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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 29205-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

RAYMOND DUSHEY and THE MARITAL COMMUNITY
OF MRS. and RAYMOND DUSHEY,

Appellants,

vs.

FIDELITY NATIONAL TITLE GROUP,

Respondent.

BRIEF OF APPELLANTS DUSHEY IN REPLY

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A review of the "Brief of Respondent" FIDELITY NATIONAL TITLE GROUP," incorrectly identified by respondent therein as "Transnation Title Insurance," establishes that, for the most part, the respondent FIDELITY has neglected to address or respond to the precise issues raised by appellants, RAYMOND DUSHEY and THE MARITAL COMMUNITY OF MRS. and RAYMOND DUSHEY, in terms of the proper application of CR 37, CR 56(c) and CR 59 as set forth in their opening "Brief of Appellants." This appears to be nothing short of an attempt by FIDELITY to avoid, confuse and distort the controlling legal questions presented by appellants on this appeal. To the extent they can accurately discern those issues which FIDELITY has chosen to address and respond to in its brief, appellants DUSHEY submit the following argument in reply.

A. ARGUMENT IN REPLY

1. Appellants' issues nos. 1 and 2. On pages

22 through 32 of its responsive brief FIDELITY appears to address issue no. 1 of the issues pertaining to appellants' assignments of error set forth in their opening brief. That issue concerns the question whether the superior court abused its discretion, by failing to properly apply and follow the governing law and criteria associated with the imposition of sanctions under Rule 37 the Washington Civil Rules for Superior Court [CR], when striking from consideration the declarations of plaintiffs' expert witnesses, John Montgomery and Robert G. Floberg, which had been offered along with other evidence in opposition to defendant's motion for summary judgment.

On the other hand, respondent FIDELITY has apparently chosen not to address appellants' issue no. 2. That issue involves the question whether the superior court further abused its discretion when striking plaintiffs' responsive "motion and memorandum," and exhibits attached thereto [CP 295-307], which challenged the exclusion of the expert witnesses of plaintiff, John Montgomery and Robert G. Floberg, and their declarations in

opposition to summary judgement. Such failure to respond should be considered a concession on FIDELITY's part as to the merits of issue no. 2. See generally, State v. Ward, 125 Wn.App. 128, 144, 104 P.3d 61 (2005).

a. Issue no. 1. Concerning issue no. 1, the precise facts and circumstance need to be taken into account even though the respondent may choose to ignore them. As previously outlined in appellants' opening brief, the respondent FIDELITY filed a motion to strike the declarations of certain expert witnesses of the plaintiffs, John Montgomery and Robert G. Floberg, in connection with plaintiffs' response and opposition to its January 14, 2010, motion for summary judgment [CP 40, 41-53], along with plaintiffs' "motion and memorandum re: exclusion of expert witnesses." [CP 844-46]. The scheduling order entered on April 10, 2009, required that the plaintiffs disclose and identify their lay and expert witness no later than August 10, 2009. [CP 9, 855].

As acknowledged before by appellants DUSHEY, they failed to disclose these witnesses until they

were faced with the subject motion for summary judgment. [CP 844]. However, the surrounding facts should have been taken into account by the trial court, which serve to either ameliorate plaintiffs' failure to earlier identify these experts only warrants a lesser sanction under CR 37 than was imposed by the trial court in this case. The exclusion of witnesses was overly severe and excessive in light of the operative facts. See, Magana v. Hyundai Motor America, 167 Wn.2d 570, 582, 220 P.3d 191 (2009). Those facts gleaned from the record can once more be summarized as follows, and were in fact brought to the attention of the trial court in "motion and memorandum re: exclusion of expert witnesses" [CP 295-301], as well as during the hearing held on February 23, 2010. [RP 25, 27-29, 40]. Curiously enough, the respondent chooses to simply gloss over these facts in its responsive argument, rather than challenge them head on.

