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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

No. 64776-8-1

MIGUEL BERNAL HERNANDEZ, a seaman

Plaintiff/Appellant

v.

GLACIER FISH COMPANY, LLC., a Washington Corporation

Defendant/Respondent/Cross Appellant

APPEAL FROM KING COUNTY SUPERIOR COURT

CAUSE NO. 08-2-12754-1 Sea

Douglass A. North, Judge

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION TO REPLY

Glacier skillfully portrays the facts and record of these proceedings in a way that is neither candid nor correct. It did the same thing at trial and this helps explain the result. Glacier now admits the trial court was wrong in awarding the video preservation deposition testimony expenses of it's vocational expert, Skilling, but still argues for the verbatim transcript costs.

II. GLACIER MATERIALLY MISSTATES THE RECORD ON NINE SEPARATE OCCASSIONS

One explanation for the trial court's ruling is the skill of Glacier at misstating the record. Glacier's Responding Brief contains nine separate and specific material misstatements, identified below:

(1) Glacier claims: "Dr. Rosen . . . could not . . . ask Bernal for his consent to the terms and conditions of the examination." The time, place, manner, and all conditions for the exam were already set in accordance with CR 35(c) by written agreement between counsel (*See CP 1607-1608, AP*

7). What Rosen could not do but tried to do, was to add additional terms and conditions for the examination.

(2) Glacier claims: “Evans additionally refused to contact defense counsel to address this newly raised issue.” (*Responding Brief at P. 1*). Evans – Bernal’s counsel – did not “refuse” to contact defense counsel, indeed, defense counsel was “contacted” and agreed to specific terms and conditions for the exam (*CP 1607-1608, AP 7*); had been privy to the ruling by Judge Zilly specifically denying that Rosen could require agreement to his Information Form (*CP1602-1604, AP18-20*) and was in receipt of a letter (*CP 1549-1600, AP 21-22*) specifically outlining Bernal’s legal counsel’s objections to Rosen’s Information Form.

(3) Glacier states: “Evans’ obstruction forced cancellation of the Bernal examination.” What forced cancellation was Rosen’s insistence on nothing less than actual agreement with his Information Form.

(4) Glacier claims: “Ultimately, Mr. Evans retracted the correspondence [letter to Bratz regarding Rosen’s

inappropriate conduct – CP 1649-1600, AP 21-22] and Dr. Rosen’s evaluation of Mr. Flores proceeded . . .” (*Responding Brief at P. 7*). Plaintiff’s counsel absolutely, positively, never “retracted” this correspondence. Defendant’s counsel, Bratz, insisted that the correspondence be sent to him and not to Rosen, clearly implying that Bratz would communicate to Rosen Bernal’s position. However, Bratz did nothing and to now portray the failure of defense counsel to do anything, at all, with full knowledge of this issue and brand that as “retracting” the correspondence is an absurd misstatement of the facts.

(5) Glacier asserts: “Mr. Evans never once raised, let alone objected to, Dr. Rosen’s informed consent materials being provided or read to Bernal or Rodriguez, nor was Dr. Rosen seeking the examinees verbal acceptance of the terms and conditions of the examination.” (*Responding Brief at P. 8*). It was Glacier’s obligation, not Bernal’s, to seek agreement to Rosen’s special conditions, before the exam and as an agreed condition per CR 35(c).

(6) Glacier asserts Rosen's special conditions are nothing more than "necessary informed consent." (*Responding Brief at P. 10*). Rosen does not seem to appreciate that there is a legal profession. In spite of what he – Rosen – believes are "requirements" in the context of a CR 35 IME, how IME conditions are set, time, place, manner, and conditions are all legal, not psychological, questions. Glacier has not cited and still does not cite any State law or even any psychological ethical regulation that requires an IME examinee at an agreed CR 35(c) exam to agree to discuss with and consent to the examiners advice on attorney-client privilege; to agree to a non-existent right to a different examiner under the laws of the "Consumer Protection Act"; to agree to reimburse the examiner for his expenses under certain conditions. As pointed out in Bernal's Opening Brief, Rosen's Informed Consent Form is something that he simply came up with on his own and that he "ran by an attorney" many years ago. (*See Appellants Opening Brief at P.33*).

