

FILED

AUG 09 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

No. 287301

In Re:

**Kourtney F. Scheib
Petitioner/Respondent on Appeal**

V.

**Christopher M. Crosby
Respondent/Appellant**

OPENING BRIEF OF APPELLANT

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 **ORIGINAL**

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I. Facts

Approximately 1 year before the hearing which is the subject of this appeal, the Petitioner Ms. Scheib began living with the Appellant/Respondent and his parents in the parent's home. RP 25. According to the Respondent they all lived harmoniously without apparent problems. RP 33-36. While living together the parties began a romance and Ms. Scheib became pregnant with what was presumed the Respondent's child. RP 31.

In the fall of 2009 Ms. Scheib decided to move out of the Respondent's home and not only told the Respondent that she was moving out, but asked Respondent's mother to help her move out. See RP 27-28. Ms. Crosby drove Ms. Scheib to downtown Spokane and the Spokane Transit Center (herein after STC) to meet her mother. Id.

After Ms. Scheib went to the STC the Respondent explains that he went to their to make sure she was safe even though when he got there the Petitioner asked him to leave. RP 34. The Respondent in fact did leave her; however, he went across the street, and kept his distance to watch to make sure she was safe. RP 34. The Petitioner said that she interpreted this as "stalking", and said she was frightened by these actions by Mr. Crosby. RP 39, line 19.

After the STC episode the Petitioner moved to her mother's home in Cheney Washington, a small college town just outside Spokane. Within a few weeks after she left Mr. Crosby she sought and filed a Petitioner for Domestic Violence restraining order against Mr. Crosby to keep him from contacting or seeing her. CP 1-5. Since there was no marital relationship, nor any children between the two parties, Ms. Scheib filed this request for a restraint in Spokane District Court. CP 1-14. After the exparte restraints were signed and filed, Mr. Crosby was serve with notice of the hearing. Id.

Mr. Crosby hired counsel to represent him at the restraint hearing and appeared and asked for a continuance to complete some discovery, and also asked that since the Petitioner was pregnant with the Respondent's child it was best that this matter be heard on the Superior Court docket because they would have a child in common. CP 1-14. The District Court judge did not immediately remove the matter to the Superior Court at that time, but did continue it for a two week period.. Id. Immediately after the continuance Ms. Scheib was properly served with a Notice of Deposition under the District Court cause number for the date of December 4, 2009 at 3:00pm at Respondent's counsel's office. CP 8-12. This was just a few days before the District Court hearing was to take place on December 8, 2009 Id. The Petitioner contacted the Respondent's counsel to continue the deposition but they failed to agree to postpone the discovery. RP 4-6. Even so, the Petitioner simply did not show for the deposition, basically ignoring the Notice. Id. See also CP 8-12 for a copy of deposition notice.

At the District Court hearing on the 8th of December the Respondent's counsel informed the District Court Judge Patty Walker that he needed to continue the matter because the Petitioner failed to obey and appear for her deposition, therefore, he and the Respondent were unprepared to deal with the allegations in the Petition. RP 4-10 and CP 1-14. Because the District Court judge wanted the Petitioner to have counsel for the deposition, and because the Superior Court offered pro bono counsel on their Domestic Violence docket, she removed the matter (by order) to the higher court so they could deal with the continuance request, the deposition issue, and need for counsel. CP 1-14. That hearing was set on the Exparte docket in Superior Court immediately and the parties adjourned to that court to deal with how to proceed. Id.

The parties met in the Exparte department of the Superior Court and informed the clerk that they were there for the hearing. The normal Family Law Commissioner [who handles DV matters] was not on the Exparte docket at the time that the parties came to that court (RP 4) rather a former District Court judge, Spokane Superior Court Judge the Honorable Annette Plese was sitting in Exparte, apparently due to the Court Commissioner's lack of availability.¹

Judge Plese came to the Exparte bench and asked the Respondent's counsel what the case was about. RP 4-5. The Respondent's counsel explained how the case arrived to the Exparte Department and that it was primarily due to Ms. Scheib's failure to attend her duly served Notice of Deposition, and that he and his client needed a continuance to do the deposition. RP 4-6.