During the time period when expert witnesses who could be expected to testify at trial were to be retained, identified and later disclosed by the

parties, plaintiff and defendants had been involved in continuing negotiations for the purpose of settlement. [RP 25, 28; CP 295-97]. Because counsel for plaintiffs fully expected and believed that such pre-trial settlement was eminent, and since his client had very limited assets to employ in this litigation due to his wife's failure to keep the mortgage payment current on the subject property, counsel initially decided not to retain any trial experts especially since the defendant's liability could arguably be established by way of its per se violation of RCW 64.08.050, and the related legal holding in Meyer v. Meyer, 81 Wn.2d 533, 503 P.2d 59 (1972). [RP 25, 28; CP 295-97].

Eventually, however, the well-meaning settlement negotiations of parties failed, which ultimately resulted in FIDELITY's filing of its summary judgment motion on January 14, 2010. [RP 25, 28; CP 295-97, 40, 40, 41-53]. Towards the end of these settlement discussions, plaintiffs DUSHEYS' counsel determined that, if this matter were to proceed to trial, expert witnesses in

handwriting and negligence would be necessary in establishing plaintiff's claims against the defendants. [CP 296-97]. Unfortunately, by this time, the date for disclosure of expert witnesses under the existing scheduling order had already run. [CP 9].

In order to either eliminate or, at the very least, minimized any arguable prejudice to defendants, plaintiffs DUSHEY filed a designation of expert witnesses on February 5, and a supplement to the same on February 12, 2009, as contemplated and required under the provisions of CR 26(e)(1)(B). [CP 276]. In this regard, local attorney, John Montgomery, had been tentatively retained as a negligence expert on December 20, 2009. [CP 276, 297]. In turn, Robert G. Floberg was retained by plaintiff as a handwriting expert on February 11, which occurred the day prior to plaintiff's supplemental disclosure of experts. [CP 276, 297].

In addition to identifying these expert witnesses expected to testify at trial, plaintiffs did on at least five [5] occasions attempt to

accommodate defendant FIDELITY in terms of its discovery of these witnesses by offering to make them available to FIDELITY for deposition or otherwise. [RP 20, 22, 27-29, 40; CP 297, 302-07]. In fact, twice plaintiffs offered to fly Mr. Floberg from Seattle at their own expense and to pay the full cost associated with these depositions. [RP 20, 22, 27-29, 40; CP 297, 302-07]. This effort to accommodate was later ignored by the superior court when faced with reaching its decision on March 1, 2010, to impose sanctions under CR 37 against the plaintiffs DUSHEY.

By the same measure, the defendant FIDELITY simply refused to consider and respond to the proposed accommodations of the plaintiffs and, instead, took the disingenuous position that nothing short of exclusion of the testimonies of Messrs. Montgomery and Floberg was the only appropriate sanction under CR 37. [RP 17-18; CP 297, 302-07, 844-46]. On March 1, 2010, the superior court granted the respondent's motion to strike the testimonies of plaintiff's witnesses, while at the same time granting FIDELITY'S motion

for summary judgment. [CP 854-66].

The single purpose or rationale behind imposing sanctions under CR 37 is to deter and educate the offending party rather than to punish. Magana, at 582. If a trial court imposes one of the more "harsher remedies" under CR 37(b), such as exclusion of evidence or witness testimony, the record must clearly reflect (a) the party to be sanctioned wilfully or deliberately violated the discovery, (b) the opposing party was substantially prejudiced in its ability to prepare for trial, and (c) the trial court explicitly considered whether a lesser sanction would suffice under the circumstances. Magana, at 582-92; Burnet v. Spok. Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); Wash. State Physicians Ins. Exch. & Assn. v. Fisons Corp., 122 Wn.2d 299, 356, 858 P.2d 1054 (1993); Casper v. Esteb Enterprises, Inc., 119 Wn.App. 759, 82 P.3d 1223 (2004).