(7) Glacier claims Bernal/Evans communications with Rosen on the morning of June 10, 2009, were “wrongful ex-parte communications.” (*Responding Brief at P. 12*). How could it possibly have been “unethical” for Bernal’s legal counsel to refuse Rosen’s invitation to discuss substantive legal requirements for IME exams, directly with him, and to instruct Rosen to discuss those issues with defense counsel instead? It would have been wholly improper for Bernal’s counsel to discuss/advise Rosen on these issues. It is beyond irony that Bernal’s counsel would now be criticized for holding to the highest ethical conduct. Rosen improperly sought to engage Bernal’s counsel in the discussion of “. . . laws that guide the performance of psychologists and issues of informed consent. . .” (*AP P.14, Rosen Deposition, P. 6, Lns. 20-23*). Discussing with Rosen, ex-parte, what he should or should not do or what “laws that guide the performance of psychologists and issues of informed consent” would have been inappropriate. Bernal’s counsel observed the highest ethical standard by time, and time again, refusing to advise

Rosen on what he should or should not do and urging him to contact defense counsel, David Bratz. It is also important to keep in mind, Rosen suddenly and without explanation, changed his mind, and unilaterally insisted that Bernal agree to Rosen's understanding of the law:

“Dr. Rosen: I cannot conduct an evaluation unless a person agrees to it, and accepts the notion that I am going to be conducting under the kinds of conditions that I am speaking about in this form. . .”

(AP P. 15, Rosen Deposition, P. 10, Lns. 23-25).

(8) Glacier claims Bernal's legal counsel “. . . agreed to have his clients execute the same [form] in prior cases. . .” *(Responding Brief at P. 23)*. Counsel did not and never has so agreed. As explained in Appellant's Opening Brief, in Federal Court, monitors are not allowed. *(See Appellant's Opening Brief P. 8, Footnote 4)*. Having won a Court Order requiring Rosen not to require agreement to his Information Form *(CP1602-1604, AP 18-20)* Bernal's counsel believed defendant's counsel would, in good faith, abide by that Order and not come up with a wholly unsupported and nonsensical

interpretation of Judge Zilly's decision. The idea that a person can be legally required to orally agree to something – virtually anything – so long as they don't sign it but only orally agree to it – was beyond Bernal's legal counsel's wildest imagination. That the trial court would accept such an argument is equally inexplicable. Such an argument requires suspension of belief in basic legal precepts.

(9) Glacier now admits nothing would have changed Rosen's mind, and Rosen did not care and would not abide by the direction of either Bernal's or Glacier's legal counsel. This surprise admission is stated as follows:

“Indeed, the contemplated discussions between Dr. Rosen and defense counsel would have been futile, for Glacier has no authority to waive or override the legal, professional, and ethical requirements imposed on Dr. Rosen by virtue of his profession. . . if Mr. Evans had an objection to Dr. Rosen's procedures, he was obligated to raise it. . .”

(Responding Brief at P. 24).

One can only imagine the corruption of CR 35(c) IME exams if experts, and not attorneys, can set, at any time, critical conditions for the examinations. Rosen cannot say, except

with tongue in cheek, the psychologist association requires that a CR 35(c) examinee be advised of a possible right to a different examiner “under the laws of the Consumer Protection Act” or that an examinee be required to discuss, and agree to, the examiner’s opinions about whether to waive attorney-client privilege. Glacier cannot have it both ways. If, on the one hand, it argues Bernal’s counsel was unethical for failing to call defendant’s counsel, then under circumstances where Glacier admits any advice to Rosen – by plaintiff or defense counsel – would have been futile, Glacier must explain why and how this allegation of misconduct could have possibly have made any difference.

