Court of Appeal Cause No. 71444-9-I

91580-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MONTI DARNALL, an individual,

Appellant,

v.

JEFF DALTON,

Respondent.

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# PETITION FOR REVIEW

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## IDENTITY OF PETITIONER

Petitioner Monte Darnall is the Plaintiff in this personal injury action, and was the Appellant in the Court of Appeals.

## COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of Division One of the Court of Appeals, filed on March 9, 2015 a copy of which is attached hereto.

Reconsideration was denied by order dated March 25, 2015, a copy of which is attached hereto.

## ISSUES PRESENTED FOR REVIEW

Issue One:

Where defense counsel brought a plainly non-meritorious motion, the sole relief sought being exclusion of an expert witness at trial, and where the motion was initially, erroneously, granted by one judge, but subsequently set aside by another judge, was defense counsel entitled to attorney's fees incurred in bringing and thereafter defending the non-meritorious motion?

Issue Two:

Were (1) the original, plainly erroneous order excluding the witness, and (2) the subsequent order setting it aside, but awarding defense counsel fees for bringing it, neither of which "adjudicated" all the "rights

and liabilities" of all the parties, both therefore "subject to revision at any time before the entry of judgement adjudicating all the claims and rights and liabilities of the all the parties"; in other words, does CR 54 (b) mean what is says, allowing (and obligating) the judge who ultimately presided over trial of this matter to set aside the attorney's fee award?

## STATEMENT OF THE CASE

Plaintiff filed this personal injury lawsuit on March 5th, 2010. CP 277. Trial was set for August 15th, 2011. Id. The case schedule set March 14th, 2011 as the Deadline for Disclosure of Possible Primary Witnesses, and April 25th, 2011, as the deadline for disclosure of possible additional witnesses. Id. The discovery cut-off was set for June 27th, 2010.

On April 25th, 2011, Plaintiff timely filed her disclosure of additional witnesses. CP 5. It contained the following:

> Gregory J. Norling, M.D.
> Evergreen Orthopedic Center
> 2911 120th Avenue N.E. Suite H-210
> Kirkland, Washington 98034
> Phone: 425 823 4000
>
> Dr. Norling is an expert witness and has agreed to examine the plaintiff and offer opinions relative to any and all aspects of the Plaintiff's injuries, including diagnosis, prognosis, treatment and causation. Dr. Norling will examine the patient in June."

Defendant made no contemporaneous objection to the substance of this disclosure.

On June 14th, 2011, defense counsel emailed plaintiff's counsel, inquiring as to Dr. Norling's availability for discovery deposition, and asking if counsel would agree to extend the discovery cut-off "if need be" for scheduling the deposition. CP 12-32. Plaintiff's counsel agreed. Id.

The plaintiff was deposed June 15th, 2010. CP 7-32. At that time, plaintiff's counsel indicated to defense counsel that Dr. Norling's examination would occur the next week, on June 21st. Id. At that time, Plaintiff's counsel confirmed his willingness---at defense counsel's request---to extend the discovery cut-off for purposes of Dr. Norling's discovery deposition. Id.

Dr. Norling's report of his examination was received by Plaintiff's counsel on July 7th, 2011, and forwarded to defense counsel that day. CP 12-32

The next day, July 8th, 2011, defense counsel filed a motion, the sole relief sought being exclusion of Dr. Norling entirely. CP 9-14. The motion was noted without oral argument.

The Motion to Exclude claimed that "Ms. Darnall has not provided defendant with the subject matter on which Dr. Norling is expected to testify, the substance of the facts and opinions to which Dr.

Norling is expected to testify or a summary of the grounds for each opinion. Defendant has no way of ascertaining the subject matter of Dr. Norling's testimony." CP 9-14. (emphasis added) The motion did not mention counsels' agreement three weeks earlier to extend the discovery cut-off for Dr. Norling's discovery deposition. Neither did the Motion acknowledge that defense counsel had been offered seven potential deposition dates for Dr. Norling. Defense counsel insinuated that she'd been offered one deposition date---the latest of the seven that had actually been offered. CP 9-14

Plaintiff's counsel responded with detailed declarations from himself, and from his paralegal. CP 7-32, CP 33-39. The declarations clarified the truth as set forth above: Defense counsel had known for months that Dr. Norling would be testifying at trial, had known that his exam would occur "in June", had specifically sought and received plaintiff's counsel's agreement to extend the discovery cutoff for Dr. Norling's discovery deposition, had received a detailed report of his exam and even as she filed her Motion, defense counsel had been offered not one, but seven potential deposition dates.

