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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
1997-01-21
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No: 67951-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

Vahit Saylik
Appellant,

vs.

David Walker
and Jane Doe Walker
Husband and Wife,

Respondents.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignments of Error:

1. Trial court erred or abused its discretion when it ordered dismissal plaintiff's complaint unless plaintiff posted a bond, in the amount of \$5000, within 90 days of the order and without entering a Findings of Fact and Conclusions of Law.

2. Trial court erred or abused its discretion when it overruled plaintiff's objections to defendant's untimely service of motion for bond under CR 6(d).

3. Trial court erred or abused its discretion when it overruled plaintiff's objections to defendant's request for bond as being untimely and waived pursuant to holding of the Washington Supreme Court in *Swift v. Stine*, 3 Wash. Terr. 518 (Wash. Terr. 1888).

4. Trial court erred or abused its discretion when it denied plaintiff's motion for protective order, granted defendant's motion in limine, and prevented plaintiff from using transcript of his deposition under CR 32(a)(3) and without entry of a Findings of Fact and Conclusions of Law.

5. The trial court erred when it granted defendant's motion in limine and prevented the plaintiff from using transcript of his

deposition, pursuant to CR 32(a)(3), because the defendant waived his right, if any, to object plaintiff's use of the transcript under the decision of the Washington Supreme Court in *Ford v. United Brotherhood of Carpenters and Joiners of America*, 50 Wn.2d 832, 315 P.2d 299 (1957).

6. Trial court erred or abused its discretion when it denied plaintiff's motion for terms and attorneys fees for bad faith dealings by the defendant and his insurance company in violations of RCW 48.01.030 and for abuse of process for frivolous proceedings under RCW 4.84.185 and Court Rule CR 11.

7. Trial court erred or abused its discretion in awarding attorney's fees and costs in the amount of \$8755.40 against the plaintiff and in favor of the defendant.

Issues Pertaining to Assignments of Error:

a. Where, two years prior to day of the trial, the defendant, as the adverse party, took plaintiff's deposition over the Internet webcam and had notice of the fact that plaintiff lived in Turkey, and

Where, three days prior to the trial, the defendant served his motion for bond pursuant to RCW 4.84.210,

a.1. Did the trial court err or abused its discretion when

it ordered dismissal plaintiff's complaint unless plaintiff posted a bond, in the amount of \$5000, within 90 days of the order and without entering any Findings of Fact and Conclusions of Law? (error no. 1)

a.2. Was the service of the motion for bond on plaintiff's attorney untimely pursuant to Rule CR 6(d)? (error no. 2).

a.3. Was the defendant's request for bond waived pursuant to holding of the Washington Supreme Court in *Swift v. Stine*, 3 Wash. Terr. 518 (Wash. Terr. 1888)? (error no. 3).

b. Where, two years prior to day of the trial, the defendant, as the adverse party, took plaintiff's deposition over the Internet webcam and had notice of the fact that plaintiff lived in Turkey, and

Where, two weeks before the trial date, the defendant demanded trial attendance of the plaintiff in Everett Washington and filed his "motion in limine" to exclude use of transcript of plaintiff's deposition in lieu of his live testimony pursuant to CR 32(a)(3);

b.1. Did the trial court err or abuse its discretion when it denied plaintiff's motion for protective order, granted defendant's motion in limine, and prevented plaintiff

from using transcript of his deposition (taken by the adverse party) in lieu of his live testimony at the trial and without entry of Findings of Fact and Conclusions of Law? (error no. 4).

b.2. Did the defendant waive his right, if any, to object plaintiff's use of the transcript, pursuant to CR 32(a)(3), under the decision of the Washington Supreme Court in *Ford v. United Brotherhood of Carpenters and Joiners of America*, 50 Wn.2d 832, 315 P.2d 299 (1957)? (error no. 5).

b.2. Did the trial court err or abuse its discretion when it denied plaintiff's motion for terms and attorney's fees for bad faith dealings by the defendant and his insurance company in violations of RCW 48.01.030 and for abuse of process for frivolous proceedings under RCW 4.84.185 and Court Rule CR 11 ? (error no. 6).

c. Did the trial court err or abuse its discretion in awarding attorney's fees and costs in the amount of \$8755.40 against the

plaintiff and in favor of the defendant? (error no. 7).

II. STATEMENT OF THE CASE

Mr. Vahit Saylik (SAYLIK), appellant/plaintiff, is a retired police chief in Ankara, Turkey. Saylik resides and lives there.

During the relevant times, the adult son of Saylik was working for Boeing Airplane Company in Everett Washington. During the summer of year 2006, Vahit Saylik, together with the other members of his family, was visiting his son in Everett, Washington.

