

71444-9

71444-9

No. 714449

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MONTI DARNALL

Appellant,

v.

JEFF DALTON,

Respondent.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2014 JUL 10 PM 2:27

APPELLANT'S REPLY BRIEF

KING COUNTY SUPERIOR COURT
CAUSE NO. 10-2-09322-2 SEA

Appellate Counsel for Plaintiff/Appellant
Monti Darnall:

DAVID A. WILLIAMS, WSBA #12010
Nine Lake Bellevue Drive, Suite 104
Bellevue, Washington 98005
Telephone: 425-646-7767
Facsimile: 425-646-1011

ORIGINAL

REPLY TO “INTRODUCTION”

The following statements do not withstand scrutiny:

“This appeal arises from the fallout of the tactical decision to not have plaintiff’s sole medical expert witness regarding causation examine the plaintiff until 6 days before the discovery cutoff date”. (Respondents Brief, p.1)

No, it doesn’t. There is no evidence whatsoever that the date of Dr. Norling’s examination was a function of anything other than Dr. Norling’s availability, let alone any “tactic” by Darnall’s counsel. Further, the discovery cutoff was waived by written (email) agreement of counsel, for purposes of Dr. Norling’s discovery deposition. (CP 17-32)

In fact, as is well documented in the record, this appeal rises from Respondent’s Counsel’s obviously “tactical decision” to bring a motion to exclude Dr. Norling, after:

Making no objection to the timeliness or form of Dr. Norling’s disclosure until the Motion to Exclude itself;

Making no objection whatsoever to the time frame for Dr. Norling’s examination; on the contrary,

Securing Darnall’s counsel’s agreement to extend the discovery cutoff date “if need be”; (CP 17-32)

Receiving a detailed report of Dr. Norling’s examination; (Id)

The “Counter-Statement” also contains at least three serious misrepresentations of the record:

“Plaintiff failed to provide the opinions of any experts who planned to testify at trial at any point prior to the motion to exclude Dr. Norling as a trial witness”.
(Respondent’s Brief, p.2)

False. As the record establishes, Dr. Norling’s report sent to Respondent’s counsel the day before she filed her motion.
(CP 17-32)

“Oral argument was requested regarding the motion to address the Burnet factors in open court on the record”.
(Respondent’s Brief, p.3)

False. Attached hereto as Appendix 1, is a copy of the Note for Motion signed by counsel, plainly requesting the motion be heard without oral argument. A separate Motion to Supplement the Record with this notice accompanies this Brief.¹

“Once the motion to exclude Dr. Norling was granted, Plaintiff refused to allow the discovery deposition of Dr. Norling. Plaintiff then scheduled the perpetuation deposition of Dr. Norling which defense counsel was unable to attend”.
(Respondent’s Brief, p.3) (emphasis added)

¹ Had Darnall’s counsel been aware of the extent to which Respondent’s counsel would misrepresent the record, it would have been included.

False. After Judge Eadie erroneously excluded Dr. Norling's testimony, Darnall's counsel did indeed schedule Dr. Norling's perpetuation deposition, for August 3th, 2011. CP 98. This was one of several "available dates" for the deposition that Respondent's counsel had specifically provided in writing! CP 102, 107 (Declaration of Sylvia Hall, exhibit B) (app 2). Once the deposition was set, Respondent's counsel moved to quash it, with no suggestion in her Motion that she was "unable to attend". CP 97-101. (app 3) The Motion to Quash was denied. CP 124-125. Respondent's counsel simply did not attend the perpetuation deposition, an obviously "tactical" decision.