Judge Barnett was the assigned trial judge but was on vacation. On July 18th, 2010, Judge Eadie signed defense counsel's Order Excluding Dr. Norling. CP 52-53. The Order contained "findings" that:

1. There was "no lesser sanction available that would not undermine the purpose of discovery";

2. The Defendant "would be substantially prejudiced if Dr. Norling were allowed to testify at trial;

3. The "improper disclosure" of Dr. Norling was "willful since no legitimate reason was given for the failure to comply with CR 26 and KCLR 26".

At trial, Plaintiff's counsel moved for revision of Judge Eadie's order, pursuant to CR 54 (b). Judge Barnett denied revision, but continued the trial to allow Plaintiff to seek Discretionary Review of Judge Eadie's ruling, since Dr. Norling was Plaintiff's only causation witness. Discretionary Review was opposed by defense counsel, and denied.

Thereafter, the defense brought a Motion for Summary Judgment before Judge Robinson, who was now assigned to the case. CP 230-232. Judge Robinson "vacated" Judge Eadie's Order Excluding Dr. Norling "under CR 60 (b) (11)" and denied Summary Judgment. CP 277-279. Judge Robinson's Order specifically pointed out that although the Order Judge Eadie had signed "recited a finding of prejudice, neither it nor the defendant's moving papers recited facts supporting a conclusion of prejudice". (emphasis added) CP 279. Further, Judge Robinson's Order pointed out that "there was no argument or finding concerning the possibility of less severe sanctions". (emphasis added) Id. In other

words, Judge Robinson (correctly) pointed out that the Motion to Exclude was non-meritorious on its face.

Nonetheless, Judge Robinson also "found" that plaintiff had "received interrogatories which called for the disclosure of Dr. Norling" which, Judge Robinson "found", were "never answered". CP 278[1]. Judge Robinson also "found", without explanation, that the disclosure of Dr. Norling "was untimely and did not comply with LCR 26 (b) in substance". Id. Therefore, Judge Robinson held that Defendant was entitled, as a sanction, to "an award of its attorney's fees for making the motion to exclude, and in responding to plaintiff's subsequent motions on this topic." Thus did Judge Robinson reward Defense counsel with fees for bringing what Judge Robinson herself pointed out to be a patently non-meritorious discovery motion.

Subsequently, Judge Robinson awarded $9,842.00 in fees, as a "sanction." CP 365-367

Judge Mertel sat Pro Tem on the subsequent jury trial. The jury awarded Plaintiff $20,500.00 CP 525-532. Plaintiff asked him to revise Judge Robinson's Order of Sanctions. CP 495-524. Judge Mertel

[1] Why shouldn't Plaintiff's Primary Witness Disclosure naming Dr. Norling be considered a supplemental response to defense counsel's expert interrogatories?

denied the motion and entered judgment deducting the sanctions award, plus interest, from the jury's verdict. CP 525-532.

By unpublished opinion dated March 9, 2015, the Court of Appeals affirmed, holding essentially that the trial court had "discretion" to award attorney's fees.

## ARGUMENT

Appellant's counsel is unaware of a single case, ever, in this or any jurisdiction, in which the moving party was awarded fees for bringing a patently non-meritorious discovery motion. It should go without saying that the Court of Appeals' opinion, unpublished though it may be, will only encourage similar frivolous discovery motions.

Further, loathe as Superior Court judges may be to "second guess" each other's decisions, CR 54 (b) plainly gives authority to revise any order that isn't "final" within the Rule's definition. Review is appropriate under RAP 13.4 (b) (1) and (4).

## CONCLUSION

This Court should accept review and reverse the trial court's award of fees, in the process clarifying CR 54 (b)'s seemingly plain meaning.

Respectfully submitted on this /S Day of April, 2015.

David A. Williams, WSBA #12010
*Attorney for Appellant*

## PROOF OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on this 15 day of April, 2015, I arranged for service VIA U.S. MAIL and EMAIL a copy of the foregoing **Petition for Review** to the parties to this action as follows:

Sylvia Hall
Merrick Hofstedt and Lindsey
3101 Western Avenue, Suite 200
Seattle, WA 98121

Dated this 15 day of April, 2015.

Lora Perry

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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|---|---|---|
| MONTI DARNALL, | ) | No. 71444-9-I |
| Respondent, | ) | DIVISION ONE |
| v. | ) | |
| JEFF DALTON, | ) | UNPUBLISHED |
| Appellant. | ) | FILED: March 9, 2015 |

Cox, J. – Monti Darnall appeals the award of attorney fees, as discovery sanctions, to Jeff Dalton. The award was incorporated into the final judgment as a setoff against damages awarded to Darnall by a jury in this personal injury action. The trial court did not abuse its discretion either in awarding sanctions or incorporating that award as a setoff in the final judgment. We affirm.

