

FILED

AUG 02 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 287904

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROBERT ALDERSON AND JOANNE ALDERSON, individually and as
the marital community composed thereof,

Appellants,

v.

R. CRANE BERGDAHL AND JANE DOE BERGDAHL, individually
and the marital community comprised thereof,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondents' cross-appeal the trial court's denial of their motion to exclude plaintiffs' expert witnesses. Respondents' motion to exclude was made on the basis that: 1) Plaintiffs' had not identified the expert opinions submitted in opposition to summary judgment in response to previous written discovery propounded by respondents; and 2) the experts are unqualified to render the opinions proffered.

The trial court did not err in denying respondents' motion to exclude. The case at issue was not subject to a case schedule order requiring disclosure of expert witnesses; respondents filed their summary judgment motion early in the proceedings when no trial date had been set, and without any advance notice to plaintiffs; and at the time that plaintiffs responded to initial written discovery, Mr. Bergdahl's deposition had not yet been taken.

Furthermore, respondents are incorrect in their assertion that plaintiffs' experts lack the competence to render opinions on the subject matter at issue. The trial court did not abuse its discretion in admitting the opinions of the experts into the evidence.

Respondents also assert that plaintiffs' response to the summary judgment was served late, which is incorrect. Plaintiffs' summary judgment response and all supporting documentation were timely served under the

rules of civil procedure. Respondents never made this argument to the trial court and raise it for the first time on appeal.

II. ARGUMENT

A. **The trial court did not err by denying Respondents Motion to strike the declarations of Appellants' expert witnesses submitted in response to Respondents' summary judgment motion based on the assertion that the expert opinions were not disclosed in response to initial written discovery.**

Respondents assert that the trial court committed reversible error for not excluding the declarations of plaintiffs' experts submitted in opposition to respondents' summary judgment motion.

In July 2009, plaintiffs responded to defendant's initial written discovery requests and indicated that they had consulted with experts but had not yet made final decisions on experts. (CP 1178 – 1182). Nor did the experts have any final opinions at that time, since Mr. Bergdahl's deposition had not yet been taken. (CP 1178 – 1182). Plaintiffs had requested that Mr. Bergdahl's deposition be taken, before the discovery requests were due, however, defense counsel insisted that the Aldersons' deposition be taken before Mr. Bergdahl's and that the same be done in Seattle with Mr. Bergdahl in attendance. (CP 1178 – 1182).

The Aldersons' depositions were taken on August 20, 2009 and Mr. Bergdahl's deposition was taken the following day on August 21,

2009. (CP 1178 – 1182).

The deposition transcript of Crane Bergdahl was received by plaintiffs' attorney on September 4, 2009. Thereafter, plaintiffs scheduled a conference with Professor John Strait to ascertain whether a basis existed for the filing additional claims against arising out of a conflict of interest theory. The first time that plaintiffs' counsel could meet with Professor Strait was on Wednesday, September 30, 2009. That meeting did occur. Materials, including the deposition of Mr. Bergdahl, were presented to Professor Strait at this meeting. (CP 1178 – 1182).

Professor Strait indicated that he would be out of the office and otherwise unavailable for approximately another three to four weeks. Thereafter, on Thursday, November 5, 2009, plaintiffs' counsel had a conversation with Professor Strait who verbally indicated that there was a sufficient basis to file an amended complaint. At this point in time Professor Strait had not reduced all of his opinions to written form. (CP 1178 – 1182).

On November 9, 2005, plaintiffs filed their Motion to Amend the Complaint to include the claims that Professor Strait had indicated were viable. (CP 1178 – 1182).

Plaintiffs' Motion to Amend the Complaint was heard

telephonically by Judge Acey on November 19, 2009. Plaintiffs' counsel received the signed Order from the court on the following week allowing the amendment of the complaint. (CP 1178 – 1182).

Less than two weeks later, On December 6, 2009, Mr. Bergdahl filed his motion for summary judgment. At the time that Mr. Bergdahl's counsel filed his motion for summary judgment, plaintiffs' counsel had not received any written report from Professor Strait, or Mr. Robinson. (CP 1178 – 1182).

This case was not subject to any case scheduling order requiring disclosure of expert opinions, nor had it been noted for trial at the time that Mr. Bergdahl filed his motion for summary judgment. The parties were still in the discovery phase at the time respondent filed his summary judgment motion. (CP 1178 – 1182).

