714449

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No. 714449

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MONTI DARNALL

Appellant,

v.

JEFF DALTON,

Respondent.

APPELLANT'S BRIEF

KING COUNTY SUPERIOR COURT
CAUSE NO. 10-2-09322-2 SEA

Appellate Counsel for Plaintiff/Appellant
Monti Darnall:

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INTRODUCTION

The plaintiff timely filed the following witness disclosure pursuant to the Civil Case Schedule:

> "Gregory J. Norling, M.D.
> Evergreen Orthopedic Center
> 2911 120th Avenue N.E. Suite H-210
> Kirkland, Washington 98034
> Phone: 425 823 4000
>
> Dr. Norling is an expert witness and has agreed to examine the plaintiff and offer opinions relative to any and all aspects of the Plaintiff's injuries, including diagnosis, prognosis, treatment and causation. Dr. Norling will examine the patient in June."

On the Eve of trial, months after having received this disclosure, weeks after having sought and received plaintiff's counsel's agreement to extend the discovery cutoff for purposes of deposing Dr. Norling, after having received a detailed report of his exam, and after having been offered seven potential discovery deposition dates, Defense counsel brought a motion to exclude his testimony completely, on grounds of "improper identification". The Motion was noted without oral argument.

Unbeknownst to counsel, the assigned trial judge was on vacation. Judge Eadie, "covering" for her, and without having taken oral

argument, signed Defense Counsel's Order Excluding Dr. Norling, which order recites (1) a "willful failure to comply" with CR 26 and KCLR 26, which (2) "substantially prejudiced" the defendant's trial preparation, and for which (3) there was "not a lesser sanction available".

After a flurry of Motions, Judge Robinson ultimately "vacated" the Order Excluding Dr. Norling, noting correctly that Defendant's own moving papers didn't recite facts "supporting a conclusion of prejudice", or demonstrate why "less severe sanctions" would be inappropriate. Indeed: The exclusion of Dr. Norling's testimony had been the sole relief sought in the Motion.

However, Judge Robinson nonetheless sanctioned Plaintiff on grounds that, although Dr. Norling was timely and completely identified in Plaintiff's witness disclosure, defendant's "expert witness interrogatory was never answered". (emphasis added) Ironically enough, Judge Robinson's detailed order recites no facts demonstrating how defense counsel was (or conceivably could be) "prejudiced" by the "failure" to answer the "expert witness interrogatory", once Dr. Norling had been specifically identified pursuant to the Civil Case Schedule, the discovery cut-off waived (at defense counsel's request) for the purpose of deposing

him, a detailed report of his examination forwarded counsel, and seven deposition dates offered.

Thereafter, Judge Robinson awarded defendant "sanctions" of $9,842.00 for the cost of bringing what Judge Robinson herself had essentially (and correctly) characterized as a patently meritless motion.

The case was tried to a verdict. The jury awarded Plaintiff $20,500.00. Judge Mertel, sitting Pro Tem, denied plaintiff's motion to revise Judge Robinson's Order of sanctions, and entered judgment deducting the sanctions, plus interest from the jury's verdict.

The basic question here is, then, whether the trial court erred in awarding the defendant attorney's fees for bringing a patently meritless motion.

ASSIGNMENTS OF ERROR

1. Judge Robinson erred in awarding the defendant attorney's fees for bringing what Judge Robinson herself found to be a meritless motion to exclude Dr. Norling.

2. Judge Mertal erred in denying Plaintiff's Motion to Revise, and in entering judgment deducting the sanctions award from the jury's verdict.

STATEMENT OF THE CASE

Plaintiff filed this personal injury lawsuit on March 5th, 2010. CP 277. Trial was set for August 15th, 2011. *Id.* The case schedule set March 14th, 2011 as the Deadline for Disclosure of Possible Primary Witnesses, and April 25th, 2011, as the deadline for disclosure of possible additional witnesses. Id. The discovery cut-off was set for June 27th, 2010.