**III. CR 37(d)
AND INHERENT POWER TO SANCTION REPLY**

The parties are in agreement that CR 37 gives authority to the trial court to sanction, including per CR 37(d), and the authority to require payment of reasonable expenses and attorney’s fees. Further, the parties also agree the court maintains inherent power to sanction per *Washington State Physicians Ins. Exch. & Ass’n. v. Fisons Corp.*, 122 Wn.2d

299, 858 P.2d 1054 (1993). The parties further agree sanctions are reviewed for an abuse of discretion including “manifestly unreasonable . . . or . . . exercised on untenable grounds . . . or . . . for untenable reasons.” *Associated Mtg. Invest v. G.P. Kent Const. Co. Inc.*, 15 Wn. App. 223, 548 P.2d 558 (1976).

The apparent purpose of sanctions certainly is not met by the trial court’s sanctions in this case which is to “deter abuses of the judicial system.” *Amy v. Kmart of Washington, LLC*, 153 Wn. App. 223, 548 P.2d 448 (1994). Imposing sanctions under the circumstances here rewards Glacier for failing to disclose, in advance, that its IME examiner Rosen had many additional and illegal conditions for the exam. Sanctioning under these circumstances would deter an attorney from performing their required role to monitor the exam. The trial court’s decision will have a chilling effect on the legitimate role of an attorney at IME exams. It rewards disobedient requesting parties for surprise misconduct.

The trial court also clearly abused its discretion in its Order ordering plaintiff's counsel excluded from rescheduled IME exams. Glacier references CR 35(a)(2) and its provision that any monitor ". . . may observe but not interfere with or obstruct the examination." (*Responding Brief at P. 34*). Bernal's counsel did absolutely everything to attempt to accommodate Rosen including meeting all of Rosen's demands right up to the point where Rosen changed his mind and suddenly decided Bernal had to orally agree with his exam conditions and his Information Form statements. If advising a client not to agree to extra judicial, clearly illegal, exam conditions and statements, and advising an examiner to consult with the lawyer arranging for the exam, constitutes "interference" and "obstruction", there is no real role whatsoever for an IME monitor. A sanction order supporting complete exclusion of an attorney under such circumstances does nothing more than reward deviant behavior by Glacier. Here again, Glacier skillfully and materially misstates the circumstances of the so called "obstruction." Specifically,

Glacier states: “. . . Mr. Evans repeatedly told Dr. Rosen that Bernal could not be asked to consent or accept the examination.” (*Responding Brief at P. 34*). This is an intentional and material misstatement of fact. Bernal willingly accepted and consented to the examination, and objected only to Rosen requiring agreement to the conditions on his Information Form: “Mr. Evans – Well I hope you understand correctly what I have written here . . . what I have written is that you should not ask our client to agree or accept your conditions on your Information Sheet.” For Glacier to say this constitutes “refusal to consent or accept the examination” is a material misstatement.

IV. THE TRIAL COURT CLEARLY MISUNDERSTOOD WHAT HAPPENED AT THE ROSEN EXAM

Glacier makes much of the transcription problems with the digital recording of the hearing on August 7, 2009 where the trial court specifically expressed its belief Rosen had not actually required Bernal to agree to his exam terms and conditions. (*Appellant’s Opening Brief P. 30*). Curiously,

although Glacier includes the affidavit of the court certified transcriptionist, Glacier fails to include the transcriptionist's statement that she had no problem whatsoever hearing and transcribing what the Judge said: "I was able to hear the Judge clearly . . ." (*CR 2278, Affidavit of Cheryl MacDonald*). Recall that the trial court, very late in the process, and at the point it decided to sign a substituted second sanction order, still had the belief ". . . Dr. Rosen made clear that he didn't have to have your client's agreement to all the terms. What he had to have was your client's signature that he had read all of it and not that he was necessarily agreeing to all of it, but he was aware of all of those." (*Appellant's Opening Brief, P. 30*). This is an astounding demonstration of misunderstanding of what happened. So successful was Glacier in confusing the situation, that the trial court still did not understand, as of the time of signing its final sanction order, that Rosen most certainly "made clear" that he "had to have" Bernal's specific agreement to all of the terms and conditions even though Rosen originally agreed to be satisfied by a mere oral reading

of his form. The trial court simply missed the boat completely on the essential issues.