Interestingly, one of the "available dates" Respondent's counsel provided for the perpetuation deposition---August 2nd, 2011---was also a date originally offered by Darnall for Dr. Norling's discovery deposition, prior to the Motion to Exclude! (CP 33)

The Counter-Statement of the case simply doesn't mention:

The lack of any objection to the timeliness or form of Dr. Norling's disclosure until the Motion to Exclude itself;

The lack of any objection to the time frame of Dr. Norling's examination, even in the original Motion to Exclude itself;

The written (email) agreement to extend the Discovery Cutoff, “if need be” for Dr. Norling’s discovery deposition; (CP 17-32)

The detailed report of Dr. Norling’s examination that counsel had been sent to her office the day before she filed the Motion to Exclude; (Id)

The seven potential dates she’d been offered for his discovery deposition the day before her Motion was filed. (CP 33-39)

Further, contrary to repeated assertions in Respondent’s Brief, Dr. Norling was not the only expert medical witness Appellant identified. Plaintiff’s Primary Witness List (CP 1-4) identified several treating doctors.

REPLY TO “ARGUMENT”

Even before addressing Respondent’s “arguments”, several other unsupported factual statements it contains must be addressed:

“The Motion [to exclude Dr. Norling was filed prior to the receipt of Dr. Norling’s opinions”.

False. Dr. Norling's detailed report was received in Appellant's counsel's office the day before the Motion was filed, and immediately sent to counsel. CP 17-32.

"It is evident that the only reason the opinions of Dr. Norling were sent to the defense counsel is because the motion to exclude him was to be filed."

False. This statement isn't arguably supported by anything in the record. Dr. Norling's report was forwarded to counsel the day it was received from Dr. Norling (CP 17-32) and seven deposition dates were offered the day before the motion was brought.

"Defendant Dalton had to disclose the lawsuit to his employer and the lawsuit prevented his parents (who were originally named as defendants) from being able to refinance their home".

No evidence exists for this bizarre and completely irrelevant lunge for sympathy for the Defendants.

"Plaintiff did not disclose any of Dr. Norling's opinions to the defendant until after defendant filed the motion to exclude Dr. Norling as a witness".

False, unsupported by anything in the record, and unsupportable by the record. The truth is that Respondent's counsel didn't bring her motion until:

She had secured Appellant's counsel's written agreement to extend the discovery cutoff "if need be"; (CP 17-32)

She had Dr. Norling's report in hand; (Id) and

She'd been offered seven potential dates for his discovery deposition. (CP 33-39)

Now, Respondent's "arguments" will be addressed:

1. Reply to argument that "Judge Eadie did not abuse his discretion in excluding Dr. Norling"

Other than false statements unsupported by anything in the record, this section of Respondent's Brief offers little by way of true argument.

The brief does not explain why "no lesser sanction would have been appropriate", where (1) the discovery cutoff had been waived by agreement; (2) Respondent's counsel had Dr. Norling's detailed report in hand; and (3) she'd been offered seven potential deposition dates, at least one of which was open on her calendar!

The brief does not explain why, under those circumstances, there was “no alternative sanction” that would not have “substantially prejudiced the Defendant”.

The brief certainly does not explain what, exactly, was “wilful” about Appellant’s counsel:

Disclosing Dr. Norling---three and a half months before trial--- as a witness “who 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”;

Agreeing at Respondent’s counsel’s request to extend the discovery cutoff ‘if need be’, for Dr. Norling’s discovery deposition;

Providing Respondent’s counsel Dr. Norling’s report the day it was received from him;

Providing seven potential deposition dates.

Interestingly, CR 35—which authorizes so-called “independent medical examinations” by physicians of the defendant’s choosing--- requires the report of such an examination to be provided “no less than 30 days prior to trial”. (emphasis added) Dr. Norling’s report of his “independent” examination was provided to Respondent’s counsel 39 days

prior to trial. The Rule isn't directly applicable to this situation, but does aptly demonstrate the absurdity of Respondent's claims of "prejudice".

Simply put: If Judge Eadie had denied the baseless Motion to Exclude, Respondent's counsel would have routinely taken his discovery deposition (if she even felt she needed it after reading his detailed report), and the case would have proceeded to trial over two years sooner than it eventually did.

2. Reply to argument that "Judge Robinson's award of attorney's fees was justified under the Civil Rules

The original Motion sought as its sole relief the complete exclusion of Dr. Norling. (CP 9-14) Ultimately, Judge Robinson correctly ruled that exclusion was inappropriate, but nonetheless awarded Respondent fees--- which the original motion didn't even seek--- thereby rewarding Respondent's counsel for bringing a meritless motion.