On April 25th, 2011, Plaintiff timely filed her disclosure of additional witnesses. CP 5. It contained the following:

> "Gregory J. Norling, M.D.
> Evergreen Orthopedic Center
> 2911 120th Avenue N.E. Suite H-210
> Kirkland, Washington 98034
> Phone: 425 823 4000
>
> Dr. Norling is an expert witness and has agreed to examine the plaintiff and offer opinions relative to any and all aspects of the Plaintiff's injuries, including diagnosis, prognosis, treatment and causation. Dr. Norling will examine the patient in June.

Defendant made no objection to the substance of this disclosure.

On June 14th, 2011, defense counsel emailed plaintiff's counsel, inquiring as to Dr. Norling's availability for discovery deposition, and

asking if counsel would agree to extend the discovery cut-off "if need be" for scheduling the deposition. CP 91-93. Plaintiff's counsel agreed. *Id.*

The plaintiff was deposed June 15th, 2010. CP91-93. At that time, plaintiff's counsel indicated to defense counsel that Dr. Norling's examination would occur the next week, on June 21st. Id. At that time, Plaintiff's counsel confirmed his willingness---at defense counsel's request---to extend the discovery cut-off for purposes of Dr. Norling's discovery deposition. Id.

Dr. Norling's report of his examination was received by Plaintiff's counsel on July 7th, 2011, and forwarded to defense counsel that day. CP 91-93

The next day, July 8th, 2011, defense counsel filed a motion, the sole relief sought being exclusion of Dr. Norling entirely. CP 9-14. The motion was noted without oral argument.

The Motion to Exclude claimed that "Ms. Darnall has not provided defendant with the subject matter on which Dr. Norling is expected to testify, the substance of the facts and opinions to which Dr. Norling is expected to testify or a summary of the grounds for each opinion. Defendant has no way of ascertaining the subject matter of Dr.

Norling's testimony." CP 9-14. (emphasis added) The motion did not mention counsels' agreement three weeks earlier to extend the discovery cut-off for the specific purpose of taking Dr. Norling's discovery deposition. Neither did the Motion acknowledge that defense counsel had been offered seven potential deposition dates for Dr. Norling. Defense counsel insinuated that she'd been offered one deposition date---the latest of the seven that had actually been offered. CP 9-14.

Plaintiff's counsel responded with detailed declarations from himself, and from his paralegal. CP 91-93, CP 33-39. The declarations clarified the truth as set forth above: Defense counsel had known for months that Dr. Norling would be testifying at trial, had known that his exam would occur "in June", had specifically sought and received plaintiff's counsel's agreement to extend the discovery cutoff for Dr. Norling's discovery deposition, had received a detailed report of his exam and even as she filed her Motion, defense counsel had been offered not one, but seven potential deposition dates.

Judge Barnett was the assigned trial judge but was on vacation. On July 18th, 2010, Judge Eadie signed defense counsel's

Order Excluding Dr. Norling. CP 52-53. The Order contained "findings" that:

1. There was "no lesser sanction available that would not undermine the purpose of discovery";

2. The Defendant "would be substantially prejudiced if Dr. Norling were allowed to testify at trial;

3. The "improper disclosure" of Dr. Norling was "willful since no legitimate reason was given for the failure to comply with CR 26 and KCLR 26".

At trial, Plaintiff's counsel moved for revision of Judge Eadie's order, pursuant to CR 54 (b). Judge Barnett denied revision, but continued the trial to allow Plaintiff to seek Discretionary Review of Judge Eadie's ruling, since Dr. Norling was Plaintiff's only causation witness. Discretionary Review was denied.

