COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No.: 328554

JOSHUA DRIGGS, a single man,

Plaintiffs/Respondents,

vs.

ANDREW T.G. HOWLETT, M.D. and JANE DOE HOWLETT, and their marital community; PROVIDENCE PHYSICIAN SERVICES CO. aka Providence Orthopedic Specialties, a Washington Corporation,

Defendants/Appellants.

APPELLANTS REPLY BRIEF

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TABLE OF CONTENTS

1. Governing Court Rule 1

2. Sanctions Re: Scheduling of Dr. Howlett's Second Deposition . . 1

3. Sanctions Re: Dr. Vandenbelt's CR 35 Examination 2

4. Sanctions Re: CR 35 Examination by Dr. Rolfe 3

5. Sanctions Re: Inadvertent Nondisclosure of Dr. Howlett's Private Surgical Journal 3

6. An Award of Attorney Fees to Mr. Driggs would be Inappropriate 4

7. Conclusion 5

TABLE OF AUTHORITIES

Page(s)

Cases

Protect the Peninsula's Future v. City of Port Angeles
175 Wn. App. 201, 220, 304 P.3d 924 (2013) 4

Other References

CR 11 1

CR 26(g).....1

CR 36 1

CR 37 1

RAP 18.1 4

RAP 18.9 4

Appellants Andrew T.G. Howlett, M.D., et ux, and Providence Physicians Services Company (hereinafter referred to collectively as "Dr. Howlett") submit the following reply to the Brief of Respondent.

1. Governing Court Rule

Mr. Driggs addresses sanctions under three rules: CR 26(g), CR 11 and CR 37. But by the plain terms of these Rules, CR 26(g) is the only one that applies. CR 11 governs the signing and drafting of pleadings, motions and legal memoranda. However, in the instant case, the trial court did not base its sanction orders on Dr. Howlett's counsel having signed a pleading, motion or legal memorandum in violation of the Rule.

CR 37 governs motions to compel discovery, and addresses sanctions for a party's failure to comply with a court order, expenses for failure to admit requests for admissions under CR 36, and the failure of a party to attend his deposition or to serve answers to interrogatories or respond to a request for production of inspection. None of the conduct at issue in the instant case fits CR 37.

As indicated by Dr. Howlett in his opening brief, the court sanctioned Dr. Howlett for what the court considered to be discovery violations. Accordingly, CR 26(g) is the applicable Court Rule.

2. Sanctions Re: Scheduling of Dr. Howlett's Second Deposition

Mr. Driggs accuses Dr. Howlett's counsel of not cooperating in the scheduling of Dr. Howlett's second deposition, and then waiting until the eleventh hour to file a motion for protective order. But Mr. Driggs' counsel knew, at end of Dr. Howlett's first deposition, that Dr. Howlett would not submit to another deposition voluntarily, and that, if Mr. Driggs' counsel attempted to schedule a second deposition, Dr. Howlett would seek a protective order. Thus, it should have been no surprise to Mr. Driggs when Dr. Howlett did not respond to repeated requests for a deposition date. When the deposition was then scheduled unilaterally by Mr. Driggs' counsel, Dr. Howlett's counsel did exactly what he told Mr. Driggs' counsel he would do: he sought a protective order. And the only reason the motion for protective order was sought on shortened time is because the court, due to a vacation, was not available earlier. Significantly, when the court did issue an order, it granted Dr. Howlett's motion in part, limiting the duration of the second deposition. Under these circumstances, it was abuse of discretion for the trial court to sanction Dr. Howlett.

3. Sanctions Re: Dr. Vandenbelt's CR 35 Examination

The lynchpin of the trial court's sanctions order with respect to Dr. Vandenbelt's CR 35 examination was its finding that the MMPI-2 was a "form" within the meaning of the parties' stipulation, such that the MMPI-2 should have been submitted to Mr. Driggs' counsel in advance of the CR

35 evaluation. That finding was clearly incorrect, and it was thus an abuse of discretion for the trial court to sanction Dr. Howlett for violation of that stipulation.

4. Sanctions Re: CR 35 Examination by Dr. Rolfe.

Dr. Howlett's counsel sent Dr. Rolfe a copy of the parties' CR 35 stipulation. For whatever reason, Dr. Rolfe did not honor the stipulation and took x-rays, without the knowledge or consent of Dr. Howlett's counsel. It was an abuse of discretion for the trial court to punish Dr. Howlett for that, particularly where Dr. Rolfe was not called as a witness by Dr. Howlett, and Mr. Driggs experienced absolutely no prejudice.

5. Sanctions Re: Inadvertent Nondisclosure of Dr. Howlett's Private Surgical Journal

As Dr. Howlett stressed in his opening brief, occasionally things are missed in responding to discovery requests, even though the answering party exercised reasonable diligence and good faith. Here, in response to Mr. Driggs' production requests, Dr. Howlett failed to produce the private, handwritten journal he kept in a safe at his home. But there was absolutely no prejudice to Mr. Driggs as a result of the inadvertent, nondisclosure, and, indeed, the journal actually enhanced one of Mr. Driggs'case theories. Under these circumstances, it was an abuse of discretion for the trial court to sanction Dr. Howlett.

6. An Award of Attorney Fees to Mr. Driggs would be Inappropriate.

Mr. Driggs requests attorney fees on appeal under RAP 18.1 and 18.9. An award of attorney fees and expenses under either Rule would be inappropriate.

RAP 18.1 allows for attorney fees and expenses on appeal if applicable law otherwise authorizes an award of attorney fees and costs to the prevailing party. Here, there is no contract or statute supporting an award of attorney fees/costs to Mr. Driggs.

As for RAP 18.9, a party can be awarded attorney fees and costs under that Rule for opposing a frivolous appeal. In determining whether an appeal is frivolous, there are five considerations: (1) a civil appellant has a right to appeal, (2) any doubts about whether an appeal is frivolous are resolved in the appellant's favor, (3) the court considers the record as a whole, (4) an unsuccessful appeal is not necessarily frivolous, and (5) an appeal is frivolous if it raises no debatable issues on which reasonable minds might differ and is so totally devoid of merit that no reasonable possibility of reversal exists. *Protect the Peninsula's Future v. City of Port Angeles,* 175 Wn. App. 201, 220, 304 P.3d 914 (2013).

This appeal presents "debatable issues" upon which reasonable minds might differ, and it is not so "totally devoid of merit" that no

reasonable possibility of reversal exists. Dr. Howlett is certainly mindful of the standard of review, and the wide discretion enjoyed by trial courts in assessing sanctions. But that discretion is not without limits, and a party should be allowed to challenge a trial court's discretionary rulings on appeal without fear of sanctions, unless the appeal is "totally devoid of merit."

7. Conclusion

Based on the foregoing argument and authorities, and the argument and authorities in his opening brief, Dr. Howlett respectfully requests that the trial court's sanctions orders against him be reversed, in whole or in part.

DATED this 29 day of June, 2015.

EVANS, CRAVEN & LACKIE, P.S.

By _____

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 29 day of June, 2015, the foregoing was delivered to the following persons in the manner indicated:

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June 29, 2015 Spokane, WA
(Date/Place

Carol L. Myers