

No. 64776-8-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I
SEATTLE

Miguel Bernal Hernandez and
Thomas C. Evans, Esq., Appellants,

v.

Glacier Fish Company, LLC, Respondent/Cross-Appellant

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COURT OF APPEALS
STATE OF WASHINGTON
2010 JUL 12 AM 11:36

Appeal from King County Superior Court
No. 08-2-18009-3 SEA and
No. 08-2-12754-1 SEA

**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
GLACIER FISH COMPANY, LLC**

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I. GLACIER’S CROSS-APPEAL FOR RECOVERY OF ALL DOCUMENTED COSTS AND EXPENSES STEMMING FROM MR. EVANS’ IMPROPER OBSTRUCTION IS UNCONTESTED

By way of cross-appeal, Glacier sought reversal of the Substituted CR 35 Order insofar as the same awarded only \$5,000 in sanctions, rather than the demonstrated (and uncontested) \$13,820 actually incurred by Glacier as a result of Mr. Evans’ wrongful conduct which forced last-minute cancellation of the agreed to Rule 35 examinations of both Bernal and Rodriguez. *See Brief of Respondent/Cross-Appellant Glacier Fish Company, LLC (“Glacier Brief”),* pp. 38-40.¹ Indeed, Civil Rules 26 and 37 require entry of sanctions equivalent to the financial burden imposed on the moving party by virtue of the improper conduct. CR 37(a)(4)

¹ As detailed in Glacier’s Brief, the uncontested record establishes the expenditure of the following fees, expenses and costs:

- \$900.00 – Interpreter Cancellation Fee for Both Scheduled Full-Day Examinations. *See Exhibit B-8 to Bratz Decl. (Bernal)* [CR 155]; *Rodriguez* [CR 679].
- \$7,920.00 – Dr. Rosen’s Cancellation Fees and Drafting of Declarations Supporting Motions to Compel Rule 35 Examinations. *See Exhibit R-8 to Rosen Declaration (Bernal)* [CR 0094] and *Rodriguez* [CR 1440].
- \$5,000 – Attorneys’ Fees – *Bratz Declaration (Bernal)*, ¶ 13 [CR 98]; *Bratz Declaration (Rodriguez)* ¶ 13 [CR 606].

These fees, expenses and costs totaling \$13,820 all directly resulted from Mr. Evans’ improper conduct, last minute obstruction of the agreed-to Rule 35 examinations, and necessary motion practice.

(directing a court granting a motion to compel to require the “party or attorney . . . to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney fees . . .”); *See also* CR 37(d) (employing identical language for unreasonable failure to participate in discovery); CR 26(c) (directing application of CR 37(a)(4) to “award of expenses incurred in relation to the motion [for protective order]”).

Appellants have challenged neither the amount, nor the legal basis, for Glacier’s recovery of the full fees and costs expended (\$13,820) as a result of Mr. Evans’ conduct. *See Generally Reply Brief of Appellants* (“*Appellants’ Reply*”) (no mention or reference to Glacier’s assignment of error regarding sanction award of less than documented fees and expenses).

It is undisputed the Superior Court had the power, authority and discretion to sanction abuses of the discovery process and inappropriate pretrial conduct. *See Glacier Brief*, pp. 19-21, 33-34, 39-40; *Appellants’ Reply*, pp. 8-9; *see also* CR 26(c); CR 37(a)(4); CR 37(d); *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339-40, 858 P.2d 1054 (1993); *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000); *In re Matter of Firestorm 1991*, 129 Wn.2d 130, 139, 916 P.2d 411 (1996); RCW 2.28.020. Abuse of this discretion is the singular and only basis for overturning a sanction award. *Fisons*, 122 Wn.2d at

338; *Associated Mtg. Invest. v. G.P. Kent Const. Co., Inc.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976); *Amy v. Kmart of Washington LLC*, 153 Wn. App. 846, 866-67, 223 P.3d 1247 (2009) (citing *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994)). Here, the Superior Court acted squarely within its discretion in finding Mr. Evans' obstruction of Bernal's and Rodriguez' agreed-to Rule 35 examinations unreasonable, his *ex parte* contact with defense expert Dr. Gerald Rosen improper, and his overall course of conduct an abuse of the discovery process. *See Amy*, 153 Wn. App. at 866-67 (noting that the "purpose of discovery sanctions . . . is to deter abuses of the judicial system") (emphasis added). The record evidence is blatantly contrary to Mr. Evans' perception of events, and the law and governing civil rules equally contrary to his allocation of burdens and responsibilities in the discovery process. *See Appellants' Reply*, pp. 1-8 (erroneously characterizing facts supported by record evidence as "misstatements"); *Glacier's Brief*, pp. 4-19, 21-24 (setting forth factual predicate for issues of sanctions).

