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SUPREME COURT
STATE OF WASHINGTON

2006 JUN 23 A 9:43

BY C. J. MERRITT

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NO. 200,315-0
Associated case 200,320-6

SUPREME COURT
STATE OF WASHINGTON

IN RE DISCIPLINARY PROCEEDINGS AGAINST

MARGITA A. DORNAY

Lawyer (Bar No. 19879)

APPELLANT'S REPLY BRIEF

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I. Summary of Reply.

Appellant, Margita Dornay, submits her reply in this matter. The Bar offers several arguments in its “Answering Brief.” For the reasons set forth in Ms. Dornay’s Appellant’s Brief and identified below all of the arguments are without merit:

- A. The Bar argues that it is immaterial whether Ms. Dornay’s testimony was the “literal truth”. It argues that regardless of whether she was telling the literal truth she still misled the Superior Court. This argument simply has no logic and must fail.
- B. The Bar argues that Ms. Dornay’s response to one question posed to her was “literally false” and that she therefore committed false swearing and perjury. The argument is not based upon any facts in the record and is supported by a theory that the Bar has created, that of “literal falsity”. That theory has not been adopted by any court. In essence, the Bar seeks to pull one question out of context (in a vacuum) to support it’s entire case against Ms. Dornay. This argument is contrary to established case law, and, as a result, it too lacks any merit.
- C. The Bar acknowledges that Ms. Dornay can raise a duress defense, but argues that the Hearing Officer and Board correctly concluded that there was no “immediate” threat supporting Ms. Dornay’s duress defense. The Bar argues that it was Ms. Dornay’s burden to establish the immediacy of a threat for purposes of her duress defense.¹ The Bar’s argument fails because neither the Hearing Officer nor the Board considered the import of the Williams case. Instead, their conclusions were apparently based upon a simple “reasonableness” standard. Moreover, it appears that neither the Hearing Officer nor the Board gave any consideration to the heinous abuse Ms. Dornay suffered, the testimony of the expert on domestic violence and the testimony of Ms. Dornay’s treatment provider who found that Ms. Dornay suffered from Post Traumatic Stress Disorder (PTSD) as a result of the abuse suffered upon her.
- D. The Bar argues that the testimony of Hick’s prior wife was properly excluded. This is contrary to the Grant and Nelson cases and, as a consequence, the argument lacks merit.
- E. The Bar argues that Ms. Dornay acted with “intent” thereby triggering the presumptive sanction of disbarment. The Bar’s argument here fails because the record does not support it.

¹ The issue of who bears the burden of proving or disproving a duress defense is an issue that is currently pending before the United States Supreme Court in the case Dixon v. United States, 05-7053, Argued Apr. 25, 2006.

- F. The Bar's argument in support of the Board's decision to drop three mitigating factors is unconvincing and demonstrates that the Board dropped the mitigating factors without sufficient bases or support in the record.
- G. The Bar's argument supporting the Board's decision to impose three aggravating factors is unconvincing and demonstrates that those aggravating factors are not supported by the record.
- H. The Bar argues that disbarment is not a disproportionate sanction in this case relying on the Whitney and Whitt cases. Those cases are inapposite and do not support the Bar's argument.

II. Reply.

- A. If Ms. Dornay responded with the "literal truth" to a question, that response is not only material to the inquiry of whether she provided false testimony or committed perjury, but is also material to the inquiry of whether she intended to mislead the Superior Court.

The Bar argues that it is not material whether Ms. Dornay is found to have committed false swearing or perjury because all the Bar need show is that Ms. Dornay intentionally misled the Superior Court. Resolution of the issue of whether she committed false swearing or perjury, however, does bear directly on the resolution of whether Ms. Dornay intentionally misled the Superior Court.

In her Appellant's Opening Brief Ms. Dornay sets forth her argument that her testimony was the "literal truth" and, therefore, could not be held to be false swearing or perjury. The Bar argues that even if it concedes that the statement was the "literal truth" and concedes that Ms. Dornay did not commit false swearing or perjury, it can still establish that Ms. Dornay "intentionally misled" the Court. If Ms. Dornay's response to the question posed to her was literally true, there can be no intent to mislead.