Instead of allowing any continuance Judge Plese challenged the Respondent's right to even take such a deposition in a District Court matter and asked, "Can I ask you why you think on a DV Protection Order though you have the right to do a deposition? Now if you had a civil case you have to ask the court's permission to take a deposition on a civil ---". RP 6 line 9-12. The Respondent's counsel respectfully indicated that the court rule regarding District Court depositions was marked for her Honor and on her bench, and that it allowed depositions in District Court without a court order. RP 6 line 13-21. The judge continued with the notion that "permission" of the judge had to be had before you were able to take a deposition in District Court since a DV protection hearing was not a "civil lawsuit". RP 6 line 22 to RP 7 line 1. The colloquy ended with the judge summarily

¹ Normally in Spokane County a Court Commissioner handles exparte matters and it is unusual for Superior Court Judge's to sit in the Exparte Department. This was a unusual occurrence and apparently occurred because a normal Commissioner who handles DV matters as well, was not available.

denying a continuance to allow for a deposition and proceeded with the case in the Exparte Department. (For the entire colloquy see RP 4-10)

The Respondent's counsel protested and continued to object to the proceeding, requesting a continuance to the right docket to deal with the matter properly and allow the deposition. RP 6-10. The judge flatly refused that continuance request and ordered that the proceeding occur right then without a continuance, and without the deposition. RP 6-10.

Being totally unprepared, and in spite of the District Court court rules that in fact allowed depositions [See CRLJ 26(c)(1)] the final proceeding went forward with testimony of the Petitioner that included discussions about events that could have been responded to by having other family members there to testify and refute the claims. RP 11-45. Mr. Crosby had to testify or simply face a default and did the best he could without any warning about the facts attested to by the Petitioner. RP 33-36. The Superior Court Judge found a basis for the restraints and ordered a restraint that has affected this prospective father from any access to information about his expected child. RP 42-45.

II. Identification of Errors by Court

The court committed the following errors in this matter:

1. Failure to allow discovery by the Respondent in spite of the fact that a proper discovery request was served and made;
2. Failure to continue the DV hearing even though the Petitioner, who was properly served with a Notice of Deposition, intentionally failed to appear for said deposition which was scheduled for a time prior to the date of December 8th, 2009;

3. Failure to follow the CRLJ rules, as well as Superior Court rules on discovery in civil matters;
4. Failure to properly characterize a domestic violence case as a civil case in which the civil court rules apply;
5. Failure to properly cite and apply District Court and/or Superior Court rules on availability of deposition in Domestic Violence matters, and then to base their ruling on that misapplication of the rules;

III. Law and Argument

- A. The Superior Court Judge was incorrect when she indicated that Depositions were not allowed in District Court matters.

During the course of the colloquy between the Respondent's counsel and the Superior Court judge, the judge indicated that depositions are not allowed in District Court without a court order. RP 4-10. On more than two occasions during that colloquy the Respondents counsel indicated clearly that depositions were in fact allowed in District Court, without a court order, referring the court to the CRLJ rules which counsel had tabbed. RP 6 lines 16-18. There was no indication that the judge even looked at the rule and simply and summarily denied the Respondent any relief from the Petitioner's intentional disobedience of the deposition notice and went on with the case. RP 4-10.

The District Court rules on depositions in proceedings indicates as follows: "(1) *A party may take the deposition of any other party, unless the court orders otherwise.*"

CRLJ 26(c)(1)

The court did not order that a deposition could not be taken in the District Court action. CP 1-14 & RP 4-10. And since the Superior Court judge in the Exparte

Department was not sitting as a District Court judge, her ruling was prospective only and not made under the CRLJ's, it was simply her interpretation or understanding of the rules in District Court.