After receipt of Respondents' summary judgment motion, plaintiffs' counsel provided the motion to its expert witnesses, Professor Strait and Mr. Robinson, so they could assess the allegations made and determine whether or not a basis existed to defend the motion based upon the briefing provided by Mr. Bergdahl. (CP 1178 – 1182).

Respondent cites no authority to support the proposition that plaintiffs' expert should be excluded because their opinions were not

disclosed in initial written discovery. It would have been impractical, if not impossible, to disclose finalized opinions at such time given that discovery was ongoing and Mr. Bergdahl's deposition hadn't yet been taken.

The law is inapposite to respondents' proposition that the trial court erred in striking the declarations of plaintiffs' experts.

Disqualification is the most extreme sanction available. The court in *In Re: Firestorm*, 129 Wn. 2d 130, 142 – 143, 916 P.2d 411 (1996) held that disqualification in matters governed by CR 26(5)(b) – “Discovery of facts known and opinions held by experts - is an extreme sanction and should only be used when any other lesser sanction would be inadequate.

In *Burnett v. Spokane Ambulance Co.*, 131 Wn.2d 484, 933 P.2d 1036 (1997), the Supreme Court analyzed the standards necessary to exclude an expert witness. In that case, the Supreme Court found that the trial court had abused its discretion in excluding expert witness testimony.

In *Burnett*, there was actually a CR 26 discovery order in place. In this case, no such order existed. The court found that it was an abuse of discretion for the trial court to exclude expert testimony without first considering on the record the imposition of less severe sanctions:

When "a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure

as are just[.]" CR 37(b)(2). Among the sanctions available for violations of this rule is "[a]n order refusing to allow the disobedient party to support ... designated claims ... or prohibiting him from introducing designated matters in evidence[.]" CR 37(b)(2)(B).

This rule is consistent with the general proposition that a trial court has broad discretion as to the choice of sanctions for violation of a discovery order. *Phillips v. Richmond*, 59 Wash.2d 571, 369 P.2d 299 (1962). Such a "discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 229, 548 P.2d 558, review denied, 87 Wash.2d 1006 (1976). Those reasons should, typically, be clearly stated on the record so that meaningful review can be had on appeal. When the trial court "chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. *Snedigar v. Hodderson*, 53 Wash.App. 476, 487, 768 P.2d 1 (1989) (citing to due process considerations [933 P.2d 1041] outlined in *Associated Mortgage*), rev'd in part, 114 Wash.2d 153, 786 P.2d 781 (1990). We have also said that " 'it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.' " *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wash.2d 693, 706, 732 P.2d 974 (1987) (quoting *Smith v. Sturm, Ruger & Co.*, 39 Wash.App., 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, review denied, 103 Wash.2d 1041 (1985)).

The Burnets assert that they did not willfully violate the court's discovery order. Thus, they rely on *Hutchinson* to support their argument that the trial court erred in entering an order prohibiting discovery on their corporate negligence claim and excluding that issue from the case.

Sacred Heart responds that the Burnets willfully violated the discovery order because they were "without reasonable excuse." *Allied Fin. Servs., Inc. v. Mangum*, 72 Wash.App. 164, 168, 864 P.2d 1 (1993), 72 Wash.App. 164, 871 P.2d 1075 (1994). The Court of Appeals apparently

agreed with Sacred Heart, concluding the Burnets' explanation that their "experts could shed no light on whether a viable credentialing claim existed without access to the file which [Sacred Heart] steadfastly refused to provide, first as a matter of confidentiality and later as a matter of immunity," was not a reasonable excuse for the Burnets' failure to specifically describe the contents of their experts' opinions as required by discovery scheduling order. Burnet, slip op. at 11. Sacred Heart also attacks the Burnets' reliance upon Hutchinson, asserting that the Burnets ignore[] the more recent decision in Physicians Insurance Exchange v. Fisons Corp. In the context of a violation of discovery rules, the court held that

... intent need not be shown Before sanctions are mandated.

Rather, the court held:

The wrongdoer's lack of intent to violate the rules ... may be considered by the trial court in fashioning sanctions.

Answer to Pet. for Review at 16 (citations omitted).

In emphasizing the above-quoted portions of the Fisons' opinion, Sacred Heart overlooks or de-emphasizes the underlying principles enunciated therein. See *Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054 (1993). Some of those guiding principles are as follows: the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery; the purpose of sanctions generally are to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong. Fisons, 122 Wash.2d at 355-56, 858 P.2d 1054.