There is no authority for awarding fees to the losing party who brings a totally meritless motion.

Furthermore, the original Motion did not raise any issue of the timeliness of Dr. Norling's disclosure under the Local Rules.

(CP 9-14) Instead, the Motion was based on the palpably absurd notion that Dr. Norling should be excluded because:

“Plaintiff’s disclosure does not list Dr. Norling’s qualifications, his opinions or the basis of his opinions.”

(CP 9-14)

Of course, at the time she brought her motion, Respondent had Dr. Norling’s detailed report in hand, and had been offered seven deposition dates where, presumably, she intended to ask him about his qualification, his opinions, and the basis of his opinions”.

3. Reply to argument that “Judge Mertel did not err in incorporating Judge Robinson’s sanctions into the judgment

CR 54 plainly states:

[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

It really doesn’t matter at this point, but Judge Mertel obviously had the authority to revise Judge Robinson’s Order. Instead, he chose to

make it his own. The final judgment he signed therefore contains the reversible error.

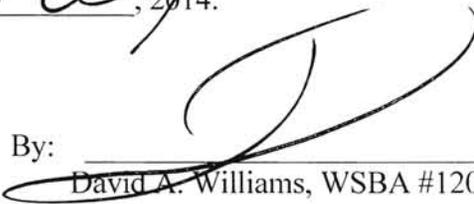
4. Respondent is Not Entitled to Fees

By rights, Appellant should receive her fees for defending a meritless motion.

CONCLUSION

The judgment should be reversed, insofar as it awarded respondent's fees for bringing a meritless motion.

DATED this 9 day of July, 2014.

By: 
David A. Williams, WSBA #12010
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that a copy of the following documents was forwarded for service upon the counsel of record:

1. Appellant's Reply Brief
2. Appendix
3. Notice of Motion
4. Motion Allowing Appellant to Supplement the Records
5. Proof of Service

Court of Appeals: Washington State Court of Appeals Division I 600 University St One Union Square Seattle, WA 98101-1176	Attorney for Respondent: Merrick, Hofstedt & Lindsey, P.S. 3101 Western Avenue, Suite 200 Seattle, WA 98121
<u>SENT VIA:</u> <input checked="" type="checkbox"/> US Mail	<u>SENT VIA:</u> <input checked="" type="checkbox"/> US Mail <input checked="" type="checkbox"/> email to: Sylvia J. Hall shall@mhlseattle.com

DATED this 9 day of July, 2014.



Lora Perry
Paralegal to David A. Williams

No. 714449

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MONTI DARNALL

Appellant,

v.

JEFF DALTON,

Respondent.

APPENDIX

KING COUNTY SUPERIOR COURT
CAUSE NO. 10-2-09322-2 SEA

Appellate Counsel for Plaintiff/Appellant
Monti Darnall:

DAVID A. WILLIAMS, WSBA #12010
Nine Lake Bellevue Drive, Suite 104
Bellevue, Washington 98005
Telephone: 425-646-7767
Facsimile: 425-646-1011

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DIVISION ONE
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STATE OF WASHINGTON
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ORIGINAL

APPENDIX 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

MONTI DARNALL,

NO. 10-2-09322-2

Plaintiffs,

**NOTICE FOR HEARING
SEATTLE COURTHOUSE ONLY**
(Clerk's Action Required) (NTHG)

v.

JEFF DALTON,

Defendants.

TO: THE CLERK OF THE COURT and to all other parties listed on Page 2:
PLEASE TAKE NOTICE that an issue of law in this case will be heard on the date below and the Clerk is directed to note this issue on the calendar checked below.