Indeed, neither the fact that informed consent is required for a non-Court ordered medical examination, nor the specific content of Dr. Rosen's informed consent materials (having been disclosed and litigated previously in the *Flores* matter), could under any circumstances be categorized as "surprise," "additional" or unanticipated by either party.

See Glacier's Brief, pp. 21-23. As the only qualified authority on the issue, Dr. Rosen's sworn statements regarding the necessity of the terms and conditions in his Informed Consent Materials in order to comport with legal, professional and ethical standards governing psychologists stands undisputed. *Id.* pp. 28-32; *Rosen Opposition Decl.*, ¶¶ 6-8 [CR 224-225] of ¶ 26 [CR 231]; *Rosen Decl. Supporting Motion to Compel Bernal Exam*, ¶ 11-15 [CR 41-43]; *Second Rosen Decl. Supporting Motion to Compel Flores Exam*, ¶ 13-14 [CR 73]; *Rosen Decl. Opposing Exclusion*, ¶¶ 18-24 [CR 228-230]; *June 10, 2009 Transcript*, p. 14, ll 2-5 [CR 91] (Mr. Evans' admission that he was not qualified to advise Dr. Rosen "in any respect with respect to what the duties and obligations are from [the psychologist's] standpoint in this [Rule 35] exam.").

The Superior Court had significant briefing (including the moving papers, Appellants' motions for reconsideration, and some oral argument), and ample time to digest and understand all of the facts surrounding Mr. Evans' improper conduct on June 10, 2009 and promise to engage in the same at Rodriguez' examination the next day. Indeed, the Court waited several days after the August 7, 2009, hearing to consider the matter and enter the Substituted CR 35 Order at issue in this appeal. *See Glacier Brief*, pp. 27-28; *Substituted CR 35 Order* (August 14, 2009) [CR 1124-1129] The Superior Court acted well within its discretion, and the law, in

assessing the reasonableness of the parties' conduct and expectations and ultimately finding that Mr. Evans wrongfully failed to raise any issues or concerns regarding Dr. Rosen's informed consent materials at any time prior to Bernal's scheduled examination, that he engaged in improper *ex parte* contact with a defense expert, that he wrongfully attempted to shift his meet and confer obligations on such matters to the defense expert, and that a protective order preventing his attendance at future examinations was necessary. *See Glacier's Brief*, pp. 39-43 (Superior Court justified in fashioning and issuing narrowly tailored protective order excluding Mr. Evans from examination); *Tietjan v. Department of Labor and Industries*, 13 Wn. App. 86, 90, 534 P.2d 151(1975) (specifically recognizing that "[a]ny unnecessary interference caused by an attorney could be alleviated by specific court order"). Mr. Evans' perception of his conduct and actions as the epitome of professionalism do not equate to the Superior Court's abuse of discretion for reaching a contrary conclusion based on considered review of the facts and circumstances presented. Indeed, Mr. Evans' staunch defiance further supports the issuance of sanctions "to deter, to punish, to compensate and to educate." *Fisons*, 122 Wn. 2d at 356 (emphasis added).

The Superior Court's determination and finding of sanctionable conduct on the part of Mr. Evans (personally and individually) should be

affirmed, and Glacier's uncontested cross-appeal for the full amount of fees and costs expended (\$13,820) as a result of the same is granted.

II. AS THE PREVAILING PARTY, GLACIER IS ENTITLED TO RECOVER INTERPRETER AND WITNESS FEE EXPENSES

As detailed at length in its' responsive brief, Glacier (as the prevailing party) is entitled to reimbursement of the necessary interpreter and witness fees expended at trial on the merits. *See Glacier Brief*, pp. 41-46. Also as discussed, Glacier rescinded its claim for reimbursement of the costs expended to videotape the perpetuation testimony of defense vocational expert William Skilling. *See Id.*, p. 45; CR 30(b)(8)(D). Accordingly, Glacier has filed a motion to amend the bill of costs and judgment in regard to the videotape expenses taxed as costs (\$646.50) and concurrently filed a motion requesting permission for the trial court to take this action.

III. BERNAL HAS NO RIGHT TO CHALLENGE JURY AS THE TRIER OF FACT

Bernal concedes that he never challenged Glacier's jury demand in his case. *See Appellant's Reply*, p. 16-17. Bernal cites no authority for the proposition that reliance on a Superior Court ruling in another case, without any affirmative action or objection on his part, is sufficient to present that issue for the first time on appeal. There is no such authority. By his inaction, Bernal clearly waived his right to challenge Glacier's jury

demand—a demand which the Washington Supreme Court expressly upheld as valid in *Endicott v. Icicle Seafoods*, 167 Wn. 2d 873, 886, 224 P.2d 761 (2010). *See Glacier Brief*, pp. 46-48.