(I). Lack of prejudice. In its argument, the respondent FIDELITY seemingly takes the untenable position that "prejudice" to the responding party is not a factor or appropriate consideration when

framing an appropriate sanction under CR 37. Simply put, such argument is groundless as evidenced by the foregoing case law. Id.

As to the criteria of prejudice, plaintiffs DUSHEY have continually maintained that any arguable prejudice which FIDELITY may have suffered, as a result of plaintiffs' failure to timely disclose their expert witnesses as contemplated by the court's scheduling order, should be placed at the feet of FIDELITY since it failed to mitigate and instead chose to flatly reject the various accommodations offered by plaintiffs' counsel in order to afford the defendants the opportunity to conduct discovery of plaintiffs' experts. In other words, the respondent's total unwillingness to agree to a remedy the situation should have been taken into account by the superior court when fashioning any sanction under CR 37. See, Fisons Corp., at 355-56. This the court did not do and, consequently, the imposition of sanctions was beyond the authority of the superior court constituting a manifest abuse of discretion. Id. On October 15,

2009, Fidelity files a proposed witness list identifying a hand writing expert. [CP 884, item numbered 32; CP 26-27]

ii. Lack of wilfulness. By the same measure, the respondent FIDELITY overlooks the lack of evidence suggesting that plaintiffs' failure to timely disclose experts was neither deliberate or wilful in nature. Once again, total exclusion of the testimonies of Messrs. Montgomery and Floberg at trial is far too harsh a penalty under the facts and circumstances showing a lack of scienter or requisite malfeasance. Magana v. Hyundai Motor America, 167 Wn.2d 570, 582-92, 220 P.3d 191 (2009).

Stated differently, there is nothing whatsoever to suggest any bad-faith, or any calculated attempt on plaintiffs' part to circumvent the discovery process. Their counsel consistently followed the mandates of the scheduling order, save the present situation, and this failure was only a result of counsel's genuine, albeit mistaken, belief that a settlement was imminent and that any retention of experts at

this perceived juncture would simply entail an unjustifiable expense to the plaintiffs, especially in light of their meager finances available to fund this litigation. Thus, the exclusion of witnesses was without the requisite factual foundation in this instance. Id.

iii. Lesser sanction. Finally, the respondent FIDELITY ignores the fact that a lesser sanction, if any, would have remedied the situation presented in this case. Again, the long-standing rule in Washington is that the superior court is required to impose the least severe sanction that will adequately serve to encourage discovery. Magana v. Hyundai Motor America, 167 Wn.2d 570, 584, 220 P.3d 191 (2009); Peluso v. Barton Auto Dealership, 138 Wn.App. 65, 155 P.3d 978 (2007); Roberson v. Perez, 123 Wn.App. 320, 96 P.3d 420, review denied, 155 Wn.2d 1002 (2004). The circumstances, as here, may well dictate that the offending party simply be warned against any future violations, and nothing more. Id. Counsel genuinely believed that settlement was eminent at the time expert witnesses were to

be disclosed under the scheduling order, and that such resolution would render any further discovery moot. See generally, Casper v. Esteb Enterprises, Inc., supra; Smith, at 327; Viereck v. Fiberboard Corp., supra; see also, Micro Enhancement International, Inc., at 439-40.

iv. Summation. In light of these considerations, respondent FIDELITY's position that the exclusion of plaintiffs' witnesses was appropriate, and did not constitute a manifest abuse of discretion is completely untenable, is not well-taken. Simply put, the superior court erred as a matter of law with respect to its total failure to follow the governing principles in framing of an appropriate sanction under CR 37 as set forth in Magana v. Hyundai Motor America, 167 Wn.2d 570, 582-92, 220 P.3d 191 (2009). [CP 844-46, 854-66]. The failure to follow such guidelines as set under Magana is a manifest abuse of discretion. See, Topliff v. Chicago Ins. Co., 130 Wn.App. 301, 122 P.3d 922, review denied, 157 Wn.2d 1018 (2006); Bar v. MacGugan, 119 Wn.App. 43, 78 P.3d 660 (2003); Stoudil v. Edwin A.