Ms. Dornay answered the question truthfully in the context in which it was asked. Ms. Dornay was not required to attempt to answer the question in a context more

expansive than that which the interrogator intended. Here the interrogator, Ms. Spalter (Hick's Dissolution attorney), did not know that Ms. Dornay knew Hick in any other context than that of a co-worker. She could not have intended anything broader. Ms. Spalter acknowledges that same. RP Page 138, Line 21 through Page 139, Line 22.

In State v. Olson, 92 Wn.2d 134, 594 P.2d 1337 (1979) the court there held "... even assuming the evidence was strong enough to support a finding that the petitioner undoubtedly knew the interrogator's intent, the cases do not support the conclusion that this would render him guilty of perjury" because the answer would still be "literally true". Id. at 140. Here the facts are even more in Ms. Dornay's favor than those found in Olson because we know that Ms. Spalter's intent was to limit the questions to the co-worker context. Ms. Spalter did not know that they had any other relationship. RP, Id. The questions themselves, when taken in context, reflect Ms. Spalter's intent to so limit the scope of the questioning. Pages 16 and 17 Appellant's Opening Brief. Amazingly, the Bar is seeking to have Ms. Dornay disbarred for answering a question truthfully and consistent with the intent of the questioner because she, according to the Bar, nonetheless misled the court.

Is a testifying witness in a case required to fully disclose everything that is known to the witness regardless of the questions posed? Is there a different answer if the witness is an attorney? Ms. Dornay was not called to testify in the Hick case as a witness to rebut Katie Hick's assertions that Hick engaged in violent and rageful behavior. Ms. Dornay was called to testify regarding her observations about child exchanges that she witnessed. This is evident from the testimony of both Ms. Dornay and Ms. Spalter. Hick had numerous other witnesses testify on his behalf concerning his parenting skills and his

psychological stability. The fact that Ms. Dornay's testimony was so limited is further evident in Judge Knight's conclusion that Ms. Dornay's testimony was inconsequential in terms of his decision making process on whether Hick exhibited violent behavior. Judge Knight indicated that Ms. Dornay's testimony had little impact on his decision relating to parenting in the dissolution matter. Instead, Judge Knight relied heavily upon the Guardian Ad Litem's report prepared in that proceeding. Tr. page 57. Moreover, Ms. Dornay was never called as a witness to testify about Hick's psychological stability and propensity for rages.

- B. The test for determining whether Ms. Dornay committed false swearing or perjury is whether her answer was the "literal truth." There is no precedence supporting the argument that if the answer to an isolated question, taken out of context, is "literally false" then the crime of false swearing or perjury has been committed.

The Bar offers the novel argument that if an answer to a question is "literally false" then false swearing or perjury has been committed regardless of the context in which the question is posed. It seems to argue that the question "Have you seen him be rageful at any time" is clear without resort to any context in which the question was asked. It argues that "at any time" means "ever". Therefore, an answer to that question that appears to be literally false, without regard to context, can serve as the basis for a finding that false swearing or perjury has been committed. This argument is contrary to the law. Our Courts have uniformly held that "the requirements of proof in a perjury case are more stringent than those in any other area of law except treason." Olson, Id. at 136. Thus, applying the literal falsity test without reference to the context in which the question is posed flies in the face of this precedent.

As indicated in Ms. Dornay's Opening Brief, our courts have held that, if there is any ambiguity in the question or in the context in which the question arises, then false swearing or perjury cannot be established as a matter of law where the answer to the question is literally true.

It is both interesting and disturbing how the Bar continues to pull the one question out of context to support its argument. The actual line of questioning is set forth fully in Ms. Dornay's Appellant's Brief at pages 16 – 17.

- C. Neither the Hearing Officer nor the Board considered, or even made mention, of the heinous acts Ms. Dornay suffered at the hands of Hick when determining whether she had properly presented a defense of duress.

Neither the Hearing Officer nor the Board took into consideration the heinous acts Ms. Dornay suffered at the hands of Mr. Hick. Ms. Dornay respectfully requests that this Court review the transcript of the proceedings pages 1450-1464 in their entirety (that portion of the transcript is subject to the protective order entered herein). Neither the Hearing Officer nor the Board consider the testimony of Joan Zegree regarding the impact of such violent acts on victims of domestic violence or the testimony of Linda Green Baskett regarding Ms. Dornay's diagnosis of PTSD as a result of the abuse she suffered. These are things that should have been considered consistent with the Williams and Ciskie cases cited in Ms. Dornay's Appellant's Opening Brief.

