714449-9

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NO. 714449

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MONTI DARNALL

Appellant,

v.

JEFF DALTON,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal arises from the fallout of the tactical decision to not have plaintiff's sole medical expert witness regarding causation examine the plaintiff until 6 days before the discovery cutoff date. Plaintiff filed her lawsuit on March 5, 2010. The case was initially scheduled for trial on August 15, 2011 with a discovery cutoff date of June 27, 2011, a primary witness disclosure deadline of March 14, 2011 and an additional witness disclosure deadline of April 25, 2011. Plaintiff did not disclose her only medical expert as a part of her Primary Witness Disclosure. Plaintiff did provide the name of her sole medical expert witness in her Additional Witness Disclosure dated April 25, 2011, but that disclosure stated that the expert witness would not examine the Plaintiff until June.

Defense counsel moved to exclude expert witness after the discovery cutoff period passed without any communication from Plaintiff's counsel regarding the examination or the expert's findings. Plaintiff failed to provide the required disclosure in accordance with the Order Setting Case Schedule, discovery requests and the Civil Rules. Dr. Gregory Norling was properly excluded as a witness at trial by Judge Eadie and Judge Robinson did not abuse her discretion by granting Defendant his fees regarding Dr. Norling after allowing Dr. Norling to testify as a witness at trial. Plaintiff's appeal is her attempt to avoid any consequences for her failure to operate in accordance to the well-established rules regarding discovery. The rulings of the court below

should be affirmed.

II. COUNTER-STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on March 20, 2007. Plaintiff filed her lawsuit on March 5, 2010. Dr. Gregory Norling was plaintiff's only causation witness but he was not disclosed until plaintiff filed her Additional Witness Disclosure on April 25, 2011. That disclosure did not provide any substantive information regarding Dr. Norling's opinions and or expected testimony because Dr. Norling never intended to examine plaintiff until the eve the of the discovery cutoff period.

Defendant propounded discovery to plaintiff requesting the names and opinions of the expert witnesses that she expected to testify at trial on May 17, 2010. Plaintiff failed to provide the opinions of any experts who planned to testify at trial at any point prior to the filing of the motion to exclude Dr. Norling as a trial witness.

After the discovery cutoff period passed without any communication from plaintiff's counsel regarding Dr. Norling's opinions, Defendant moved to exclude Dr. Norling as a trial witness. No information was provided regarding plaintiff's expert witness prior to notifying plaintiff's counsel that a motion would be filed to exclude Dr.

Norling as a witness. Oral argument was requested regarding the motion to address the *Burnet* factors in open court on the record.

Judge Eadie signed the order granting the motion to exclude Dr. Norling on July 18, 2010. Plaintiff did not move for reconsideration of the order. Once the motion to exclude Dr. Norling was granted, Plaintiff refused to allow the discovery deposition of Dr. Norling. Plaintiff then scheduled the perpetuation deposition of Dr. Norling which defense counsel was unable to attend. Due to plaintiff's failure to provide the opinions and expected testimony of Dr. Norling prior to the discovery cutoff date, Defendant was never afforded the opportunity to depose Dr. Norling prior to his perpetuation deposition.

On August 15, 2011, the date that was to be the first day of trial, plaintiff moved to "revise" Judge Eadie's order excluding Dr. Norling as a witness. Judge Barnett advised plaintiff's counsel that she did not have the authority to revise the ruling of a Superior Court Judge. Judge Barnett did allow plaintiff to seek discretionary review of the order excluding Dr. Norling.

Plaintiff filed her motion for discretionary review seeking relief under CR 54(b). The Court of Appeals denied the motion and informed plaintiff that CR 54(b) did not apply to facts of this case. App. A.

Plaintiff requested modification of the Commissioner's ruling which was also denied. App. B. The case was then remanded back to the trial court.

In response to Defendant's Motion For Summary Judgment regarding the causation of any injuries to the motor vehicle accident Judge Robinson reinstated Dr. Norling as a witness in exchange for granting Defendant his fees and costs incurred relating to the exclusion of Dr. Norling. The order was entered on June 14, 2012. Defendant submitted a subsequent motion to recover the costs incurred at the trial and appellate court level regarding Dr. Norling. The fees amounted to $9,842.00. Judge Robinson entered the order granting fees on July 20, 2012. Plaintiff did not move for reconsideration regarding Judge Robinson's order allowing Dr. Norling as a witness and granting Defendant fees and costs pertaining to Dr. Norling or the order Judge Robinson entered regarding the specific amount of the sanction.