Calendar Date: July 15, 2011 **Day of Week:** Friday

Nature of Motion: Defendant's Motion to Exclude Expert Norling

CASES ASSIGNED TO INDIVIDUAL JUDGES – Seattle	
If oral argument on the motion is allowed (LR 7(b)(2)), contact staff of assigned judge to schedule date and time before filing this notice. Working Papers: The <u>judge's name</u> , date and time of hearing must be noted in the upper right corner of the Judge's copy. Deliver Judge's copies to Judges' Mailroom at C203.	
<input checked="" type="checkbox"/> Without oral argument (Mon - Fri)	<input type="checkbox"/> With oral argument Hearing
Date/Time: July 15, 2011	
Judge's Name: Suzanne Barnett Trial Date: August 15, 2011	

CHIEF CRIMINAL DEPARTMENT - Seattle in E1201	
<input type="checkbox"/> Bond Forfeiture 3:15 pm, 2 nd Thur of each month	
<input type="checkbox"/> Certificates of Rehabilitation- Weapon Possession (Convictions from Limited Jurisdiction Courts) 3:30 First Tues of each month	

CHIEF CIVIL DEPARTMENT – Seattle -- (Please report to W1060 for assignment)	
<i>Deliver working copies to Judges' Mailroom, Room C203. In upper right corner of papers write "Chief Civil Department" or judge's name and date of hearing</i>	
<input type="checkbox"/> Extraordinary Writs (Show Cause Hearing) (LR 98.40) 1:30 p.m. Tues/Wed -report to Room W1060	Non-Assigned Cases:
<input type="checkbox"/> Supplemental Proceedings (1:30 pm Tues/Wed)(LR 69)	
<input type="checkbox"/> DOL Stays 1:30 pm Tues/Wed	
<input type="checkbox"/> Motions to Consolidate with multiple judges assigned (without oral argument) (LR 40(a)(4))	
<input type="checkbox"/> Non-Dispositive Motions M-F (without oral argument).	
<input type="checkbox"/> Dispositive Motions and Revisions (1:30 pm Tues/Wed)	
<input type="checkbox"/> Certificates of Rehabilitation (Employment) 1:30 pm Tues/Wed (LR 40(2)(B))	

You may list an address that is not your residential address where you agree to accept legal documents.

Sign: /s/ Sylvia J. Hall

Print/Type Name: Sylvia J. Hall

WSBA # 38963 (if attorney)

Attorney for: Defendants

Address: 3101 Western Ave. Suite 200 City, State, Zip: Seattle, WA 98121
Telephone: 206-467-2687 Date: 7.7.11

DO NOT USE THIS FORM FOR FAMILY LAW, EX PARTE OR RALJ MOTIONS.

LIST NAMES AND SERVICE ADDRESSES FOR ALL NECESSARY PARTIES REQUIRING NOTICE
--

David A. Williams, WSBA #12010
Law Office of David A. Williams
9 Lake Bellevue Drive, Suite 104
Bellevue WA 98005
425-646-7767
425-646-1011 FAX
daw@bellevue-law.com

IMPORTANT NOTICE REGARDING CASES

Party requesting hearing must file motion & affidavits separately along with this notice. List the names, addresses and telephone numbers of all parties requiring notice (including GAL) on this page. Serve a copy of this notice, with motion documents, on all parties.

The original must be filed at the Clerk's Office not less than ~~six~~ court days prior to requested hearing date, except for Summary Judgment Motions (to be filed with Clerk 28 days in advance).

THIS IS ONLY A PARTIAL SUMMARY OF THE LOCAL RULES AND ALL PARTIES ARE ADVISED TO CONSULT WITH AN ATTORNEY.

The SEATTLE COURTHOUSE is in Seattle, Washington at 516 Third Avenue. The Clerk's Office is on the sixth floor, room E609. The Judges' Mailroom is Room C203.

APPENDIX 2



The Honorable Suzanne Barnett

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

MONTI DARNALL,)	
)	
)	NO. 10-2-09322-2
Plaintiffs,)	
)	DECLARATION OF SYLVIA J. HALL
v.)	
)	
JEFF DALTON,)	
)	
)	
Defendants.)	
)	

I, Sylvia J. Hall, declare as follows:

1. I am the attorney of record for the defendant in the above-captioned case. I make this declaration based on personal knowledge.
2. Attached as Exhibit A is a true and correct copy of the July 19, 2011 sent by Plaintiff's counsel David A. Williams. The letter stated that Mr. Williams would not extend the discovery cutoff date for Dr. Norling or any other witness.
3. Attached as Exhibit B is a true and correct copy of the August 1, 2011 letter sent to Plaintiff's counsel.
4. Attached as Exhibit C is a true and correct copy of the Notice of Deposition for Gregory Norling, M.D.
5. Attached as Exhibit D is a true and correct copy of the Notice of Deposition for Amy Richardson, D.P.M.