Instead, the Bar maintains, as facts, the Hearing Examiner and Board's conclusions. (The Bar throughout its counter-statement of facts and throughout its argument cites to the DP as if it were the evidentiary record in this matter). The Bar asserts "although the Hearing Officer and the Disciplinary Board placed the specific findings of fact in their conclusions of law ... they should properly be labeled findings of fact." Bar Answering

Brief page 36. This would be true if the conclusions in question were indeed supported by facts in evidence, but they are not.

In post hoc support of those conclusions the Bar pulls things out of the factual record in an attempt to support the conclusions. Neither the Hearing Officer nor the Board engaged in that exercise. See the Bar's brief at page 37, 38.

What the Bar has established through this exercise is to clearly illustrate that absolutely no consideration was given to the abuse Ms. Dornay suffered and its impacts upon her as victim of domestic violence. The standard of reasonableness changes within the context of domestic abuse for purposes of establishing duress. See Williams and Ciskie cited in Appellant's Opening Brief.

Moreover, the Bar attempts to compare "apples to oranges". For example, the Bar asserts as support for the conclusion that there was no imminent fear on Ms. Dornay's part that "[a]lthough Hick had asked Respondent prior to her testimony to lie about Katie's 'out of control' behavior at the child exchanges, and about additional trips to Ellensburg where Katie did not 'show up' with Wyatt, Respondent decided to defy Hick and to testify truthfully about the exchanges." The Bar appears by this statement to argue that Ms. Dornay could defy Hick without repercussion. Ms. Dornay testified that Hick was angry, flew into a rage, and berated her for her position. Ms. Dornay, however, could gauge the severity of Hick's reactions. Tr. 1654-57. Refusing to testify that Katie was "out of control" is significantly different than affirmatively testifying against Hick. To affirmatively testify against Hick, by disclosing the rages she saw him display in their personal relationship, would have subjected Ms. Dornay to a significantly higher degree

of danger and she knew this to be the case. Hick had prior to her testimony threatened to “fucking kill” her if she ever betrayed him. Tr. page 1504.

D. The Hearing Officer erred by excluding the testimony of Hick’s prior wives.

The Bar argues that Hick’s first wife, though she would have testified that she experienced the same types of abuse from Hick, was properly excluded because Ms. Dornay did not know about the first wife at the time Ms. Dornay offered her testimony to the Superior Court and because the abuse that the first wife suffered occurred some 10 years prior.² It argues that this information, thus, did not contribute to any fear Ms. Dornay may have had when she testified. Ms. Dornay, however, did not seek to offer the first wife’s testimony as a means to show why Ms. Dornay had fear on the day she testified. Instead, Ms. Dornay sought to include the testimony to demonstrate the reasonableness of her fear in the context of the abusive relationship in which she found herself. Such testimony is clearly admissible for this purpose. See Grant and Nelson cited in Ms. Dornay’s Appellant’s Opening Brief. Excluding the testimony was an abuse of discretion.

E. Ms. Dornay did not act with intent; the presumptive sanction of disbarment is, therefore, inapplicable.

The Bar appears to believe that if it asserts that Ms. Dornay acted with “intent” enough times then it magically becomes a fact. The facts, however, clearly demonstrate that she did not act with intent. As set forth in Ms. Dornay’s Appellant’s Brief and above, Ms. Dornay’s intent, consistent with what Ms. Spalter had indicated to her, was to testify about the child visitation exchanges she witnessed. She never intended to testify about her personal relationship with Hick or the violent behavior he exhibited during that

relationship (the WSBA acknowledges that the personal relationship was “clandestine”). The scope of the questioning was limited to their co-worker relationship. Thus, when Ms. Dornay responded to the questions posed to her she never acted with “intent”. At best, if this Court finds that she did not respond more fully, she did so with knowledge. She did not intend to mislead with her testimony. An attorney acts with “intent” when the attorney acts “with the conscious objective to accomplish a particular result.” Anschell, 141 Wn.2d 610. A lawyer acts with “knowledge” when the attorney has “the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” Id.