The Respondent believes that the Judge committed obvious error by misstating the CRLJ's and whether it was necessary to have an order before a deposition to take place or not in a District Court DV matter. The reason for this belief is that the CRLJ's were amended September 1, 2005 to include this new rule wherein court orders are not needed to take someone's deposition in civil matters in District Court. See footnote to CRLF 26. This error was compounded by the fact that CR 26 allows for depositions in Superior Court, and an order could have been entered to allow a continuance to accomplish this important process to occur so that the Respondent could find out the facts of the allegations, and line up his witnesses to refute the Petitioner's claims about what happened both at the bus stop, and at the Crosby's family home over their extended stay together..

B. A domestic violence case is a civil case is to be governed by the Civil Court Rules, and since the court based part of their ruling to deny a continuance request on this mistaken understanding, that decision was on untenable grounds.

During the Respondent's colloquy with the judge regarding a continuance to do the deposition, Judge Please indicated that a DV matter is not a "civil lawsuit". However, case law on these cases seems to say otherwise. For example, the case of *In re Freeman*, 146 Wn.App. 250, 192 P.3d 369 (2008) stated that a RCW 26.50 action is considered a "civil action" when it indicated clearly that the RAP rules for civil actions apply with

regard to what issues are before its courts. Further CR 81 indicates that all actions, that are not criminal or a “special proceeding” are to be governed by the Civil Court Rules. It states,

(a) To What Proceedings Applicable. Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings. Where statutes relating to special proceedings provide for procedure under former statutes applicable generally to civil actions, the procedure shall be governed by these rules.

(b) Conflicting Statutes and Rules. Subject to the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict.

In order to define what a “special proceeding” is we must turn to case law on this subject. In that regard, research seems to suggest that in order for a proceeding to be a “Special Proceeding” it must clearly show in the statute that either the civil rules do not apply to all such proceedings or it has special rules that conflict with the civil rules so that it is clear that they do not apply. If it is silent on the issue the civil rules apply. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005). As they said in *Defense Fund* case, “When a statute is silent on a particular issue, the civil rules govern the procedure. *King County Water Dist. v. City of Renton*, 88 Wash.App. 214, 227, 944 P.2d 1067 (1997).” Id.

A close look at RCW 26.50 et seq. seems to indicate that it is not a special proceeding since there are no specific rules that in fact make a deposition inappropriate in such actions; as in, for example the case of RCW 71.09 for mental health matters. See e.g. *In re Detention of Meints*, 123 Wn.App. 99, 96 P.3d 1004 (2004). Additionally, there are no special service requirements in RCW 26.50 that conflict with the court rules other than the time limit for having the hearing, which in and of itself does not conflict with the taking of a deposition. More importantly the statute itself would seem to indicate that the

civil rules have to apply since a RCW 26.50 action can be consolidated with actions governed by RCW 26.09. RCW 26.50.025. It therefore would be inconsistent with this statute's application to suggest that it is not governed by civil court rules since this portion of the DV statute alone clearly indicates that the civil rules must apply to these cases. The reason for this is that RCW 26.09 clearly is a "civil lawsuit" in which the civil rules apply. For example it states at RCW 26.09.010 that, "Except as otherwise specifically provided herein, the practice in civil action shall govern all proceedings under this chapter, except that trial by jury is dispensed with." It would be superfluous to have RCW 26.50.025 applied as a Special Proceeding under CR 81 when it can be consolidated with another matter in which the civil rules clearly apply. The conflict between whether the civil rules apply or not in such consolidated matters would create havoc with any domestic matter where they were joined.

The civil rules clearly seem to apply to these actions pursuant to CR 1, 2 & 81. Unfortunately Judge Plese seemed to primarily base her ruling to not allow the deposition and/or continuance based on a misapplication of both the statutes and court rules, making her decision a potential abuse of discretion. As the court said in the case of *Rossmiller v. Rossmiller*, 112 Wn.App. 304, 48 P.3d 377 (2002), "Generally, we review a trial court's decisions related to a parenting plan for abuse of discretion. *In re Marriage of Littlefield*, 133 Wash.2d 39, 46, 940 P.2d 1362 (1997). 'A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.' *Littlefield*, 133 Wash.2d at 46-47, 940 P.2d 1362." At page 309. More specifically, the failure to properly apply a court rule properly is considered an abuse of discretion. See e.g. *Combs v. Combs* 105 Wn.App. 168, 19 P.3d 469 (2001). As they said in *Combs*,

quoting Littlefield, "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." Id. page 173. It is considered an untenable ground if the Judge misapplies or does not apply a court rule or statute properly. Id.