Thereafter, the defense brought a Motion for Summary Judgment before Judge Robinson, who was now assigned to the case. CP 230-232. Judge Robinson "vacated" Judge Eadie's Order Excluding Dr. Norling and denied Summary Judgment. CP 277-279. Judge Robinson's Order specifically pointed out that although the Order Judge Eadie had signed "recited a finding of prejudice, neither it nor the

defendant's moving papers recited facts supporting a conclusion of prejudice". (emphasis added) CP 279. Further, Judge Robinson's Order pointed out that "there was no argument or finding concerning the possibility of less severe sanctions". (emphasis added) *Id.*

Nonetheless, Judge Robinson also "found" that plaintiff had "received interrogatories which called for the disclosure of Dr. Norling" which, Judge Robinson "found", were "never answered". CP 278. Judge Robinson also "found", without explanation, that the disclosure of Dr. Norling "was untimely and did not comply with LCR 26 (b) in substance". *Id.* Therefore, Judge Robinson held that Defendant was entitled, as a sanction, to "an award of its attorney's fees for making the motion to exlude, and in responding to plaintiff's subsequent motions on this topic." *Id.*

Subsequently, Judge Robinson awarded $9,842.00 in fees, as a "sanction". CP 365-367

Judge Mertel sat Pro Tem on the subsequent jury trial. The jury awarded Plaintiff $20,500.00 CP 525-532. Plaintiff asked him to revise Judge Robinson's Order of Sanctions. CP 495-524 Judge Mertel

denied the motion and entered judgment deducting the sanctions award, plus interest, from the jury's verdict. CP 525-532.

ARGUMENT

1. Judge Eadie abused his discretion in excluding Dr. Norling.

Well before defense counsel's motion to exclude, our Supreme Court set forth two very explicit rules relative to the appropriate sanction for a discovery "violation":

> The court must impose "the least severe sanction that will be adequate to serve the purpose of the particular sanction". Burnett v. Spokane Ambulance, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997);

When the Court excludes a witness, the record must reflect (1) the trial court's consideration of a lesser sanction; (2) the willfulness of the violation; and (3) substantial prejudice arising from it. Mayer v. Sto Industries, 156 Wn.2d 677, 688, 132 P.3d 115 (2006).

Here, one struggles to see any but the most de minimus "violation" of the disclosure rules at all. But more to the point: The sole relief sought in Defendant's motion was exclusion of the witness.

Yet as Judge Robinson's Order points out, Defendant's own working papers point to no "prejudice". How could they? At the time the Motion was filed, Defendant had received Dr. Norling's detailed report, had secured plaintiff's counsel's agreement to extend the discovery cutoff to depose him, and had been offered seven deposition dates!

2. Judge Robinson's award of attorney's fees was without basis in the Civil Rules and sould be reversed for the same failure to demonstrate "prejudice" that Judge Eadie's Order would have been

CR 37 A (4) authorizes an award of fees for successfully bringing, or successfully defending a discovery motion. No rule authorizes fees for unsuccessfully moving to exclude a witness.

CR 54 (b) authorizes revision of any "order" that "adjudicates fewer than all the rights and liabilities" of the parties, "at any time before the entry of judgment".

Judge Robinson chose to consider Judge Eadie's Order under CR 60 (b) (11), which authorized relief from a "judgment or order" for "any other reason justifying relief from the operation of the judgment". (emphasis added). CR 60(b) generally provides for relief "upon such

terms as are just", but under this analysis the question is: How can it be "just" to sanction Plaintiff for defending a patently meritless motion?

3. Judge Mertel erred in incorporating Judge Robinson's sanctions into the judgment

CR 54 (b) authorized Judge Mertel to revise Judge Robinson's Order of fees. Instead, he incorporated Judge Robinson's erroneous Order.

CONCLUSION

Plaintiff should not have been sanctioned for Defendant's meritless motion.

DATED this 5 day of May, 2014.

By: _____
David A. Williams, WSBA #12010
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that a copy of the Appellant's Brief, was forwarded for service upon the counsel of record:

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DATED this 5 day of May, 2014.

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