F. The Board erred when it set aside three of the mitigating factors found by the Hearing Officer.

The Hearing Officer found consistent with the evidence that “Although Ms. Dornay could have acted more quickly to correct the misimpression created by her February 13, 2002 testimony in *Hick v. Hick*, after Dornay obtained a protection order against Hick, she acted to correct the misimpression ...”. The Board eliminated this mitigating factor and held “The Board finds Ms. Dornay’s efforts to correct her untruthful conduct were not timely. As a prosecutor with experience in domestic violence cases, Ms. Dornay understood the danger to the child in delaying truthful testimony.” The Board’s holding is premised upon the Board’s erroneous conclusion that the testimony was untruthful. The Board also ignores the fact that Dornay was completely terrified of Hick and what he might do, again demonstrating the Board’s complete disregard for the heinous abuse Ms. Dornay suffered and the realities of domestic violence.

² The Bar initially argued that the abuse Ms. Dornay suffered did not happen. Ms. Dornay sought to offer the testimony of the prior wife to support her assertion that she was abused.

The remaining reasons supporting a conclusion that the Board erred in striking mitigating factors has been set forth in the Appellant's Opening Brief (as is her argument on most of the points raised by the Bar in its Answering Brief). In the interest of conserving space, Ms. Dornay respectfully requests that the Court refer to her Appellant's Brief on these issues.

G. The Board erred when it imposed three aggravating factors not supported by the record.

Again, in the interest of conserving space, Ms. Dornay respectfully requests that the Court refer to her Appellant's Opening Brief on these issues.

H. The Board's determination to impose a three year suspension is disproportionate and the Whitney and Whitt cases are inapposite.

The Bar urges this Court to impose a sanction against Ms. Dornay similar to the sanctions imposed in the Whitney and Whitt cases. Suggesting that the Court compare Ms. Dornay's case to the Whitney and Whitt and suggesting that the same sanction should be imposed in Ms. Dornay's case is utterly incredible. In the Whitney case, the attorney showed absolutely no remorse or concern for any harm to the legal system; the attorney engaged in multiple counts of dishonesty, a pattern of misconduct, and persisted in that dishonesty throughout the entire disciplinary proceeding; the attorney ignored opportunities to cure the dishonest conduct; the attorney's conduct was likely to continue and the attorney posed a danger to the integrity of the judicial system. Whitney, 155 Wn.2d 451, 459. The attorney's state of mind was that of "intent" not "knowledge". The following aggravating factors were present in that case: (1) dishonest or selfish motive, (2) pattern of misconduct, (3) multiple offenses, (4) bad faith obstruction of disciplinary proceedings, (5) submission of false evidence, (6) refusal to acknowledge wrongful

nature of his conduct, (7) vulnerability of victims/clients, (8) substantial experience in practice, (9) indifference in making restitution, (10) illegal conduct. The sole mitigating factor was lack of disciplinary record. Id. at 459.

It is Ms. Dornay position that she only presents one aggravating factor (substantial experience in practice) and that the 6 mitigating factors the Hearing Examiner found are present. Her case is vastly different than the Whitney case and that case actually demonstrates why the sanction imposed by the Board is disproportionate in Ms. Dornay's case.

In the Whitt case, the attorney failed to communicate with her client and then dismissed her client's case with prejudice without the client's knowledge. She then continued to lie to the client about the status of the case. When disciplinary proceedings were brought she fabricated documents, submitted those to the Bar, and continued to lie about what had occurred in the case. Whitt also failed to reimburse money owing to the client. Whitt, 149 Wn.2d 707, 777-12. The Court suggested that suspension would have been an appropriate sanction in the Whitt case but for the fact that she falsified information during an attorney disciplinary proceeding. This "is one of the most egregious charges that can be leveled against an attorney." Id. at 720. Thus, based on the fact that Whitt falsified evidence in the disciplinary proceedings, the Court found disbarment was appropriate. Id. 720-21. Ms. Dornay, unlike Whitt, has not falsified information in the bar proceedings. Dornay modified her testimony to the Superior Court on her own accord and before any disciplinary proceedings were instituted. Based on these distinguishing factors, and for other reasons, the Whitt case is inapplicable for purposes of assessing proportionality.

III. Conclusion.

For the reasons set forth in Ms. Dornay Appellant's Opening Brief and set forth in this Reply, Ms. Dornay requests that this Court either impose no sanction because no misconduct occurred or at the most impose the suspension recommended by the Hearing Officer in this matter.

Respectfully submitted this 22nd day of June, 2006.


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