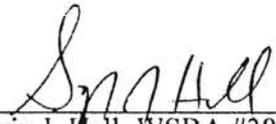
DECLARATION OF SYLVIA J. HALL - 1

MERRICK, HOFSTEDT & LINDSEY, P.S.
 ATTORNEYS AT LAW
 3101 WESTERN AVENUE, SUITE 200
 SEATTLE, WASHINGTON 98121
 (206) 682-0610

107

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

3 EXECUTED this 2 day of August, 2011, at Seattle, Washington.

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7 Sylvia J. Hall, WSBA #38963
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DECLARATION OF SYLVIA J. HALL - 2

MERRICK, HOFSTEDT & LINDSEY, P.S.
ATTORNEYS AT LAW
3101 WESTERN AVENUE, SUITE 200
SEATTLE, WASHINGTON 98121
(206) 882-0610

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EXHIBIT

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LAW OFFICE OF
DAVID A. WILLIAMS

Nine Lake Bellevue Drive, Suite 104 Bellevue Washington 98005

105

RECEIVED
JUL 21 2011
MERRICK
HOFSTEDT
& LINDSEY

July 19, 2011

Sylvia Hall
Merrick, Hofstedt, & Lindsey, P.S.
3101 Western Avenue, Ste 200
Seattle, WA 98121

Re: Darnall v. Dalton
Cause No. 10-2-09322-2 SEA

Dear Ms. Hall:

I see that Judge Eadie signed your Order excluding Dr. Norling.

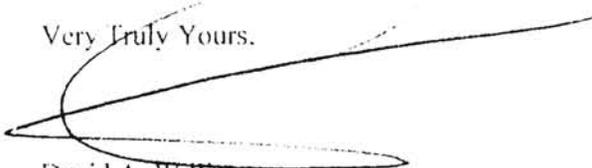
I will ask the trial judge to revise the Order pursuant to CR 54 and if he/she does not do so, I will appeal any adverse verdict.

Unless Judge Eadie happens to be our trial judge, I anticipate that the Order will be revised. Meantime, I will set up a perpetuation deposition of Dr. Norling, which you can attend, or not attend as you prefer.

The discovery cutoff has come and gone and I will not agree to extend it, for Dr Norling or for any of the other fifteen or so witnesses that you have not deposed.

Thank you.

Very Truly Yours,



David A. Williams
Attorney at Law

DAW/jb

106

EXHIBIT

B

MERRICK HOFSTEDT LINDSEY



107
Sylvia J. Hall
shall@mhlseattle.com

August 1, 2011

Via Facsimile (if no answer via U.S. mail)

Mr. David A. Williams
9 Lake Bellevue Dr., Suite 104
Bellevue, WA 98005
(425) 646-1011

Re: *Darnall v Dalton*
Our File No. 139-2054

Dear Mr. Williams:

Defendant Dalton objects to the perpetuation deposition of Gregory Norling and its use at trial since Mr. Norling has already been excluded as a witness per the order issued by the court. However, if you insist on taking the deposition, I feel that it is in my client's best interest for me to attend. My attendance will in no way constitute a waiver of any of my objections to the use of the deposition at trial, and I will ask the court to award my fees for attending the deposition. I am available August 2, 3, 5, 9, 11 or 12 for the deposition.

