken, written, or recorded, is not what the person *intended* to speak, write, or record." *McNickle v. Bankers Life & Cas. Co.*, 888 F.2d 678, 682 (10th Cir. 1989). This rule is used to make the record speak the truth and not to make it say something other than what it originally said. 11 CHARLES A. WRIGHT & ARTHUR P. MILLER, FEDERAL PRACTICE & PROCEDURE § 2854, at 149 (1973). Rule 60(a) is not to be used as a vehicle for relitigating matters already litigated and decided, nor to change what has deliberately been done. *See Security Mut. Cas. Co. v. Century Cas. Co.*, 621 F.2d 1062, 1065 (10th Cir. 1980). "The problem is essentially one of characterization, that is, whether a substantive change or amendment was made or whether the amended conclusions and judgment were in the nature of corrections." *Kelley v. Bank Bldg. & Equip. Corp.*, 453 F.2d 774, 778 (10th Cir. 1972).

Clement v. D.C. Dep't of Hum. Servs., 629 A.2d 1215, 1218-19 (D.C. 1993). Defendants are correct that Judge Anderson awarded them fees and costs in the amount of $9,588.64, which amount represented 75 percent of Defendants' requested fees and all of their costs incurred in connection with their motion to compel discovery. *See* June 22, 2020 Order (Anderson, J.) (citing Super. Ct. Civ. R. 37(a)(5) as basis for awarding fees and costs). Defendants are also

correct that the February 9, 2024 *Final Judgment Order* this Court entered after trial did not include the sanctions award. But, no rule required the Court to couple the discovery sanctions award with that of the jury verdict. As such, the absence of the award in the *Final Judgment Order* cannot be characterized as a "clerical mistake or mistake from oversight or omission" within the meaning of Rule 60(a). To be sure, reducing the sanctions award to a judgment, and then amending the final judgment order to incorporate the sanctions award, would represent "a substantive change or amendment" that would fall outside the scope of Rule 60(a).

Defendants fail to appreciate that the operative effect of the sanctions award was not—and is not—dependent on the entry of a judgment. Dr. Mann was required to pay the sanctions award upon Judge Anderson's entry of the June 22, 2020 Order. *See In re Est. of Bonham*, 817 A.2d 192, 193-94 (D.C. 2003) (noting litigant initially failed to pay fees and costs awarded by court order without judgment); *see also Hospitality Mgmt. v. Preferred Contractors Ins. Co.*, No. 3:18-cv-00452-YY, 2020 U.S. Dist. LEXIS 249314, at *2-3 (D. Or. Aug. 11, 2020) (explaining that orders imposing monetary sanctions under Fed. R. Civ. P. 37[2] are "immediately enforceable, and a litigant may be held in contempt[3] for failure to timely pay" (citing *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1221 (9th Cir. 2018))); *Mgmt. Registry, Inc. v. A.W. Cos., Inc.*, No.

[2] Super. Ct. Civ. R. 37 is substantively identical to Fed. R. Civ. P. 37. "When a local rule and a federal rule are identical, we may look to federal court decisions interpreting the federal rule as persuasive authority in interpreting the local rule." *Tovar v. Regan Zambri Long, PLLC*, 317 A.3d 884, 903 (D.C. 2024) (brackets omitted) (quoting *Goldkind v. Snider Bros.*, 467 A.2d 468, 472 (D.C. 1983)).

[3] *In re Estate of Bonham* appears to preclude the use of civil contempt proceedings in Superior Court to enforce an order solely awarding fees and costs. *See In re Est. of Bonham*, 817 A.2d at 195. Such preclusion would differ from federal authority indicating that a court (and a prevailing party) may elect between engaging in contempt proceedings or reducing an award to judgment to collect on a sanctions award. *See also Rosales v. Wallace (In re Wallace)*, 490 B.R. 898, 906-07 (B.A.P. 9th Cir. 2013) (holding contempt proceedings to enforce monetary sanctions award were not improper because sanctions award was not an "ordinary" money judgment and thus not subject to Fed. R. Civ. P. 69(a)'s limitations on methods of enforcing money judgments).