IV. GLACIER IS ENTITLED TO RECOVER ALL APPELLATE ATTORNEYS' FEES AND COSTS

Glacier's entitlement to attorneys' fees and costs on appeal does not rest on the singular basis (frivolity) addressed by Appellants' Reply. Undoubtedly, an appeal such as this, on matters where the Superior Court properly exercised its substantial discretion (discovery sanctions/ fashioning protective orders) and requesting review of issues never raised in the proceedings below (challenge to jury as trier of fact) reaches the frivolity threshold necessary to trigger an award of fees and costs for Glacier. *See* RAP 18.9(a); *Yurtis v. Phipps*, 143 Wn. App. 680, 696, 191 P.2d 849 (2008); *Johnson v. Jones*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998).

However, affirmance of the Substituted CR 35 Order—insofar as it found Mr. Evans' conduct sanctionable under CR 37 and the Superior Court's inherent power—provides a global basis for award of Glacier's appellate attorneys' fees and costs. Rule of Appellate Procedure 18.1 provides for recovery of a party's attorneys' fees and expenses on appellate

review where "applicable law" grants the right to such recovery. RAP 18.1(a). In this instance, Washington Rule of Civil Procedure 37 provided the crux for issuance of sanctions against Mr. Evans, personally, for his wrongful obstruction of informed consent and grant of the protective order excluding him from future examinations with defense examiner Dr. Rosen. Appellants admit the sanctioning ability vested in the Superior Court inherently and under CR 37. *See Appellants' Reply*, pp. 8-9. Clear and unequivocal case law likewise holds CR 37 to be an "applicable law" predicate for an award of attorneys' fees and expenses on appeal. *See Magaña v. Hyundai Motor Corp.*, 167 Wn.2d 570, 593, 220 P.3d 191 (2009); *Eugster v. City of Spokane*, 121 Wn. App. 799, 817, 91 P.3d 117 (2004). Appellants do not, and legally cannot, contest CR 37 and the trial court's inherent power as providing a basis for recovery of fees and expenses. Collectively, Rules of Appellate Procedure 18.1 and 14.2, allow Glacier's recovery of the attorneys' fees, costs and expenses incurred on appeal.

Having raised its request for the same in the first brief filed on the merits, *see Glacier Brief*, pp. 48-49; RAP 18.1(b), Glacier is additionally entitled to those fees and costs expended in defending against Appellants' unsuccessful attempt to appeal the non-final Substituted Rule 35 Order. *See Certificate of Finality Re Case 64138-7-I* [CR 2322-2325]; RAP 14.1,

18.1, 18.9. Appellants' premature interlocutory appeal was dismissed following the Appellate Court's RAP 6.2(b) motion for statements regarding interlocutory appealability of the Substituted CR 35 Order pre-trial and oral argument on the same. *See Certificate of Finality* [CR 2322-2325]. Following oral argument on the matter, the Court Commissioner found the substituted CR 35 order unappealable as a matter of right or discretion, and dismissed the premature appeal. *See id.* No briefing on the merits was entertained, scheduled or requested by the Court or either party. Accordingly, Glacier's request for attorneys' fees and costs made in its opening brief here (its first opportunity to do so) comported with RAP 18.1. Glacier undisputedly prevailed on the premature appeal, and is entitled to attorneys' fees and costs for defending against the same.

As discussed in detail above, and in Respondent/Cross-Appellant's opening brief on the merits, Glacier is entitled to recovery of all attorneys' fees, costs and expenses incurred on review—both the current review and the prematurely attempted review—of the Substituted CR 35 Order.

V. CONCLUSION

The trial court correctly found sanctions were warranted against Mr. Evans, personally, for obstructing his client's informed consent, engaging in wrongful *ex parte* contact with a defense expert, and failing to raise issues regarding the Informed Consent Materials in a timely manner

or appropriate forum. Accordingly, Glacier's uncontested cross-appeal for the full documented fees and costs incurred as a result of this behavior (\$13,820) should be granted. *See* CR 37(a)(4), CR 37(d), CR 26(c).

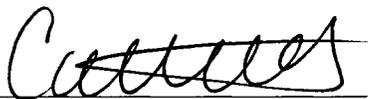
Excepting the award of expenses for videotaping Mr. Skilling's perpetuation deposition, the Bill of Costs should be affirmed.

Bernal's failure to object to a jury as the trier of fact prior to his appellate brief, coupled with *Endicott's* recognition that all Jones Act litigants in Washington State courts have the right to trial by jury, forecloses his argument to the contrary here.

Glacier is entitled to an award of the attorneys' fees and costs for this appeal, as well as those expended in defending against Mr. Evans' unsuccessful attempt to prematurely appeal the Substituted CR 35 Order. *See* RAP 14.2, 18.1, 18.9.

RESPECTFULLY submitted this 12th day of July 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below a copy of the document to which this certificate is attached on the following counsel of record:

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Via Hand Delivery

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of July 2010.

Signed at Seattle, Washington