Epstein, Jr., Operating Co., 101 Wn.App. 294, 3 P.3d 764 (2001); DeYoung v. Cenex Ltd., 100 Wn.App. 885, 1 P.3d 587, review denied, 146 Wn.2d 1016 (2002). State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); see also, Pybas v. Paolino, 73 Wn.App. 393, 399, 869 P.2d 427 (1994); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990).

b. Issue no. 2. Even if FIDELITY's failure to specifically address plaintiffs' related issue no. 2 concerning the court's further decision to strike plaintiffs' "motion and memorandum re: exclusion of expert witnesses" [CP 295-301] is not considered a concession by respondent as to the merits of the issue, see, State v. Ward, 125 Wn.App. 138, 144, 104 P.3d 61 (2005); such decision once more constitutes an abuse of discretion since FIDELITY suffered no prejudice in terms of the alleged untimeliness of service and filing of said pleadings. Once again, rather than attempt to mitigate any possible prejudice, FIDELITY chose to sit on its hands and instead move to strike plaintiffs' motion in bad-faith and

for this hyper-technical reason. [CP 295-307, 844-46]. Given these circumstances, the court's grant of respondent's motion striking plaintiffs' CR 37(b) memorandum is further evidence of a manifest abuse of discretion warranting reversal by this court under RAP 12.2. Id. Additionally, Plaintiff's motion and memorandum re exclusion was filed on February 19, 2010 [CP 295] in anticipation of Fidelity's motion for exclusion that was filed on February 22, 2010. [CP 844]. The trial court struck plaintiff's motion and memorandum re exclusion representing that plaintiff's motion some how related to the Fidelity's summary judgment motion. [CP 862-863]. This was erroneous.

2. Appellants' issue no. 3. On pages 21 and 22, and 32 through 36, and 41-42 of the respondent brief, respondent FIDELITY incorrectly asserts that the appellants DUSHEY had the burden of proving negligence and it failed to do so in this case. This assertion is simply one more example that the respondent has lost track of the fact that we are not concerned with an appeal of a

judgment entered after trial. Thus, the ultimate burden of proof is not at issue. Instead, this appeal is directed towards the single question whether the grant of summary judgment was proper under the procedural considerations associated with CR 56(c). Those considerations focus upon whether the respondent FIDELITY, as moving party, did in fact establish the absence of any genuine issue of material fact and whether it was entitled to judgment as a matter of law. Id. Again, the moving party has the burden of proving a lack of any genuine issues of fact irrespective of which party would have the ultimate burden of proof if the case went to trial. Preston v. Duncan, 55 Wn.2d 678, 682, 349 P.2d 605 (1960).

Proof of negligence requires a showing of (1) a duty owed on the part of the defendant, (2) a breach thereof, (3) causation and (4) damages. Rounds v. Nellicor Puritan Bennet, Inc., 147 Wn.App. 155, 161, 194 P.3d 274 (2008). Here, once again, the superior court incorrectly concluded that elements (2) and (4) were lacking so as to warrant the grant of summary judgment to FIDELITY.

a. Element of breach of duty of care. It is axiomatic that the moving party bears the initial burden of making a prima facie showing that there are no genuine issues of matter fact in question. Id. Here, the respondent relied upon the affidavit of Marie York in its attempt to satisfy its initial burden of proof under CR 56(c). [CP 54-154]. However, a review of the affidavit itself [CP 54-56] makes clear that Ms. York did not recall this particular transaction but instead relied upon her alleged practice and procedure when having closing documents signed by the parties. [RP 33-35]. Even assuming, arguendo, that this evidence of Ms. York's alleged protocol was sufficient to shift the burden of proving a genuine issue of material fact to the plaintiffs under CR 56(e), it is equally clear that the opposing declarations of Mr. DUSHEY [CP 267-69, 287, 308-538, 539-830] and Ms. Dushey [CP 273-75] re-establish genuine issues of material fact in terms of whether Mr. DUSHEY's signatures on the closing documents was forged and, also, whether the defendant was negligent in terms of Ms. York's