Here, the court's denial of a continuance and proceeding to the final hearing was appears to be an abuse of discretion since it was primarily based on a mistaken notion that RCW 26.50 actions do not allow for depositions, when in fact that is a inappropriate application of the statute and court rules. This was compounded by the fact that the judge misinterpreted the lower court rules in her decision making her denial of the continuance and discretion lay on untenable grounds.

C. The court should not have condoned the Petitioner's obvious and intentional disobedience of a properly served Subpeona for her deposition by denying the Respondent's request for a short continuance to complete her deposition.

The Petitioner admitted that she was served with a notice of deposition from the Respondent's counsel but did not attend that deposition. RP 11 lines 7-10. Case law on this subject of what to do when faced with disobedience of a properly served deposition or discovery notice, and subsequent disobedience by the person from whom discovery is sought, suggests that it is error for a judge to disregard such disobedience and proceed to trial or hearing. The case of *Lampard v. Roth*, 38 Wn.App. 198, 684 P.2d 1353 (1984), which has been sighted by recent courts as proper law, indicates that it is an abuse of discretion to allow testimony or a proceeding in which an offending discovery party is

giving testimony, if the failure to provide discovery is either intentional or an apparent tactical nondisclosure, and that the remedy is a “new trial”. They said,

No reason was given for failure to respond and to supplement the interrogatories, or failure to comply with the order compelling discovery. We are forced to conclude that these actions and omissions constitute a willful failure to comply with the discovery rules. *Anderson v. Mohundro*, 24 Wash.App. 569, 574, 604 P.2d 181 (1979) (violation of an explicit court order without reasonable excuse must be deemed willful). CR 37(b)(2) lists potential sanctions for failure to comply with a court order. The choice of specific sanctions for violation of a discovery order is within the trial court's discretion, *Associated Mortgage Investors v. G. P. Kent Constr. Co.*, 15 Wash.App. 223, 229, 548 P.2d 558 (1976), but this discretion is not limitless. The court should exclude testimony if there is a showing of intentional or tactical nondisclosure. See *Barci v. Intalco Aluminum Corp.*, 11 Wash.App. 342, 351, 522 P.2d 1159 (1974). The trial court abused its discretion in failing to exclude the testimony of witnesses who were not disclosed prior to trial. *Scott & Fetzer Co. v. Dile*, supra at 675. Roth is entitled to a new trial. (Emphasis added).

In this case, Ms. Scheib gave no reason for failing to appear for the deposition except that she had to baby-sit her little brother, therefore it can only be concluded that it was either intentional or done with a tactical purpose to keep the Respondent off balance or unprepared. See RP 11. This had a devastating affect on the Respondent in that he was not prepared with all his witnesses that could have been brought forth regarding their home life and what went on between them to cause their breakup. See transcript generally, and RP 4-10. For example, much of the Petitioner's testimony and Petition focused on what had occurred while living in the Respondent's parents home, with them obviously being around to see if what she said was true or not true. Had the Respondent had the opportunity to find out the basis or foundation of Petitioner's allegations prior to trial and what she was going to testify about, he could have subpoenaed his parents and/or neighbors to attest to an opposite perception. Further, one of the primary issues

surrounded the STC incident was that the Petitioner allegedly was told a number of times to leave but apparently did not. With this being outlined in a deposition the Respondent could have sought out witnesses at the bus station that day, and/or again, his mother to testify about the Petitioner's emotional state to shed light on whether she felt threatened or not at the time of the alleged "stocking". All in all, the Respondent feels that the judge abused her discretion by failing to do something fair as it related to the Petitioner's obvious disobedience of a properly served Notice of Deposition. At the very least the court should not have allowed the Petitioner to testify after she willfully failed to appear for her deposition instead of proceeding forward without allowing a continuance. *See e.g. Hyundai Motor America v. Magana, 141 Wn.App. 495, 170 P.3d 1165 (2007)*

D. The Respondent's due process was violated by being forced to go to final hearing without completion of proper discovery.