In November 2013, this case was tried to a jury before Judge Mertel. The jury awarded plaintiff a verdict of $20,500 and Defendant requested an offset for the $9,842 awarded in Judge Robinson's July 20, 2012 order. Prior to the entry of final judgment plaintiff filed a motion to revise Judge Robinson's July 20, 2012 order pursuant to CR 54(b). The remaining amount of the verdict was paid and the parties entered partial satisfaction of judgment.

III. ARGUMENT

1. Judge Eadie did not abuse his discretion in excluding Dr. Norling.

Defendant moved to exclude Dr. Norling as a witness when the experts and opinions had not been provided in accordance with the Order Setting Case Schedule and the Civil Rules. The trial of the case was scheduled to commence on August 15, 2011. The motion was filed on July 8, 2011 prior to the receipt of Dr. Norling's opinions. It is evident that the only reason the opinions of Dr. Norling were ever sent to the defense counsel is because the motion to exclude him was to be filed. Dr. Norling was plaintiff's sole expert witness. Defendant was entitled to his opinions by the Primary Witness Disclosure deadline of March 14, 2011.

When a court excludes a witness based on a discovery violation, the record must reflect: 1) the Court's consideration of a lesser sanction; 2) the willfulness of the violation; and 3) the substantial prejudice arising from it. *Mayer v. Sto Industries*, 156 Wn.2d 677, 699, 132 P.3d 115 (2006); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-496, 933 P.2d 1036 (1997). All three *Burnet* factors were met regarding the exclusion of Dr. Norling as a witness.

No lesser sanction would have been appropriate given the rapidly approaching trial date. There was not an alternative sanction that would

not have substantially prejudiced the Defendant. The weight of being a defendant in a lawsuit is not unsubstantial. In the instant case the trial was delayed for over two and a half years as a result of plaintiff's failure to properly disclose Dr. Norling. Defendant Dalton had to disclose the lawsuit to his employer and the lawsuit prevented his parents (who were originally named as defendants) from being able to refinance their home.

Plaintiff's discovery violations were wilful. Plaintiff was not examined by Dr. Norling until June 21, 2011 when the discovery cutoff date was June 30, 2011. Plaintiff never had any intention to provide Dr. Norling's opinions in accordance with the deadlines in the Order Setting Case Schedule and discovery requests.

Defendant was substantially prejudiced by Plaintiff's untimely disclosure. The discovery rules are implemented to prevent parties from being blindsided at trial. This case involved a plaintiff who had a total of three doctor's visits from March 20, 2007 through the date of trial that were related to this accident. After the discovery cutoff date Dr. Norling expressed opinions regarding plaintiff's possible need for surgery and expensive medication. The purpose of the case management schedule and disclosure deadlines is to have an orderly process by which a case can proceed. Requiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely

fashion. Allowing disclosures to be made in the manner suggested by Plaintiff in this case would frustrate the purpose of the scheduling rules. *Lancaster v. Perry*, 127 Wn. App. 826, 833, 113 P.3d 1 (2005). This is precisely the type of late disclosure the discovery rules are designed to prevent. Dr. Norling's original exclusion was warranted.

2. Judge Robinson's award of attorney fees was justified under the Civil Rules.

Rulings on discovery are reviewed for abuse of discretion. *Mayer v. Sto Industries, Inc.* 156 Wn. 2d 677, 132 P. 3d 115 (2006). Judge Robinson did not abuse her discretion in awarding defendant his attorney fees and costs pertaining to the exclusion of Dr. Norling. Dr. Gregory Norling was plaintiff's only medical causation witness. He was not an additional witness whose testimony was only relevant after defendant disclosed his primary witnesses. Dr. Norling was a primary witness whose opinions should have been disclosed by the March 14, 2011 deadline for the disclosure of possible primary witnesses. At the very latest, plaintiff was required to disclose the opinions and expected testimony of Dr. Norling by the April 25, 2011 deadline for the disclosure of additional witnesses.

King County Local Rule 26(k) governs the disclosure of witnesses. The rule states:

> *(1) Disclosure of Primary Witnesses:* Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to

call as witnesses at trial.

(2) *Disclosure of Additional Witnesses*: Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons *whose knowledge did not appear relevant until the primary witnesses were disclosed* and whom the party reserves the option to call as witnesses at trial. (emphasis added).