**V. GLACIER CONCEDES RECOVERABLE COSTS
DO NOT INCLUDE EXPENSES FOR VIDEOTAPING
AND TRANSCRIPTION FOR TRIAL**

Glacier now concedes expense of videotaping an expert's deposition for trial may not be taxed as costs. Blaming Bernal for "not citing additional authority in the form of CR 30(b)(8)(D)", Glacier only concedes the \$646.50 videographer expense but not the cost of the verbatim transcript expense of \$453.70.

Incredibly, Glacier cites to only part of RCW 4.84.010(7) in it's Responding Brief. In it's quotation of text, it fails to include the relevant text clearly disclosing the verbatim transcript is also not a taxable cost. This professional lapse begins on Page 45 of Respondent's Brief and runs through Page 46 and is shown as follows. The bottom Paragraph, Page 45 of Respondent's Brief states:

“. . . The transcript costs associated with perpetuating and presenting Mr. Skilling's deposition testimony at trial (\$453.70) are expressly recoverable statutory expenses. See RCW 4.84.010(7) (allowing recovery of

“the reasonable expense of the transcription of depositions used at trial.”

Left out of the quote of RCW 4.84.040(7) is the following text:

“. . . The reasonable expense of the transcription of depositions used at trial . . . *provided, that the deposition shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence for purposes of impeachment.*”

(emphasis added)

Glacier’s exclusion of the above provision of the statute limiting recoverable costs to “. . . those portions of the depositions introduced into evidence for purposes of impeachment” when this is a part of the statutory language, is inexplicable. No part of the Skilling deposition was used for impeachment purposes. To the contrary, it was used solely for the convenience of Glacier as direct testimony in lieu of the presence of it’s expert. *Allard v. First Interstate Bank of Wash., N.A.* 112 Wn.2d 145, 148, 768 P.2ds 998 (1989), cited by Glacier, (*Responding Brief, P. 46*), is not authority to the contrary and indeed further represents that Glacier’s conduct in leaving out this critical

portion of the statute is inexcusable. The total cost for Skilling (\$1,120.20) which the trial court imposed against Bernal for the video tape expense and the transcript expense, should be reversed as now admitted error by the trial court.

VI. GLACIER'S PRIVATE INTERPRETER EXPENSES

Nothing cited by Glacier changes the fact that the court, following the mandatory appointment procedures established by GR 11.2, appointed Ms. Manriquez as the interpreter for trial and Glacier admits this. (*Responding Memorandum, P. 42*). Glacier's claim that it was "required to engage a certified Spanish interpreter to secure any meaningful cross examination. . ." (*Responding Memorandum P. 42*) simply is not true and not supported by the records. If an interpreter is properly appointed and provides interpreter services for direct examination, nothing in this process suggests that a different interpreter should interpret for cross examination. Glacier was never required to engage additional interpreters as it suggests.

Glacier engaged the services of its interpreters for its private purposes and neither interpreter was appointed as the interpreter for trial. RCW 2.43.040(3) which establishes that “the party requiring an interpreter” bare the costs of the interpreter argues against, not in support of, Glacier’s claims. Bernal paid for his interpreter. Nothing in the record, no finding by the trial court or otherwise, finds or holds that Glacier’s private interpreters were required.

**VII. BERNAL DID NOT WAIVE HIS RIGHT TO
CHALLENGE THE JURY AS THE TRIER OF
FACT**

The law does not require a useless act. All of the rulings on the issue of whether a Jones Act/general maritime law personal injury litigant may, in their sole discretion, either accept a jury trial or a trial by court, had been ruled on by Judge North well prior to trial in Bernal. It would have been a useless exercise, and unnecessary, for Bernal to move, in a now consolidated action, to strike Glacier’s Jury Demand in Bernal.