On July 3, 2006, Saylik was riding and walking with his bicycle and crossing over the **crosswalk** near Harbour Pointe Blvd and State Route SR 525, in Mukilteo, Washington. Defendant-respondent, David Walker (WALKER), while trying to get onto State Route ST 525 near the crosswalk, hit Saylik with his motor vehicle over the crosswalk, knocked him to the ground and injured him. Others rushed to help Saylik. A fire truck and an ambulance came in and took Saylik to the hospital emergency room as they provided emergency treatment over his injuries (CP 147–154).

The Complaint was filed on 10/15/2008 in Snohomish County Superior Court (CP 253-256). At that time, the undersigned attorney for Saylik was not aware of the fact that Saylik was not residing in

Washington but that he (with the rest of his family) was simply visiting his son in Everett (CP 147 & 253).

Walker's attorney demanded to take a deposition of Saylik in their Everett office with notices dated 04-15-2009 and 07-29-2009. (CP 231 and 244). A number of times, Saylik's attorney informed them that Saylik was overseas and could not be in their Everett office for an in-person deposition but that he would be available for a deposition over the telephone. Saylik's attorney also informed Walker's attorney that he would have to submit Saylik's testimony over the telephone during the trial. Walker's attorney strongly opposed to both the telephonic deposition and the trial testimony over the telephone (CP 235- 236).

Walker's attorney refused to take the deposition of Saylik over the telephone and filed his "Motion to Compel Deposition of Plaintiff" in their office in Everett Washington (CP 224-250).

Saylik filed his "Response and Declaration in Opposition to Motion to Compel" and repeated nine different times the fact that Saylik lived in Ankara, Turkey, could not be in their office, in Everett, but that he would be available over the telephone for his deposition (CP 219-223). In his same response, Saylik moved to strike certain attachments of Walker which were improperly attached to motion to

compel (CP 219).

In his “Reply on Motion to Compel Deposition of Plaintiff,” Walker went through extensive efforts in arguing as to why Saylik’s telephonic deposition as well as his testimony over the telephone during the trial would not be acceptable to them [that Saylik must fly from Turkey to Everett for his deposition and for his testimony during the trial] (CP 214-217).

Finally, on 01-12-2010, Commissioner A. J. Bedle of the superior court allowed Saylik to remain in Ankara, Turkey, and ordered Walker to take Saylik’s deposition by webcam over the Internet to be done on 01-29-2010 (CP 212).

The deposition was taken over Internet webcam (on 01-29-2010) by Walker’s attorney as the adverse party (CP 145-157). During the deposition, Saylik repeated the fact that he lived in Eryaman, Turkey, [near Ankara]. (CP 147, line 24 of its page 7).

The parties went through an arbitration hearing, after which Saylik filed for a Trial De Novo (CP 257-258).

Almost **two years after the deposition**, on 10-28-2011, (approximately a week before the scheduled trial date of 11-08-2011), Walker demanded Saylik to appear at the trial. Next, he filed his “Motion in Limine” and a massive declaration (34 pages long with its

exhibits) in an effort to exclude Saylik's use of the transcript of his deposition in lieu of his live testimony during the trial [pursuant to Court Rule CR 32(a)(3)]. (CP 205-207; CP 171-204).

In response, Saylik filed his "Motion for Protective Order" (CP 158-160) together with the "Declaration of Ahmet Chabuk in Support for Protective Order and Sanctions" and attached a copy of the transcript of the deposition. (CP 140-157).

Walker filed his massive "Defendant's Response to Plaintiff's Motion for Protective Order" (together with its exhibits -- 45 pages long in total (CP 93-137).

In addition, (almost two years after the deposition was taken and five court days prior to day of the trial), on 11-01-2011, Walker's counsel apparently filed, noted, and mailed "Defendant's Motion for Bond Pursuant to RCW 4.84.210," received by Saylik's attorney on 11-03-2011 – two court days prior to the day of the trial (CP 161-170).

With his "Response of Plaintiff to Defendant's Motion for Bond Pursuant to RCW 4.84.210," Saylik objected to the bond as being untimely based on the fact that the notice of the motion was served less than five days notice prior to the hearing and also the request for bond under RCW 4.84.210 was at least **two years too late** and, therefore, it was waived pursuant to the holding of the Washington

Supreme Court in *Swift v. Stine* 3 Wash. Terr. 518 (Wash. Terr. 1888). Saylik attached to his response a copy of the Supreme Court's decision in the *Swift* case (CP 145-157). Saylik also asked for sanctions and attorneys fees against Walker (CP 81-92).

