

65448-9

RECEIVED
COURT OF APPEALS
DIVISION ONE

FEB -1 2011

65448-9

NO.: 65448-9-I

DIVISION ONE OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

2011 FEB -1 PM 1:57
COURT OF APPEALS
DIVISION ONE

DEBORAH VINCENT, APPELLANT

v.

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES, RESPONDENT

REPLY BRIEF OF APPELLANT

DEBORAH VINCENT, PRO SE, APPELLANT
600 E. OLIVE ST., NO. 10
SEATTLE, WASHINGTON 98122
TELEPHONE 206-724-7145

TABLE OF CONTENTS

INTRODUCTION1

ARGUMENTS IN REPLY TO RESPONDENT2

A. Appellant's Arguments Are Not Raised for the First Time2

B. Appellant Agrees That the Board Found She Was Not Assaulted4

C. Appellant Made an Adequate Offer of Proof5

D. Principles of Fairness That Apply to Discovery Also Apply Here6

E. CR 60(b) Is Applicable.....7

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

Cases

Sutton v. Mathews, 41 Wn.2d 64, 67, 247 P.2d 556 (1952)5

Statutes

RCW 51.52.1044

Rules of Court

Civil Rule 603

Civil Rule 60(b)7

Evidence Rule 9043

Treatises

Bryan A. Garner, ed.-in-chief, BLACK'S LAW DICTIONARY, 2d Pocket Ed.,
2001, pp. XII, 6211

INTRODUCTION

The Attorney General's office ("AG"), which had Ms. Vincent's medical records all along since the mediation and sat on them before and during the hearing, wants to profit from its own silence, which we contend constitutes negligence or worse. The AG would have the records thrown out because they were not submitted through the "proper channels." We have already argued, and will stand on our argument, that the instructions promulgated by the Board for submission of evidence were less than perfectly clear to a layperson, which Ms. Vincent was. Their argument is based on a supertechnical reliance on the letter of the procedural law and an assertion that exclusion of testimony is not a sanction. This is at variance with Black's Law Dictionary¹ and also with common sense.

The AG dwells on the issue of whether the facts show that the force applied did not amount to an assault. But that is not at issue in this appeal. The issue is whether other facts relevant to the force applied, which were not admitted, should have been considered along with the other facts. These facts are descriptions of the injury that give rise to inferences about the amount of force required to produce such an injury.

¹ "A penalty or coercive measure that results from failure to comply with a law, rule, or order <a sanction for discovery abuse>." Bryan A. Garner, ed.-in-chief, BLACK'S LAW DICTIONARY, 2d Pocket Ed., 2001, p.621. Angle brackets (<>) enclose contextual illustrations. Id. at XII.

Maybe they would not change the decision, but without them the decision is suspect. Ms. Vincent offered the records in proof that her injury had to be the result of excessive force under the circumstances.

The AG makes much of its contention that the said records are hearsay. Granted. If Ms. Vincent cannot produce a physician to authenticate the records, the hearsay rule applies. But as it stands now, she has not even been given the opportunity to make that attempt.

ARGUMENTS IN REPLY TO RESPONDENT

A. Appellant's Arguments Are Not Raised for the First Time

Respondent asserts that Ms. Vincent is making new arguments on appeal, when in fact she is supporting previous arguments with new legal research. To characterize it otherwise is to assert that she must prepare her Appellant's Brief before submitting her Notice of Appeal. If that were the intent, why provide time to prepare the brief? Her assertions below were that:

- The Board made its decision on the lack of evidence she had submitted, only because the Board wouldn't admit it;
- The documents should be admitted, despite her failure to submit them through the prescribed channels, because the Board had had

them and had let the AG's office take them months earlier without objecting to them;

- The penalty was extreme;
- She acquired a misunderstanding of the procedure at the mediation hearing, which was not corrected; and that
- This court has the power to correct the injustice.

These essentially are all of the five issues that Respondent argues (Respondent's Brief (RB) at 16), that she waived by not bringing them up below. However, an examination of her brief to the Superior Court will show that these arguments appear on p.4 ("failure to read or consider... medical records"); p.5 ("The representative should not have accepted the records"); p.5 ("...fatal to Ms. Vincent's case"); p.6 ("It was her understanding that the records she was providing would be used for any future hearing..."); and p.8 ("...asks this Court to make findings requiring payment of compensation..."). Brief of Plaintiff Deborah Vincent at 4, 5, 6, 8.