The material facts are not in dispute. This personal injury action arises from an automobile accident. Darnall filed suit on March 5, 2010. The Case Schedule issued at that time set March 14, 2011 as the deadline for disclosure of possible primary witnesses and April 25, 2011 as the deadline for disclosure of possible additional witnesses. Both deadlines referenced KCLCR 26(b). The scheduled trial date was August 15, 2011 and the discovery cut-off was June 27, 2011.

Dalton propounded interrogatories to Darnell in May 2010. They required Darnall to identify any expert witnesses she expected to testify at trial together

with the subject matter on which the expert was expected to testify, the substance of the facts and opinions to which the expert would testify, and a summary of the grounds for each opinion. Darnall did not disclose any experts in her answers.

On April 25, 2011, Darnall first identified Dr. Gregory J. Norling as an expert witness who would testify at trial. She stated that Dr. Norling "is an expert witness and has agreed to examine [Darnall] and offer opinions relative to any and all aspects of [Darnall's] injuries, including diagnosis, prognosis, treatment and causation."[1] She further stated that Dr. Norling would examine Darnall in June.

On June 14, 2011, defense counsel e-mailed Darnall's counsel asking when Dr. Norling was available to be deposed. Counsel also asked if Darnall's counsel would agree to the deposition taking place after the discovery cut-off, June 27, 2011. Darnall's counsel agreed to the extension.

Dr. Norling examined Darnall on June 21. Darnall's counsel received Dr. Norling's examination report on July 7, 2011 and forwarded the report to defense counsel that same day.

The next day, Dalton moved to exclude the testimony of Dr. Norling at trial on the basis that this expert was not properly disclosed pursuant to CR 26 and KCLCR 26. The judge hearing this motion granted it.

After further motions not directly relevant to our analysis, the original scheduled trial date passed without this matter going to trial. Thereafter, Dalton

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[1] Clerk's Papers at 22.

moved for summary judgment, arguing that Darnall could not establish causation. In her response, Darnall admitted that, without the ability to call Dr. Norling as a witness, she could not establish causation. She asked that the order excluding Dr. Norling be "revised," arguing that the ruling was "clear reversible error."

Both Dalton's motion for summary judgment and Darnall's "motion to reconsider" the exclusion of Dr. Norling were heard by a different judge than the one who originally excluded this witness from testifying at trial. It appears that this judge denied Dalton's motion for summary judgment. And she considered Darnall's motion under CR 60(b)(11).

This second judge ruled that Dr. Norling would be allowed to testify at the rescheduled trial. The judge further ruled that Darnall had violated CR 33 and the Order Setting Case Schedule. Thus, the judge concluded that Dalton was entitled, as a sanction, to an award of his attorney fees for making the motion to exclude and responding to Darnall's subsequent motions on this topic.

Thereafter, Dalton moved for attorney fees and costs. The judge granted this motion and assessed sanctions in the amount of $9,842.

The case proceeded to a jury trial in late 2013. The jury returned a verdict in favor of Darnall on her claim for personal injuries in the amount of $20,500.

Thereafter, a third judge incorporated the sanctions award of $9,842 as a setoff against the award of damages, entering a final judgment in the amount of $10,071.96.

Darnall appeals.

## SANCTIONS

Darnall argues that the trial court erred in awarding Dalton attorney fees for bringing "a meritless motion" and by entering judgment deducting the sanctions award from the jury's verdict. We disagree.

"Discovery sanctions are generally within the sound discretion of the trial court."[2] "However, the court may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction."[3] Sanctions should be "proportional to the nature of the discovery violation and the surrounding circumstances" of the case.[4]

We review a trial court's discovery sanctions for abuse of discretion.[5]

Here, the court awarded attorney fees as sanctions in its order granting relief under CR 60(b)(11). This order granted relief in two ways. First, the court granted relief from the prior order by permitting the expert to testify at the rescheduled trial. Second, it awarded sanctions because of Darnall's violation of discovery rules.

As for the first ruling, Darnall does not argue that the ruling permitting Dr. Norling to testify at the rescheduled trial was erroneous. That would make no sense since this expert was crucial to her case.

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[2] Teter v. Deck, 174 Wn.2d 207, 216, 274 P.3d 336 (2012).

[3] Id.

[4] Rivers v. Wash. State Conf. of Mason Contractors, 145 Wn.2d 674, 695, 41 P.3d 1175 (2002).