misconduct under the governing provisions of law in RCW 42.44.090(3) and the related holding in Meyer v. Meyer, 81 Wn.2d 533, 503 P.2d 59 (1972). Hence, contrary to respondent's bald assertion, at pages 21 and 22 of its brief, expert testimony of a forgery and of the fact Ms. York breach her duty of care under the foregoing statute and case law was not required in this particular instance.

Conflicting assertions of fact in opposing affidavits give raise to issues involving witness credibility and the weight to be given such contradicting evidence which are beyond pale of resolution in summary judgment proceeding. Balise v. Underwood, 62 Wn.2d 195, 199-200, 381 P.2d 966 (1963); see also, Barker v. Advanced Silicon Materials, LLC., 131 Wn.App. 616, 128 P.3d 633, review denied, 158 Wn.2d 1015 (2006). In other words, the trial court may only go so far under CR 56(c) as to determine the single issue whether a genuine issue of material fact exists. Barker, at 619.

As stated before, the superior court erred when it undertook to weigh the weight and

credibility of the opposing affidavits including that of Ms. York. This the court is not permitted to do on a motion for summary judgment. Thoma v. C. J. Montag & Sons, Inc., 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Consequently, the trial court erred as a matter of law when determining that there was no genuine issue of material fact concerning the element of breach of duty of care on the part of the defendant [CP 863-65]. Id.

By the same measure, it is clear from a simple review of pages 21 and 22, and 32 through 36, that respondent FIDELITY is engaging in the same type of prohibited "weighing" of evidence as the trial court did in this case. Rather than address the precise question whether there was a genuine issue of material fact associated with the element of breach of a duty of care, the respondent engages in an valuation of the evidence.

FIDELITY correctly states that a notary has an affirmative duty to exercise reasonable care to ascertain the identity of persons executing sworn documents before the notary. The holding in

Meyer, at 536, clearly bears this out. However, FIDELITY chooses to simply ignore or discount the opposing affidavits of Mr. and Mrs. DUSHEY which established that Mr. DUSHEY's signature was forged on the subject loan documents. At a very minimum, this evidence creates the reasonable inference that Ms. York breached her duty of care to the plaintiffs. CR 56(c). Given FIDELITY failure to establish an abuse of proof concerning this element of negligence, summary judgment was clearly improper under that court rule.

b. Element of damages. The superior court also overlooked the fact that there was evidence establishing the plaintiffs DUSHEY had suffered damages as a result of the defendant breach of duty of care. In this regard, the record reflects they suffered both actual damages in terms of the subject loan transaction including Ms. Dushey's secretive misuse of the subject funds, the added costs and increased interest rates associated with this fraudulently secured loan, the damage to credit rating, as well as general damages resulting therefrom. [RP 36, 50-51, CP 21-22, 57-

154, 287, 308-538, 539-830].

On page 41 and 42, respondent FIDELITY acknowledges these damages but baldly claims it cannot be held accountable for the same. Simply put, conclusory statements such as this do not come close in satisfying the moving party's initial burden of proving the absence of any genuine issue of material fact. CR 56(c). Given the defendant's breach of duty of care, such breach creates a reasonable inference suggesting the plaintiffs' suffered some, if not all, the damages referenced above. Id.

Furthermore, regardless of whether plaintiffs bear the ultimate burden of proving that the marital community did not benefit from the subject loan proceeds as suggested by respondent on pages 41 and 42 of its argument, FIDELITY bore the burden of proving by competent evidence on summary judgment that the community did, in fact, benefit. CR 56©; see also, Balise v. Underwood, 62 Wn.2d 195, 199-200, 381 P.2d 966 (1963). Clearly, this proof was not forthcoming in its motion, nor has FIDELITY demonstrated the absence of this issue of

fact in its argument on appeal.