Walker's attorney offered no arguments as to why the *Swift* decision of the Supreme Court should not apply in this case but claimed that she had emailed her motion to Saylik's attorney. To her motion, the attorney attached huge number of copies of prior email correspondence and documents between the attorneys (CP 93-137).

On the day for the trial, the trial court denied Saylik's motion for protective order but provided that Saylik could testify in person, or telephonically, or via webcam (CP 76); granted Walker's motion in limine and prevented Saylik from using the transcript in lieu of his live testimony (CP 79-80); granted Walker's motion for bond and ordered Saylik to post \$5000.00 bond within 90 days and, otherwise, the case would be dismissed. The trial date was rescheduled to March 20, 2012 (CP 77-78). Saylik failed to post the bond.

The notice of appeal to the Court of Appeals was filed on 11-21-2011 (CP 73-75).

In the Court of Appeals, on 11-21-2011, pursuant to RAP 17.4 (b), Saylik filed his "Motion and Declaration on the Merits" with

his arguments that Rule CR 32(a)(3)(B) and (C) permitted Saylik to use transcript of his deposition since no reasons were offered against its use pursuant to CR 32(a)(3)(B) and (C); that the deposition was taken by the adverse party; that Walker's motion for bond, pursuant to RCW 4.84.210, should have been denied because it was waived since the demand was made approximately two years after the adverse party was notified of Saylik's overseas residence; that sanctions and attorneys fees should have been awarded to Saylik because Walker had provided no reasons or arguments as to why the *Swift* decision of the Washington Supreme Court and Rule CR 32(a)(3)(B) and (C) should not apply in this case to let Saylik use the transcript in lieu of his live testimony and without having to post a bond.

In response, in the Court of Appeals, on **12-01-2011**, Walker filed his massive volume of "Respondents' Answer to Petitioner's Motion on the Merits (174 pages long) without hardly arguing the real issues raised. The Court of Appeals took no further action on that motion.

Again, **in the Court of Appeals**, pursuant to RAP 2.2 (a)(3), Saylik filed his motion for discretionary review because the 90-days deadline to post the bond had not expired yet at that time.

In his response, again with a massive volume of pages

(approximately 175 pages long), Walker filed his “Respondents’ Answer to Petitioner’s Motion for Discretionary Review” without hardly arguing the real issues raised.

Initially, after the 90-days deadline had passed, the Commissioner of the Court of Appeals, by an apparent oversight on 02-08-2012, dismissed the motion for discretionary review but soon corrected the oversight and, on 2-16-2012, granted the motion -- since the 90-days deadline to post the bond had already expired at that time.

Meanwhile, back **in the trial court**, on 03-13-2012, the Order of Dismissal was entered (CP 71-72). Walker asked in the trial court for huge sums of attorneys fees and costs with a huge volume of “Motion for Prevailing Party Determination and Judgment on Arbitration Award” – filed on 03-16-2012 (CP 49-70). In her declaration for attorney’s fees, the attorney, under penalty of perjury, asked for attorney’s fees for work done in the Court of Appeals by misleadingly stating that Saylik’s “discretionary appeal was dismissed” in the Court of Appeals on 02-08-2012 (CP 51).

The said declaration was apparently signed on 03-15-2012 even though, a month earlier, on 2-16-2012, the Commissioner of the Court of Appeals had revised her ruling and ruled that “Upon proof that the complaint has been dismissed, Saylik’s appeal will go forward

pursuant to RAP 2.2(a)(3).” Yet, Saylik asked for attorney’s fees in the trial court for work done in the Court of Appeals (CP 51).

Saylik submitted his objections with “Response to Motion for Prevailing Party Determination and Judgement on Arbitration Award for Fees and Costs” (CP 41-48).

In her huge volume of “Reply Re: Motion for Fees and Costs” (37-pages long), Walker **falsely claimed** that “Mr. Chabuk was well-advised before undertaking the MAR appeal of the potential fees being awarded to the defendant,” which is false (CP 5 – lines 12-13).

The trial court awarded \$8,755.40 against Saylik for attorney’s fees and costs (CP 1). In violation of CR 52(a), no findings of fact and conclusions of law was entered.

III. ARGUMENT

3.1 The defendant and the trial court provided no reasons as why Saylik should not be permitted to use the transcript under Court Rule CR 32(a)(3). And no findings of fact and conclusions of law was entered even though it was required by Rule CR 52(a).

Moreover, Rule CR 32(a)(3) allows Saylik to use the transcript in lieu of this live testimony. No reasons were offered against its use.