Sacred Heart also cites two post-Fisons decisions in which the Courts of Appeals upheld the respective trial courts' imposition of sanctions for what were considered to be "willful" violations of discovery rules. In one of the cases, *Allied Fin. Servs. v. Mangum*, 72 Wash.App. 164, 168, 864 P.2d 1 (1993), 72 Wash.App. 164, 871 P.2d 1075 (1994), the trial court excluded witnesses for the defendants because they could not provide an explanation for failing, up to the time of trial, to name any of their witnesses. In the other case, *Dempere v. Nelson*, 76 Wash.App. 403, 405, 886 P.2d 219 (1994), review denied, 126 Wash.2d 1015, 894 P.2d 565

(1995), the trial court excluded a witness that the party identified only 13 days before trial.

We note, initially, that the sanction that was imposed in this case is significantly more severe than the sanctions imposed in either *Allied* or *Dempere*. Here, the trial court not only limited the Burnets' discovery on the credentialing issue, but it also removed that issue from the case. Furthermore, the circumstances of this case are far different than those which the Court of Appeals faced in the two above-cited cases. One major difference is that although several years had transpired from the initiation of the Burnets' claim until their expert witnesses were named, deposed, and their opinions were clearly identified, a significant amount of time yet remained before trial. That being the case, *Sacred Heart* [933 P.2d 1042] could not be said to have been as greatly prejudiced as the non-wrongdoing parties in *Allied* and *Dempere*, who engaged in the sanctionable conduct on the eve of trial.^[4] In addition, unlike the situation in *Allied* and *Dempere*, the record here reveals that some of the delay in completing discovery was due to what can only be described as bickering between counsel for the opposing parties. While some of the responsibility for this unfriendly atmosphere can be attributed to the Burnets' counsel, we are satisfied, after reviewing the voluminous record, that *Sacred Heart's* counsel bears a portion of the responsibility for the acrimonious spirit that developed, and which had the effect of delaying the identification and refinement of the issues before the court.

More importantly, though, we agree with the Burnets that its negligent credentialing claim against *Sacred Heart*, and discovery relating to it, should not have been excluded absent a trial court's finding that the Burnets willfully violated a discovery order. In that regard, we rely upon *Hutchinson* and note that there was no finding by the trial court of willful violation on the part of the Burnets. Indeed, the record would not support such a finding.

In any case, we are satisfied that it was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony on the credentialing issue without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of discovery and yet compensated *Sacred Heart* for the effects of the Burnets' discovery failings.^[5] See *Fisons*, 122 Wash.2d at 355-56, 858 P.2d 1054. Furthermore, even if the trial court had considered other options before imposing the sanction that it did, we

would be forced to conclude that the sanction imposed in this case was too severe in light of the length of time to trial, the undisputedly severe injury to Tristen, and the absence of a finding that the Burnets willfully disregarded an order of the trial court. See *Lane v. Brown & Haley*, 81 Wash.App. 102, 106, 912 P.2d 1040 ("[T]he law favors resolution of cases on their merits."), review denied, 129 Wash.2d 1028, 922 P.2d 98 (1996).

Here, disqualification is not only inappropriate, but any other lesser sanction the would have been as well, as there was no violation of any discovery order; no violation of any court scheduling order requiring disclosure of experts and/or their opinions; and the case was still in the discovery phase had not been noted for trial and when respondents moved for summary judgment.

Respondents' argument presupposes that the law requires a plaintiff to divine what a defendant will argue in a summary judgment motion before the motion is made, or be foreclosed from offering responsive expert declarations to the issues raised in a summary judgment motion filed during the pendency of discovery. There is no authority to support such a proposition.

B. The trial court did not err by denying Respondents Motion to strike the declarations of Appellants' expert witnesses based on the assertion that plaintiffs' experts were not competent to testify

It is uncontested that the declarations of plaintiffs' expert are in the record and were not stricken by the trial court. Respondents argue that the trial court erred in not striking plaintiffs' experts offer lack of competency as

an ostensible basis for this argument. Respondents concede that “The competency of an expert to testify is to be judged by the trial court, and its determination will not be set aside in the absence of a showing of abuse of discretion. Citing *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989). (See Opening Brief of Respondents/Cross Appellants, P. 12 - 13).

Respondents offer no argument, nor do they cite to the record or otherwise offer any authority to show how the trial court abused its discretion in failing to find that plaintiffs’ experts lack the competency to render their opinions. Respondents merely offer the conclusory statement that “this court should not consider Strait and Robinson’s declarations under any circumstances.”