For this additional reason, the decision of the superior court on summary judgment should be reversed. RAP 12.2. Simply put, the record does not support either prong of summary judgment.

3. Appellants' issue no. 4. For the same reasons set forth above, it is clear that the superior court also abused its discretion when denying plaintiffs' subsequent motion for reconsideration [CP 909-16] even though FIDELITY does not bother to address this issue in any substance. Once again, the court acted upon untenable grounds and for untenable reasons, and erroneously interpreted, misapplied or otherwise ignored the governing law at hand. See, Topliff v. Chicago Ins. Co., 130 Wn.App. 301, 122 P.3d 922, review denied, 157 Wn.2d 1018 (2006); Bar v. MacGugan, 119 Wn.App. 43, 78 P.3d 660 (2003); Stoudil v. Edwin A. Epstein, Jr., Operating Co., 101 Wn.App. 294, 3 P.3d 764 (2001); DeYoung v. Cenex Ltd., 100 Wn.App. 885, 1 P.3d 587, review denied, 146 Wn.2d 1016 (2002). State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); see also,

Pybas v. Paolino, 73 Wn.App. 393, 399, 869 P.2d 427 (1994); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990). Hence, the challenged decisions of the trial court should be reversed on this appeal and this case remanded for a trial. RAP 12.2.

4. Issues improperly raised by respondent.

Finally, on pages 36 through 43 of its argument, respondent FIDELITY attempts to raise additional issues of its own volition which are not a proper part of this appeal. These issues essentially relate to affirmative defenses to plaintiff's claims for monetary damages.

Respondent FIDELITY is neither an "aggrieved party" in this case [RAP 3.1], nor has it filed a cross-appeal or assigned error to any decision of the trial court [RAP 5.2(f), 10.1(f), 10.3(b)] so as to be entitled to raise issues on its own volition. A party who is denied relief on one ground raised at trial but obtains all the relief requested on another ground is not an "aggrieved party" for purposes of RAP 3.1. See, Vol. I, "comment" to RAP 3.1, Washington Court Rules

Annot. (West 2d Ed. 2010-2011). For this reason alone, those issues should not be considered. Id.

Notwithstanding this infirmity, a simple review of FIDELITY's argument on pages 36 through 43 of its responsive brief clearly establishes that the respondent is once more engaging in bald assertion of fact rather than any competent, admissible evidence, while at the same time "weighing" and discounting plaintiffs' opposing evidence, which can serve as no basis for the grant of relief under CR 56(c) or otherwise. In short, it is for the fact finder at trial to decide the underlying facts associated with any of FIDELITY's proposed affirmative defenses outlined on pages 36 through 43 of its argument. CR 56(c).

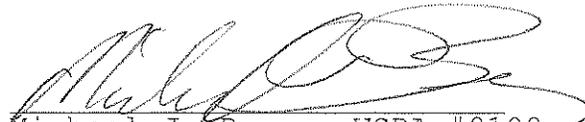
B. CONCLUSION

Based upon the foregoing points and authorities, appellants, RAYMOND DUSHEY and THE MARITAL COMMUNITY OF MRS. and RAYMOND DUSHEY, once more respectfully requests that challenged decisions of the superior court as set forth in the March 1, 2010, memorandum "decision" of the

superior court granting defendant's motions to strike and summary judgment [CP 854-66], the March 26, 2010, "order granting summary judgment [CP 867-81], and June 15, 2010, memorandum "decision" of the superior court denying plaintiffs' motion for reconsideration [CP 909-16] be reversed with prejudice and, accordingly, that the present case be remanded for trial. Application of the governing law requires nothing less.

DATED this 25th day of February, 2011.

Respectfully submitted:


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