As Glacier admits, the consolidation order, wherein both cases were consolidated including the rulings heretofore made, was by order of consolidation of cases on July 17, 2009. (CR 1618-1620). The order denying the motion to strike Glacier's jury demand in the *Rodriguez* matter, (CR 1623-1624) was entered on July 31, 2009, after consolidation. The exact same issues were involved in Bernal and the *Rodriguez*. RAP 2.5(a) regarding appellate court refusing to review a claim not raised in the trial court, is inapplicable.

**VIII. GLACIER IS UNENTITLED TO
REASONABLE ATTORNEY'S FEES UNDER
ANY THEORY OF THE CASE**

The fact that a trial court may have found conduct violating CR 37(a)(4), and authorizing the court's inherent power to sanction, does not mean an appeal of those issues is frivolous. Issues of a frivolous appeal are entirely different than whether a court abused its discretion in imposing sanctions. The standard for attorney's fees requires that the appeal itself be frivolous. RAP 18.9(a);

Yurtis v. Phipps, 143 Wn. App. 680, 696, 191 P.3d 849 (2008) and *Johnson v. Jones*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998) do not stand for the proposition that even if this Court should affirm Judge North’s sanction ruling, an appeal is per se frivolous. So long as the issues are debatable, the appeal is justified.

Glacier also requests fees and costs for “unsuccessful attempts to appeal the not yet final substituted Rule 35 sanction order.” These matters are not before the court and were the subject of separate appellate proceedings. Any request for relief should have been made in Glacier’s response to those appeals.

IX. CONCLUSION

Glacier succeeded in pulling the wool over the trial courts eyes. Bernal’s counsel did not obstruct the process; Glacier’s did. It was Glacier’s obligation, not Bernal’s, to identify issues and conditions it was insisting on for the agreed CR 35(c) exam. If anything, the conduct of counsel was exemplary. Bernal’s counsel could not possibly have

engaged in improper “ex-parte” contact, as Glacier alleges, by advising its expert to discuss these issues with the attorney arranging for the IME, Mr. Bratz. Glacier had the obligation to raise the issues in a timely manner. The trial court’s action in sanctioning Bernal’s counsel is inexplicable and understandable only when one examines the trial court record which clearly discloses the trial court had no correct understanding of what actually happened.

The trial court should also be reversed, by admission, from imposing the video tape expense of Mr. Skilling, and likewise for imposing the transcript expense when the transcript expense has no statutory authority.

Bernal had no obligation to re-raise the issue of jury versus non-jury trial under circumstances where the trial court had already made a ruling and its intentions clear.

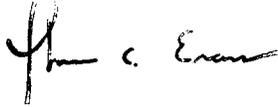
Glacier has no arguable basis for an award for attorney’s fees or costs.

“

The matter should be reversed with judgment on reversal entered accordingly.

Respectfully submitted this 10th day of June 2010.

INJURY AT SEA

A handwritten signature in cursive script, appearing to read "Thomas C. Evans".

THOMAS C. EVANS

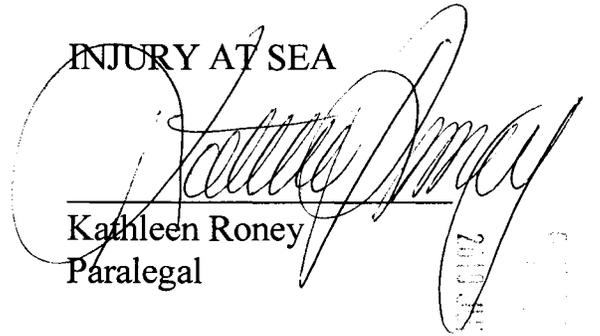
CERTIFICATE OF SERVICE

I hereby certify that on 10th of June, I filed this Reply Brief of Appellant and Appendix with the Clerk of the Court of Appeals, Division I and sent copies of the same to the following via legal messenger

David Carl Bratz
LeGros Buchanan & Paul
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I certify under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

Dated this 10th day of June, 2010.

INJURY AT SEA


Kathleen Roney
Paralegal
2010 JUN 11 10:17 AM