17-5009 (JRT/KMM), 2020 U.S. Dist. LEXIS 197472, at *5 (D. Minn. Oct. 23, 2020) ("Permitting . . . delayed enforcement [of orders imposing discovery sanctions] 'would undermine trial judges' discretion to structure a sanction in the most effective manner.'" (quoting *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 209 (1999))). Therefore, at the time the Court entered the *Final Judgment Order*, the Court did not intend to incorporate the sanctions award because reducing and incorporating the award into the judgment was not necessary for Defendants to seek enforcement of the award.[4] Thus, Defendants' request to reduce and incorporate the sanctions award would go beyond merely "correct[ing] what is erroneous" because the *Final Judgment Order* indeed was "what the [Court] *intended* to speak, write, or record" at the time of its entry. *Clement*, 629 A.2d at 1218 (quoting *McNickle*, 888 F.2d at 682).

In addition, reducing the sanctions award to a judgment constitutes a further step toward collecting the award amount that is separate and distinct from an order levying sanctions in an amount certain. As one federal district court explained:

> A [trial] court enjoys broad discretion to enforce its sanctions orders. *See, e.g.*, *In re United Mkts. Int'l Inc.*, 24 F.3d 650, 656 (5th Cir. 1994). Relevant here, "a sanctions award may be reduced to a judgment if the sanctioned party has failed to pay the sanctions despite being provided with the opportunity to do so." *Mass. Mut.*

[4] The Court also notes that Rule 58(a)'s separate document requirement, *see* Super. Ct. Civ. R. 58(a) ("Every judgment and amended judgment must be set out in a separate document . . . ."), does not apply to the June 22, 2020 Order. Rule 37 sanctions against a party are not immediately appealable, *see Scott v. Jackson*, 596 A.2d 523, 529 (D.C. 1991) ("It is well settled that such sanctions, no matter how damaging to a litigant's case, are not appealable until after final judgment."), thus placing an order levying Rule 37 sanctions against a party outside of the definition of a "judgment" for the purposes of the Rules of Civil Procedure, *see* Super. Ct. Civ. R. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."). *Cf. Mgmt. Registry, Inc.*, 2020 U.S. Dist. LEXIS 197472, at *6 ("In sum, the monetary Sanctions Order is immediately enforceable, even though it is not a final decision under [Fed. R. Civ. P.] 54(b)."); *TMF Tool Co. v. Muller*, 913 F.2d 1185, 1188-89 (7th Cir. 1990) (noting order on Fed. R. Civ. P. 11 sanctions was an "appealable decision which constitutes a judgment" pursuant to Fed. R. Civ. P. 54, and thus separate judgment document was required by Fed. R. Civ. P. 58).

> *Life Ins. Co. v. Williamson*, [Nos. 4:15-CV-166-DMB-JMV & 4:15-CV-184-DMB-JMV, 2019 U.S. Dist. LEXIS 220871, at *5-6] (N.D. Miss. Dec. 26, 2019) (citing *Moore v. Harris*, 600 F. App'x 201, 204-05 (5th Cir. 2005)).

Hoggatt v. Allstate Ins., 502 F. Supp. 3d 1110, 1114 (N.D. Miss. 2020); *see also Moore*, 600 F. App'x at 205 (finding trial court did not abuse discretion in reducing sanctions award to judgment where trial court found that the sanctioned party "repeatedly failed to pay the sanctions imposed by the established deadlines," even with repeated deadline extensions to accommodate the party, and the sanctions remained unpaid). Thus, Defendants' request to reduce the June 22, 2020 sanctions award to judgment by amending the *Final Judgment Order* implicates substantive issues concerning the Parties' intentions and conduct surrounding collection of the award that were neither raised nor addressed at the time of entry of the June 22, 2020 Order or the *Final Judgment Order*. Therefore, Rule 60(a) is not the appropriate mechanism for reducing the sanctions award to judgment. *See Clement*, 629 A.2d at 1218 (quoting *Kelley*, 453 F.2d at 778).