3.2. Trial court erred or abused its discretion when it overruled plaintiff's objections to defendant's untimely service of motion for bond under CR 6(d), which requires Walker to serve his motion "not less than 5 days before the time specified for the hearing.

The motion for request for bond was filed on the last day it could have been filed and placed in a U.S. mailbox on the same deadline under Court Rule CR 6(d). By the time it was delivered, there were only two or three court days left before the scheduled hearing.

The defendant's attorney submitted copies of a number of email communications between the attorneys and claimed that she had emailed the motion on the deadline, which Saylik did not receive until the printed copy was delivered. And service of the motion was untimely.

3.3. Trial court erred or abused its discretion when it overruled plaintiff's objections to defendant's request for bond as being untimely and waived pursuant to holding of the Washington Supreme Court in *Swift v. Stine*, 3 Wash. Terr. 518 (Wash. Terr. 1888).

In the case at bar, the request for bond under RCW 4.84.210

was made two or three days before the trial date and it was at least two years too late. Therefore, it was waived pursuant to holding of the Washington Supreme Court in *Swift v. Stine* 3 Wash. Terr. 518 (Wash. Terr. 1888).

3.4. Trial court erred or abused its discretion when it denied plaintiff's motion for protective order, granted defendant's motion in limine, and prevented plaintiff from using transcript of his deposition under CR 32(a)(3).

Rule CR 32(a)(3)(B) and (C) provides in pertinent part:

“The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment . . .”

Saylik lives in Turkey and he was visiting his adult son in Everett Washington when defendant Walker hit Saylik with his motor vehicle as Saylik was crossing over a crosswalk. Saylik was taken to an emergency room for his injuries.

No reasons were offered as to why Saylik should not benefit from rule CR 32(a)(3) especially considering the fact that Saylik's

deposition was taken by Walker's own attorney as the adverse party.

The trial court may have the discretion on determination of relevant facts in this case but without any facts offered against the applicability of this rule here, the court erred or abused its discretion in its ruling.

3.5. The trial court erred when it granted defendant's motion in limine and prevented the plaintiff from using transcript of his deposition, pursuant to CR 32(a)(3), because the defendant waived his right, if any, to object plaintiff's use of the transcript under the decision of the Washington Supreme Court in *Ford v. United Brotherhood of Carpenters and Joiners of America*, 50 Wn.2d 832, 315 P.2d 299 (1957).

Almost two years earlier, in his "Reply on Motion to Compel," filed on 01-11-2010, Walker argued extensively as to why they would object to a telephonic deposition as well as a telephonic trial testimony of Saylik (CP 215). And the deposition was taken a short time later (on 01-29-2010) by Walker's attorney (as the adverse attorney). The opposing attorney made no objections against use of the transcript at the trial, pursuant to CR 32(a)(3) even though Saylik testified in his deposition that he lived in Turkey. Therefore, Walker waived any right

to do so under the ruling of Washington Supreme Court in *Ford v. United Brotherhood of Carpenters and Joiners of America*, 50 Wn.2d 832, 315 P.2d 299 (1957).

In that case, the Washington Supreme Court held that defendants' objection to admission of deposition taken in another state was waived where counsel for defendants was present when deposition was taken and failed to make objection at that time.

3.6. Trial court erred or abused its discretion when it denied plaintiff's motion for terms and attorneys fees for bad faith dealings by the defendant and his insurance company in violations of RCW 48.01.030 and for abuse of process and for frivolous proceedings under RCW 4.84.185 and Court Rule CR 11.

Walker, through his attorney, has been dealing with Saylik in bad faith and frivolously. As soon as Walker learned of the fact that Saylik had gone back to Turkey and his adult son no longer worked in Washington, they demanded to take deposition of Saylik in person in their office in Everett. They would not agree to a telephonic deposition and demanded that Saylik fly from Turkey to Everett.

Approximately two years earlier, in "Reply on Motion to Compel Deposition of Plaintiff," filed in court on 01/11/2010, Walker

through his attorney, made the following arguments against a telephonic testimony (CP 216, lines 9–22):

“a telephonic deposition in this case would be **unduly burdensome and expensive**. The Defendant would be **saddled with the cost of locating a certified court reporter in Ankara, Turkey**. Without a court reporter physically present at the deposition with the Plaintiff, there would be no way to verify whether the person being deposed is in fact the Plaintiff.

Moreover, the Plaintiff has requested a Turkish interpreter which only increases **the logistical nightmare**.

Even a video deposition would be inadequate. As the Plaintiff was on bicycle at the time of the collision with the Defendant, there is no record of a driver's license or other picture identification on file so as to allow for visual identification by video.