[5] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

We need not delve into the propriety of the order excluding the witness before the originally scheduled trial date. Darnall has not been prejudiced by that order since her expert did testify at the rescheduled trial. Thus, Darnall is not an aggrieved party to that order for purposes of this appeal.

As for the second ruling, Darnall argues that the trial judge abused her discretion in awarding attorney fees as discovery sanctions. We disagree.

The trial court properly concluded that the disclosure of Dr. Norling was untimely. The Case Schedule set March 14, 2011 as the deadline for disclosure of possible primary witnesses and April 25, 2011 as the deadline for disclosure of possible additional witnesses. Both deadlines referenced KCLCR 26(b).

Darnall did not identify Dr. Norling, a primary expert witness, in the answers to interrogatories propounded in May 2010. Darnall failed to timely supplement those interrogatories, first providing information on April 25, 2011. The disclosure stated that Dr. Norling would examine Darnall in June. Thus, it did not provide Dr. Norling's opinions at that time. In sum, the court properly concluded that this did not comply with KCLCR 26(b) in substance and that this violated CR 33.

Based on these violations, sanctions were appropriate.

CR 37(a)(4) authorizes an award of attorney fees for successfully bringing a motion compelling discovery. It states:

> If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including [reasonable] attorney fees, unless the court finds that the opposition to the motion was substantially

> justified or that other circumstances make an award of expenses unjust.[6]

This rule provides the basis for an award of attorney fees to Dalton based on Darnall's discovery violations. The attorney fees awarded were those "for making the motion to exclude [Dr. Norling] and responding to [Darnall's] subsequent motions on this topic."[7]

In sum, the second trial judge did not abuse her discretion.

Darnall argues that the second trial judge's award of attorney fees was "without basis in the Civil Rules" and should be reversed for failure to demonstrate prejudice. Because of the above discussion, we reject this argument.

Darnall argues that CR 37(a)(4) authorizes an award of fees for successfully bringing or successfully defending a discovery motion, but it does not authorize fees "for unsuccessfully moving to exclude a witness." But Dalton successfully brought a discovery motion. This argument is not persuasive.

Darnall argues that the second trial judge erred in awarding Dalton attorney fees "for bringing what [the second trial judge] herself found to be a meritless motion to exclude Dr. Norling." But the second trial judge did ***not*** find that Dalton's motion to exclude Dr. Norling was meritless. While the second trial judge did not agree with Dalton's suggested remedy to exclude Dr. Norling at

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[6] CR 37(a)(4).

[7] Clerk's Papers at 279.

trial, she agreed with Dalton on the underlying merits—that Darnall violated discovery obligations and a sanction was appropriate.

Darnall argues that it is not "just" to sanction Darnall "for defending a patently meritless motion." But as just discussed, Dalton's motion was not meritless.

Finally, Darnall argues that the judge who entered judgment erred in incorporating the second trial judge's award of sanctions into the judgment. Because the second judge's ruling was not an abuse of discretion, this argument is without merit.

**ATTORNEY FEES ON APPEAL**

Both parties argue that they are entitled to attorney fees. We reject both arguments.

RAP 18.1(a) provides for an award of attorney fees on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review . . . ." "Washington courts traditionally follow the American rule in not awarding attorney fees as costs absent a contract, statute, or recognized equitable exception."[8]

Dalton argues that he "is entitled to his attorney's fees and costs for this appeal under RAP 18.1" And he argues that the June 12, 2012 order authorized him to recovery attorney fees based on responding to Darnall's motions and that "[t]he instant appeal falls into [that] category." But RAP 18.1 allows an award of

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[8] City of Seattle v. McCready, 131 Wn.2d 266, 273-74, 931 P.2d 156 (1997).

attorney fees where authorized by "applicable law." Because Dalton cites no applicable law that would support such an award, we decline to award Dalton attorney fees on appeal.

Likewise, we decline to award Darnall attorney fees on appeal. In her reply brief, Darnall argues, "By rights, [Darnall] should receive her fees for defending a meritless motion." Darnall's request is nothing but a bald assertion. Moreover, Darnall failed to comply with the mandatory requirements of RAP 18.1 because this request was not made until her reply brief.[9]

We affirm the order on motion for reconsideration and the judgment.

COX, J.

WE CONCUR:

Appelwick, J.

Becker, J.

[9] RAP 18.1(b).

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

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|---|---|---|
| MONTI DARNALL,<br><br>Appellant,<br><br>v.<br><br>JEFF DALTON,<br><br>Respondent. | ) | No. 71444-9-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellant, Monti Darnall, has moved for reconsideration of the opinion filed in this case on March 9, 2015. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 25th day of March 2015.

For the Court:

Cox, J.

Judge