Defendants' reliance on *Cowan* is misplaced. There, the Court of Appeals was not presented with the question whether Rule 60(a) was the correct authority governing amendments to a final judgment, entered after a jury verdict, to include previously assessed discovery sanctions. *See Cowan*, 687 A.2d at 598, 600-01. Rather, the trial judge in *Cowan* assessed sanctions orally, during the trial, and never reduced the ruling to writing in a judgment or order until the request to amend the judgment. *Id.* at 601. The Court of Appeals, for its part, was called upon to address whether the appellant's challenge to the correctness of the sanctions was timely, as the appellant filed the appeal only after the trial court granted a Rule 60(a) motion to amend the judgment, entered an amended judgment, and denied appellant's motion for reconsideration. *Id.* at 601. Finding that the appeal was timely, the Court of Appeals then turned to the correctness of the sanctions without passing on the merits of the trial court's decision to

include the previous sanctions award in an amended judgment as a means of correcting an "omission" under Rule 60(a). *Id.* As such, "'[t]he judicial mind was not asked to focus upon, and the opinion did not address, the point at issue,' so it 'lends no support to [Defendants'] position.'" *Morales v. United States*, 248 A.3d 161, 181 (D.C. 2021) (quoting *Alfaro v. United States*, 859 A.2d 149, 154 (D.C. 2004)).

The Court notes, however, that Judge Anderson's June 22, 2020 Order did not set a deadline by which Dr. Mann was to pay the sanctioned amount. The Court further notes that Dr. Mann's *Response* did not indicate that he opposed paying the sanctioned amount.[5] What is more, Defendants appears not to have demanded or otherwise sought payment from Dr. Mann. Because Defendants' request could be easily mooted through Dr. Mann's paying the sanctions award, the Court will set a deadline by which Dr. Mann must pay the sanctions award. Defendants may later seek to reduce the sanctions award to judgment, *see* Super. Ct. Civ. R. 58(d), and pursue collection through methods of judgment execution, should Dr. Mann fail to comply with the deadline ordered by the Court. *See In re Est. of Bonham*, 817 A.2d at 195-96 (discussing non-contempt-based methods of enforcing orders assessing fees and costs, including through execution of money judgments); *Hoggatt*, 502 F. Supp. 3d at 1114 ("By reducing the sanctions orders to judgments, the Court ensures that Allstate will be able to use the tools made available under Mississippi law for enforcing judgments."); *see also, e.g.*, *Ctr. Pointe Sleep Assocs., LLC v. Panian*, Civ. A. No. 08-1168, 2008 U.S. Dist. LEXIS 110675, at *5-6 (W.D. Pa. Dec. 8, 2008) (granting motion to reduce discovery sanctions to judgment upon showing that

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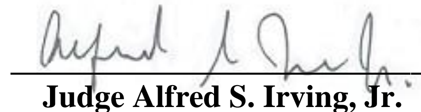
[5] Dr. Mann's stated intent to appeal the June 22, 2020 Order, *see* Pl.'s Resp. 1, does not relieve him of his obligation to pay the sanctions award.

sanctioned party had yet to pay or seek leave to appeal sanctions and directing clerk to enter judgment should party not pay or seek leave to appeal within ten days of issuance of order).

ACCORDINGLY, it is by the Court this 19th day of January, 2025, hereby

ORDERED that *Defendants Competitive Enterprise Institute and Rand Simberg's Motion to Alter or Amend Judgment*, filed on February 15, 2024, is **DENIED**; and it is further

ORDERED that, within thirty days of issuance of this Order, Plaintiff Michael E. Mann, Ph.D., will pay Defendants Competitive Enterprise Institute and Rand Simberg the sum of $9,588.64, representing the reasonable fees and costs Defendants Competitive Enterprise Institute and Rand Simberg incurred in connection with their February 21, 2020 motion to compel discovery.



Judge Alfred S. Irving, Jr.

Copies to:

John B. Williams, Esq.
Peter J. Fontaine, Esq.
Patrick J. Coyne, Esq.
Fara N. Kitton, Esq.
Amorie I. Hummel, Esq.
Counsel for Plaintiff

Andrew Grossman, Esq.
Mark I. Bailen, Esq.
David B. Rivkin, Esq.
Mark W. DeLaquil, Esq.
Renee Knudsen, Esq.
Victoria L. Weatherford, Esq.
Counsel for Defendants Competitive Enterprise Institute and Rand Simberg

H. Christopher Bartolomucci, Esq.
Counsel for Defendant Mark Steyn

Anthony J. Dick, Esq.
Jonathan E. DeWitt, Esq.
Counsel for National Review, Inc.