C. Respondents contention that plaintiffs’ responsive pleadings to the summary judgment were served late is incorrect, and should not be considered as Respondent never asserted this argument to the trial court.

The summary judgment motion at issue was noted for and heard on January 6, 2010. (CP 883-884). CR 56(c) provides that a party resisting summary judgment may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing.

CR 6(a) governs the computation of time and states in relevant part:

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050.

The 11th day before the summary judgment, the last day to file the response under CR 56(c) was December 26, 2009, which happened to fall on a Saturday. Consequently, under the mandates of CR 6(a), plaintiffs' responsive papers were due the next day that did not fall on a Saturday, Sunday or legal holiday. In this case, that day was Monday December 28, 2010. Respondents counsel, William Cameron, was served with plaintiffs' responsive papers on Monday December 28, 2009, within the time frame prescribed by CR 56(c) and CR (6).

Respondents never made any argument in their summary judgment reply briefing that plaintiffs' paperwork was served late, presumably because it was served timely. (CP 1159-1177). Arguments made for the first time on appeal are generally not reviewed unless they relate to errors based upon: 1) lack of trial court jurisdiction; 2) failure to establish facts upon which relief can be granted; and 3) manifest error affecting a

constitutional right. RAP 2.5. No such basis exists with regard to this issue.

D. Respondents' contention that appellants are basing their argument on the "infallibility of hindsight" "speculation" and the appropriate "tactical decisions" of Mr. Bergdahl are not persuasive.

Respondents argue on appeal that Mr. Bergdahl had no duty to check the legal descriptions on the bids submitted, yet Mr. Bergdahl admits in his deposition that the standard of care required him to check the legal descriptions. (CP 945; P 68; Lines 11-13). Furthermore, Mr. Robinson has opined that it was a breach of the standard of care for Mr. Bergdahl to include the Grandma Jesse property in the bids he prepared for his other client, Frank Tiegs. (CP 1091 – 1095).

It is somewhat hard to fathom the logic that an attorney handling the closing of a real estate transaction doesn't have a duty to draft transfer documents consistent with his clients wishes not to sell a parcel of property they don't intend to sell, to another client of the attorney, who the attorney is also representing as the potential buyer in same transaction.

Respondent argues that since Mr. Bergdahl caught his mistake he should have been exonerated by Judge Vanderschoor. However, the bidding had been closed and Peterson had exercised his right of first refusal when Mr. Bergdahl discovered that the Grandma Jesse property

had been erroneously included in the legal description of at least five successive binding bids that Mr. Bergdahl submitted on behalf of Mr. Tiegs during the bidding process. Yet, under respondents theory, the contention is that Judge Vanderschoor erred as a matter of law by refusing to go back and reopen a binding bidding process to fix a mistake made by Mr. Bergdahl many months after the bidding had closed, and Peterson's right of first refusal was exercised.

The foregoing doesn't involve holding an attorney to some standard of "infallibility of hindsight." The simple proposition is that an attorney is negligent when he fails to check legal descriptions on transfer documents that transfer property his clients didn't intend be transferred.

Nor do these facts exonerate Mr. Bergdahl on the basis that there was some sort of tactical decision that resulted in a bad outcome. There is no question that there was a mistake. There was no tactical advantage to be gained by the Aldersons at any point in time, from the erroneous inclusion of the Grandma Jesse property in the bids Mr. Bergdahl submitted on behalf of Mr. Tiegs.

Furthermore, the claims of the Aldersons are not speculative. Even under Respondents' theory, the Aldersons wouldn't have been deprived of their interest in the Grandma Jesse property had Mr. Bergdahl not

erroneously included the legal description in the bids he prepared on behalf of his other client, Mr. Tiegs.

The evidence in this matter supports only one of two possibilities:

1) Judge Vanderschoor awarded the property to Mr. Peterson because, under the binding bid process, a number of bids prepared by Mr. Bergdahl erroneously included the legal description for the Grandma Jesse property; or 2) Mr. Bergdahl misinterpreted the ruling made by Judge Vanderschoor with regard to the property going the way the “sale document” states.

E. Mr. Bergdahl did have a conflict of interest and his statement that he wasn't representing Mr. Tiegs in submitting bids is in contravention of the factual record.

Respondents argue that Mr. Bergdahl didn't have any conflict of interest because Judge Vanderschoor was the actual seller of the property. Judge Vanderschoor was not the seller of the farm property, and the court certainly wasn't the owner of the Grandma Jesse parcel. Judge Vanderschoor simply ordered the farm property sold pursuant to a procedure he devised in the farm dissolution action.