The said brief by Ms. Vincent to the Superior Court doesn't cite ER 904, CR 60, or the case law that was researched and discussed in her brief to this Court. But it does mention the issues that those citations apply to. The question to ask in deciding whether an issue is new is: Was it brought up clearly enough below to apprise the court that it was an issue? Our

answer is yes, the Superior Court was sufficiently apprised of what Ms. Vincent was seeking. The citations to ERs, CRs, and case law are embellishments in support of issues that were already clear.

Respondent misapplies RCW 51.52.104. RB at 16. Failure to raise an issue when petitioning for review of a Board decision was a point to be considered by the Superior Court. But the Superior Court never addressed it. That Court's decision states "The Court reviewed the records and files herein..." Findings of Fact, Conclusions of Law and Judgment at 1. By inserting that issue now, Respondent is indulging in the very sin of which it accuses Ms. Vincent: that is, making a claim of error that was not raised in the trial court. Respondent itself says in its brief that "failure to raise an issue in superior court waives argument on the issue." RB at 16.

B. Appellant Agrees That the Board Found She Was Not Assaulted

It is true that the Board found Ms. Vincent was not assaulted, but it made that finding based on evidence that unfairly favored one side. In a "he said/she said" exchange, of course the policemen were more articulate. She could not, with only her own oral testimony, prove the connection of the incident to the injury. That required medical proof, which was excluded. That, we submit, is why the Board said in two places (Decision and Order at 3) that she failed to establish a prima facie case that the injury was "proximately caused by a criminal act." The Board in that

document cited no other legal grounds for its ruling, although it recited a number of facts without stating their legal significance.

C. Appellant Made an Adequate Offer of Proof

An offer of proof must be sufficiently definite and comprehensive to advise the tribunal whether the evidence would be admissible. Respondent says we failed here. However, it is hard to imagine an offer more comprehensive than handing over the entire file, which Ms. Vincent tried to do. In addition, one page of her brief is largely taken up with a description of the offered records and what they would prove:

- "Medical records... indicate post-traumatic abnormalities..."
- "...indicate a traumatic injury to Ms. Vincent's dominant left arm..."
- "...evidence of excessive force is contained in the medical records..."

AB at 4,5. "Sufficient" is a subjective term, and only case law can flesh out its meaning. The *Sutton* case, on which Respondent relies, is similar in that medical evidence was rejected. However, it was a much different situation from this one in that the evidence was hypothetical. *Sutton v. Mathews*, 41 Wn.2d 64, 67, 247 P.2d 556 (1952). Not only that, it was meaningless because part of the medical information needed to make the determination was missing. Furthermore, the offering counsel gave no

indication what the answer to the hypothetical would be. Nothing would be added to the testimony already received, and any opinion gained from the hypothetical would be merely cumulative. *Id.* at 67-69.

It should be clear that the present case is different. Ms. Vincent has described the records in detail; they are her own records, they are not hypothetical; and she has told the court they would show excessive force. Moreover, there is no other evidence available to prove proximate cause of the injury.

D. Principles of Fairness That Apply to Discovery Also Apply Here

The rest of Respondent's brief consists of earlier arguments restated, a rehash of the arrest (still not relevant to the relief sought here), and contentions that the rules should be applied with draconian strictness regardless of the level of culpability.

It is not true that Ms. Vincent thinks the exclusion to be a discovery sanction. Throwing away evidence because a party didn't follow the rules is a sanction, whatever phase the case is in (see BLACK'S definition cited earlier), and none of the cases cited in Appellant's Brief say that discovery sanctions are the only sanctions or that their guidance on levels of sanctions is limited to the discovery phase.

E. CR 60(b) Is Applicable

Respondent's argument that CR 60(b) is inapplicable at the Appellate level is a bit hard to follow because Respondent's next paragraph says it's applicable to remand a case to the lower tribunal. RB at 27. No problem; that's what we want. If CR 60(b) doesn't work, the Appellate Court certainly has the power to amend a judgment for abuse of discretion. Please remand this case to Superior Court with instructions to give it a *de novo* review that includes the medical records.

Respectfully submitted this February 1, 2011



Deborah Vincent, Plaintiff / Appellant pro se
Address: 600 E. Olive St., #106
Seattle, WA 98122
Telephone: 206 329-2717
Email: deborahlv@hotmail.com

Declaration of Service.

On this February 1, 2011, I served a copy of this Notice to the attorney representing the **Defendant/Respondent**.

by personal delivery at the following address;

by email to the following e mail address;

Attorney for the Defendants, Lisa M. Roth, WSBA 19312, Office
of the Atty. General 800 5th Ave Ste 2000, Seattle, WA 98104-
3188, Phone: (206) 389-3820,
email lisar1@atg.wa.gov.

Signed under penalty of perjury, under the laws of the State of Washington, at
Seattle, Washington, this February 1, 2011.



Deborah Vincent