"Where a willful noncompliance with discovery substantially prejudices the opponent's ability to prepare for trial, the exclusion of evidence is not an abuse of discretion. *Lampard v. Roth, supra; Associated Mortgage Investors v. Kent Constr. Co., Inc., 15 Wash.App. 223, 228-29, 548 P.2d 558, review denied, 87 Wash.2d 1006 (1976).*" *Hampson v. Ramer, 47 Wn.App. 806, 737 P.2d 298 (1987); see also Rhinehart v. Seattle Times Co., 51 Wn.App. 561, 754 P.2d 1243 (1988)*

In this case the Respondent was severely prejudiced because not only did the Petitioner not provide information and discovery before trial as was the purpose of the deposition, she then reneged on an agreement to continue the case after she intentionally failed to appear for the duly served deposition. All in all, the Respondent's due process rights were violated and he was prejudiced thereby. He had to provide testimony in a

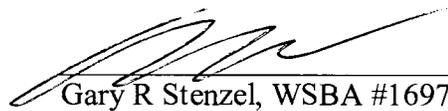
exparte hearing that was totally unprepared, and was not able to see what relatives and/or neighbors that should come to the hearing to also testify to rebut the Petitioner's allegations. This was even more egregious when the facts of the case show that the Respondent's family members had peculiar knowledge of what went on in their own home, and what the Respondent and Petitioner's relationship was like. The results were a forgone conclusion, and that was to enter a year long restraint against the prospective father of the Petitioner's unborn child.

IV. Conclusion

After living with the Respondent and his parents for a number of years, and having been intimate with the Respondent and becoming pregnant with Respondent's alleged child, the Petitioner moved out of this home and filed a Petition for a Domestic Violence restraining order. This Petition was first in Spokane District Court, and then was moved to Superior Court to allow the Petitioner a pro bono attorney to help with her deposition. Unfortunately the Petitioner intentionally failed to appear for her deposition and the matter went to trial/hearing with the Respondent requesting a continuance to make sure she was deposed before trial, and because of the Petitioner's intentional disobedience of a lawful Notice of Deposition. Although the Superior Court Judge tried to explain the court rules and her interpretation and application of those rules, it was incorrect. She denied the Respondent's request to continue the DV hearing even though he was not at fault in the failure to complete the Petitioner's deposition. The judge also seemed to primarily base her ruling on an analysis that misinterpreted the court rules and statutes, denying the requests to complete the deposition and favoring the Petitioner who simply blew off the deposition notice for a baby-sitting job for her mother. Mr. Crosby

had to go to hearing unprepared and an order was issued. The decision to not allow the deposition and the continuance in the face of the Petitioner's clear defiance of the notice of deposition should not be condoned; the appeals court should remand this case so that the Respondent can take the deposition of the Petitioner and seek to properly present evidence and witnesses to refute her allegations in this case.

Respectfully submitted this 9th day of August 2010



Gary R Stenzel, WSBA #16974

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COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In Re:

KOURTNEY F. SCHEIB,
Petitioner,

and

CHRISTOPHER M. CROSBY,
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Supreme Court No. 278301

**Spokane County Superior Court
No: 09-2-05516-0**

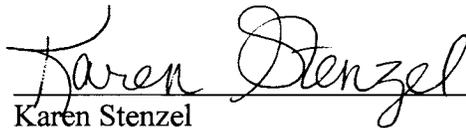
DECLARATION OF MAILING

I, Karen Stenzel, being first duly sworn upon oath deposes and says:

That she is now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of eighteen years; that on the 9th day of August, 2010, affiant caused to be enclosed in an envelope a copy of the Opening Brief of Appellant, addressed to: Robert Seines P.O. Box 313 Liberty Lake, WA 99019

Said address being the last known address of the above-named individual, and on said date caused to be deposited the same so addressed with postage prepaid in the United States Post Office in the City and County of Spokane, State of Washington.

I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.



Karen Stenzel

**Declaration of Mailing
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