The terms of the bids, including the legal descriptions, weren't prepared by Judge Vanderschoor, rather, they were prepared by Mr. Bergdahl, who was representing the interests of his clients, the Aldersons, while also submitting bids on behalf of Mr. Tiegs as a potential purchaser

in the same transaction. The interests of the Aldersons and Tiegs could not be more opposite.

Even accepting, without conceding, respondents argument that the conflict was waivable, there was no valid waiver. The authority cited by Respondents states:

Only likely conflicts may be waived after full disclosure; actual conflicts are not waivable. Full disclosure requires the lawyer to explain to the client the potential adverse impact of the multiple representation, advise the client to seek independent legal advice about whether consent should be given, and contemporaneously to confirm the disclosure in writing.

Mr. Bergdahl did not make full disclosure, nor did he obtain informed consent (CP 947).

Instead Mr. Bergdahl represented the Aldersons' interests as sellers of the property, while at the same time drafting the bids on behalf of his long time client, Mr. Tiegs to purchase the property. (CP 44; Page 63, Lines 9-25; Page 64, Lines 1-3).

Mr. Bergdahl made a motion to have Mr. Tiegs confirmed as the high bidder and eliminate any further bidding (CP 944; Page 61). This action was in direct conflict with the Aldersons interest that the bidding continue so as to raise the purchase price of their interest, yet it was in the interest of Mr. Tiegs to get the property without upping his bid. This event

alone can only represent an actual conflict as the interests of Mr. Tiegs and the Aldersons were directly opposite.

It was in Tiegs interest, not the Alderson's, to defeat Peterson's right of first refusal, yet the Alderson's paid for the challenge to Tiegs mounted to defeat Peterson's right of first refusal. (CP 1142-1144).

The foregoing can only be classified as actual conflicts. The authority cited by respondents states:

An actual conflict of interest exists when the lawyer has a duty to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client."

Mr. Bergdahl had a duty to contend for the highest price on behalf of the Aldersons. Yet at the same time, he undertook a duty to oppose further bidding on behalf of his other client Frank Tiegs to ensure that Mr. Tiegs paid as little for the property as possible.

Respondents haven't shown that Mr. Bergdahl didn't have an actual conflict of interest, and even if the conflict was waivable, Mr. Bergdahl did not make full disclosure confirmed in writing as required by the authority cited by Respondents.

III. CONCLUSION

Respondents cross appeal contending that it was reversible error to deny the motion to strike plaintiffs experts is unfounded. The law doesn't

require a party opposing a summary judgment to make prior disclosure of expert opinions that will be submitted in opposition to that motion, when there is no court order requiring the same; where the motion was noted during the pendency of discovery without a trial date having been set and where such an action would be an extreme sanction, requiring the court to conduct an analysis on the record of less severe sanctions, which didn't occur.

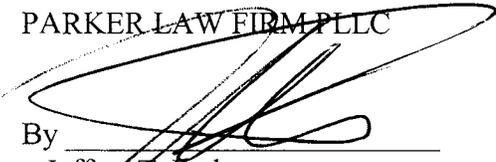
Respondents also haven't refuted why the court erred in dismissing plaintiffs negligence cause of action, where there is ample evidence giving rise to a question of fact that respondents breached the standard of care by either making a mistake in not reviewing the legal descriptions of the bids submitted, or in misinterpreting the underlying trial courts order.

Finally, respondent doesn't justify how his representation of both Tiegs and the Aldersons on opposite sides of the same transaction doesn't constitute an actual conflict of interest. The assertion that Judge Vanderschoor was the actual seller of the property is not supportable under any legal or factual framework. It was err for the court to dismiss plaintiffs claims arising out of Mr. Bergdahl's conflict of interest.

DATED this 29th day of July, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury of the laws of the State of Washington that a true and correct copy of the foregoing Appellants Reply Brief was sent for service via legal messenger, this 30th day of July, 2010 to:

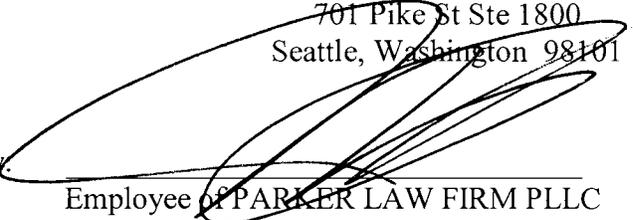
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