The Plaintiff chose to bring suit against the Defendant in Snohomish County and **then move halfway across the world**. He should not be allowed to force the Defendant to follow him, or prevent the case from being handled in the country where it was brought, order to unduly burden the defense.”

Moreover, in their opposition to a telephonic trial testimony (before deposition transcript became available), the defendant made the following argument in the trial court (CP 217, lines 1-14):

“Even if this motion were properly before the Court, it presents the same difficulties as the motion for a telephonic deposition, namely undue burden and expense and logistical nightmare of locating a court reporter in Ankara, Turkey, or facing the risk of receiving testimony from someone whose identity cannot be verified.”

Now, it is obvious that Walker, through his insurer, is trying to

force Saylik to abandon his court action for personal injury by placing all the hardship they listed above on him and by preventing him from using transcript of his deposition, which is available and can be easily read to the jury during the trial.

It should be noted that, when Saylik filed in the Court of Appeals his “Motion and Declaration on the Merits” (on 11-21-2011), Walker responded with a massive volume of papers, which were hardly relevant to the motion.

Similarly, when Saylik filed in the Court of Appeals (on 12-05-2011) his “Motion for Discretionary Review,” Walker responded with another massive volume of papers, which were hardly relevant to the motion.

Similar huge volume of papers were routinely filed in the trial court. Initially, one would wonder why so many volume of papers are being filed with virtually no use for them. The reason became obvious when Walker asked for award of attorney’s fees in the trial court for work done in that court as well as for work in the Court of Appeals.

The judges are often very busy. Obviously huge volumes of papers give the impression that a great deal of legal work must have been done to justify award of large sums for attorney’s fees.

In the case at bar, the trial court awarded \$8755.40 to Walker

for work, which was supposed to be for work only after the arbitration award.

It should also be noted that, after Walker filed in court his motion for bond pursuant to RCW 4.84.210, Saylik objected and submitted a copy of the ruling in the Washington Supreme Court case of *Swift v. Stine 3 Wash. Terr. 518* (Wash. Terr. 1888) to prove that the bond was waived. Yet, Walker never responded to the cited authority and successfully proceeded with their demand for bond.

When Saylik cited rule CR 32(a)(3) and argued that he should be allowed to use his transcript at the trial, Walker responded with some court cases applicable to expert witnesses with no argument why Saylik should not be allowed to benefit from rule CR 32(a)(3).

RCW 48.01.030 provides:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance."

The conduct of Walker, through his attorney, has been in bad faith and frivolous. It was an error or abuse of discretion for the trial court to deny attorney's fees to Saylik pursuant to RCW 48.01.030, for abuse of process and for frivolous proceedings under RCW 4.84.185

and Court Rule CR 11.

3.7. Trial court erred or abused its discretion in awarding attorney's fees and costs in the amount of \$8755.40 against Saylik and in favor of the defendant.

Saylik incorporates his arguments in the preceding section, above (section 3.6) by reference and argues that the trial court erred or abused its discretion in awarding \$8755.40 against Saylik.

IV. ATTORNEYS FEES:

Pursuant to RAP 18.1(d) Saylik submits that he should be awarded his costs and reasonable attorney's fees in this appeal as well as the work in the trial court.

The facts presented in Saylik's deposition are very short and basic – how he was hit by the defendant as he was crossing the crosswalk and how he was taken to an emergency room in an ambulance and his injuries (CP 147-157). Yet by their earlier opposition to Saylik's telephonic deposition and later by their demand for his trial attendance, the defendant, through his attorney, has been trying to force Saylik to abandon his Complaint against Walker. The respondent's conduct is in bad faith and in violation of RCW 48.01.030 as cited above, in the preceding section.

Also pursuant to RCW 4.84.185 and Court Rule CR 11 the Court of Appeals should award terms, sanctions, costs and attorney's fees in favor of Vahit Saylik for defendant's abuse of process and for their frivolous acts in the trial court as well as in the Court of Appeals.

V. CONCLUSION

Saylik incorporates in here by reference his arguments in Section 3.6 above.

For the reasons indicated above, the Court of Appeals should reverse the trial court and award terms, sanctions, reasonable attorneys fees and costs to Vahit Saylik in this case.

Respectfully submitted on this October 15, 2012



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DECLARATION OF SERVICE:

I certify that on 15th day of October, 2012, I served a copy of this document on defendant's counsel by mailing it first class mail postage prepaid to Megan O. Masonholder, Anderson Hunter Law Firm, 2707 Colby Avenue, Suite 1001, PO Box 5397 Everett, WA 98206-5397