(3) *Scope of Disclosure*: Disclosure of witnesses under this rule shall include the following information: Experts. *A summary of the expert's opinions and the basis therefore* and a brief description of the expert's qualifications. (emphasis added).

(4) *Exclusion of Testimony*. Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.

Plaintiff did not disclose Dr. Norling in compliance with LCR 26(k). Plaintiff did not disclose any of Dr. Norling's opinions to the defendant until after defendant filed the motion to exclude Dr. Norling as a witness. It is undeniable that Dr. Norling was not properly disclosed in compliance with KCLR 26(k) or the Order Setting Case Schedule. The untimely disclosure was also not in compliance with the interrogatories regarding expert witness testimony or the requests for production of documents requesting expert opinions and reports.

The Case Schedule provided the deadlines for the disclosure of primary witnesses, the disclosure of additional witnesses, and the deadline for all discovery to be completed. The Order Setting Case Schedule specifically states that "[p]enalties, including but not limited to sanctions

set forth in **Local Civil Rule 4(g) and Rule 37** of the Superior Court Civil Rules may be imposed for non-compliance."(emphasis added). KCLR 4(g) reads in pertinent part:

> **Enforcement; Sanctions; Dismissal; Terms.**
>
> (1) Failure to comply with the Case Schedule may be grounds for imposition of sanctions, including dismissal, or terms.
> ...
> (3) If the Court finds that an attorney or party has failed to comply with the Case Schedule and has no reasonable excuse, the Court may order the attorney or party to pay monetary sanctions to the Court, or terms to another party who has incurred expense as a result of the failure to comply, or both; in addition, the Court may impose such other sanctions as justice requires.
>
> (4) As used with respect to the Case Schedule, "terms" means costs, attorney fees, and other expenses incurred or to be incurred as a result of the failure to comply...

Civil Rule 37(b) governs discovery sanctions for failure to comply with an order. CR 37(b) reads in pertinent part:

> [i]n lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Plaintiff failed to timely and properly disclose Dr. Gregory Norling in accordance with LCR 26(k), Civil Rules 33 and 34 and the order setting case schedule. The costs and fees that were awarded by way of Judge

Robinson's June 13, 2012 and July 20, 2012 orders were the fees and costs incurred by defendant based solely on plaintiff's failure to properly and timely disclose Dr. Norling. Judge Robinson did not abuse her discretion in awarding defendant his attorney fees and costs.

3. Judge Mertel did not err in incorporating Judge Robinson's sanctions into the judgment.

Judge Mertel did not have the authority to 'revise' Judge Robinson's order pursuant to CR 54(b). Judge Robinson's orders allowing defendant to request fees and granting a specific amount of fees were entered on June 14, 2012 and July 20, 2012 respectively. Plaintiff did not seek 'revision' of the orders until December 17, 2013. Plaintiff's application of CR 54(b) to "revise" orders after the time period authorized under CR 59(b) has already been refuted by the trial court and the Court of Appeals. Plaintiff has not provided any authority for her contention that CR 54(b) allows any order to be revised until there is a final judgment. Such a reading of CR 54(b) would render the time provisions of CR 59(b) and CR 6(b) meaningless.

4. Defendant Dalton is entitled to his attorney's fees and costs for this appeal under RAP 18.1.

Attorney fees are recoverable if authorized by statute, contract or on equitable grounds. RAP 18.1 states that if applicable law grants to a party the right to recover reasonable attorney fees or expenses on review

before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless the statute specifies that the request is to be directed to the trial court. Judge Robinson's June 14, 2011 Order authorized Defendant to recover attorney fees based on responding to plaintiff's motions regarding the exclusion of Dr. Norling. The instant appeal falls into the category outlined by Judge Norling. Defendant requests his attorney fees in responding to Plaintiff's appeal.

IV. CONCLUSION

Discovery rulings are reviewed for abuse of discretion. Judge Eadie did not abuse his discretion in initially excluding Dr. Norling. Judge Robinson did not abuse her discretion in allowing Dr. Norling as a witnesss but granting Defendant the attorney fees and costs incurred pertaining to Plaintiff's improper disclosure and discovery violation regarding Dr. Norling. Judge Mertel did not err by incorporating Judge Robinson's order into the final verdict. Defendant is entitled to fees and costs incurred in responding to plaintiff's appeal.

Respectfully Submitted this 6 day of June, 2014.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By _____
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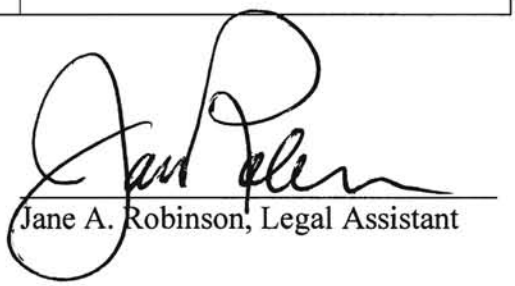
CERTIFICATE OF MAILING

I hereby certify that on this 6th day of June, 2014, I caused a true and correct copy of the foregoing to be delivered to all counsel of record in the following manner:

David A. Williams Nine Lake Bellevue Drive Suite 104 Bellevue, WA 98005 DAW@bellevue-law.com Phone: (425)646-7767	[xx] Via U.S. Mail [xx] Via E-mail



Jane A. Robinson, Legal Assistant

APPENDIX A

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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November 10, 2011

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CASE #: 67594-0-I
Monti Darnall, Petitioner v. Jeff Dalton, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on November 9, 2011, regarding petitioner's motion for discretionary review:

"This matter arises from a personal injury action following an automobile accident. Plaintiff/Petitioner Monti Darnall seeks discretionary review of a July 18, 2011 trial court order granting defendant/respondent Jeff Dalton's motion to exclude the testimony of Darnall's medical causation expert, Dr. Gregory J. Norling, for violation of discovery rules, and the August 23, 2011 order denying Darnall's motion for revision.

It is certainly arguable that the order excluding Darnall's expert does not comply with established case law, including Blair v. TA-Seattle East No. 176, 171 Wn.2d 342, 254 P.3d 797 (2011) (although a trial court generally has broad discretion to fashion remedies for discovery violations, when imposing a severe sanction such as witness exclusion, the record must show the trial court considered lesser sanctions, the willfulness of the violation, and substantial prejudice arising from it); and Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997).

But Darnall did not timely seek review. Dalton filed his motion to exclude Dr. Norling's testimony on July 7, 2011. Because the assigned trial judge was absent, another trial judge ruled on the motion. The order excluding Dr. Norling's testimony was filed July 18, 2011. Darnall did not file a motion for reconsideration, which would have been due July 28, 2011. Instead, on August 5, 2011, she filed a motion for revision directed to the trial judge, citing CR 54. On August 15, 2011, the trial judge denied the motion, and the order was filed August 23, 2011. Darnall filed her notice of discretionary review on September 1, 2011.

Darnall argues that she properly sought revision under CR 54, which provides in part:

> (a) **Definitions.**
> (1) *Judgment.* A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.
> (2) *Order.* Every direction or a court or judge, made or entered in writing, not included in a judgment, is denominated an order.
> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon express determination . . . that there is no just reason for delay. . . . In the absence of such findings . . . any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . of fewer than all the parties shall not terminate the action as to any of the claims or parties, *and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.*

Darnall relies on the last sentence of CR 54(b). But on its face CR 54 has no application to the present circumstances, and Darnall acknowledges that he has found no authority supporting his argument. Darnall has not demonstrated that the August 23, 2011 order denying revision was obvious error or probable error, and Darnall's notice of discretionary review was not timely as to the July 18, 2011 order excluding Dr. Norling's testimony. Any challenge to the trial court's decision excluding evidence must be brought in a timely notice of appeal from a final judgment.

Therefore, it is

ORDERED that discretionary review is denied; and it is

ORDERED that review is dismissed.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp

c: The Honorable Suzanne Barnett

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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State of Washington

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February 16, 2012

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CASE #: 67594-0-I
Monti Darnall, Petitioner v. Jeff Dalton, Respondent

Counsel:

Please find enclosed a copy of the Order Denying Motion to Modify the Commissioner's ruling entered in the above case today.

The order will become final unless counsel files a motion for discretionary review within thirty days from the date of this order. RAP 13.5(a).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

enclosure

emp

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MONTI DARNALL, Petitioner, v. JEFF DALTON, Respondent.	No. 67594-0-I ORDER DENYING MOTION TO MODIFY

Petitioner Monti Darnall has filed a motion to modify the commissioner's November 10, 2011 ruling denying her motion for discretionary review. Respondent Jeff Dalton has filed a response. We have considered the motion under RAP 17.7 and have determined that it should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 16th day of February, 2012.

COX, J.