Very truly yours,

Sylvia J. Hall

SJH:jcm

L:\139\2054\Correspondence\Williams 8.1.11 re Norling Deposition

Transmission Report

Date/Time 08-01-2011 10:19:53 a.m. Transmit Header Text
Local ID 1 2064672689 Local Name 1 MERRICK, HOFSTEDT & LINDSEY PS

This document : Confirmed
(reduced sample and details below)
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MERRICK HOFSTEDT LINDSEY



Sylvia J. Hall
shah@mhlcsattle.com

August 1, 2011

Via Facsimile
Mr. David A. Williams
9 Lake Bellevue Dr., Suite 104
Bellevue, WA 98005
(425) 646-1011

Re: *Darnall v Dalton*
Our File No. 139-2054

Dear Mr. Williams:

Defendant Dalton objects to the perpetuation deposition of Gregory Norling and its use at trial since Mr. Norling has already been excluded as a witness per the order issued by the court. However, if you insist on taking the deposition, I feel that it is in my client's best interest for me to attend. My attendance will in no way constitute a waiver of any of my objections to the use of the deposition at trial, and I will ask the court to award my fees for attending the deposition. I am available August 2, 3, 5, 9, 11 or 12 for the deposition.

Very truly yours,

Sylvia J. Hall

SJH:jcm

L:\1392054\Correspondence\Williams R.1.11 v Norling Deposition

Merrick, Hofstedt & Lindsey, P.S.
3101 Western Ave. Suite 200 Seattle, WA 98121
Telephone (206) 682-0510 Fax (206) 467-3680

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Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send
PL: Polled local
PR: Polled remote
MS: Mailbox save
MP: Mailbox print
RP: Report
FF: Fax Forward
CP: Completed
FA: Fall
TU: Terminated by user
TS: Terminated by system
G3: Group 3
EC: Error Correct

EXHIBIT

C



LAW OFFICE OF
DAVID A. WILLIAMS

Nine Lake Bellevue Drive, Suite 104 Bellevue Washington 98005

To:	Sylvia J. Hall MERRICK, HOFSTEDT & LINDSEY, P.S.	From:	Jen L. Bassetti
Fax:	(206) 4672689	Phone:	(206) 682-0610
Pages (Including Cover):	4	Date:	August 1, 2011
Re:	Monti Darnall		

URGENT For Your Records Action Required Hard Copy Will Follow

Please find enclosed the Notice of Perpetuation Deposition for Dr. Norling. If you have any questions, do not hesitate to call.

Sincerely,

Law Office of David A. Williams

This facsimile message is for the sole use of the intended recipient(s) and contains confidential and privileged information. Any unauthorized review, use, disclosure, or distribution of this facsimile is PROHIBITED. If you are not the intended recipient, please destroy all paper/electronic copies of this document and notify the original sender.

Phone: (425) 646-7767 | Fax: (425) 646-1011 | www.bellevue-law.com

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MONTI DARNALL,

Plaintiff,

NO. 10-2-09322-2 SEA

vs.

JEFF DALTON,

Defendant.

NOTICE OF PERPETUATION
DEPOSITION OF GREGORY NORLING,
M.D.

TO: Gregory Norling, M.D.,

AND TO: Sylvia Hall, Attorney for Defendant:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE THAT the perpetuation testimony of Gregory Norling, M.D., will be taken upon oral examination at the request of the Plaintiff in the above-entitled action before a court reporter and notary public at the following:

Date: Wednesday, August 3, 2011

Time: 5:00 PM

Location: Evergreen Orthopedic Clinic
12911 120th Ave NE, Ste H210
Kirkland, WA 98034

Reporter: Yamaguchi & Associates

NOTICE OF PERPETUATION
DEPOSITION OF GREGORY NORLING, M.D. - 1

DAVID A. WILLIAMS

9 Lake Bellevue Drive, Suite 104, Bellevue, WA 98005
Telephone (425) 646-7767 - Facsimile (425) 646-1011

1 The said oral examination to be subject to continuance or adjournment from time to time or place
2 to place until completed, and to be taken on the grounds and for all purposes pursuant to court rules. It is
3 for the purpose of preserving the witness' testimony for trial.

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DATED this 27th day of July, 2011.


David A. Williams, WSBA #12010
Attorney for Plaintiff

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DECLARATION OF SERVICE

I hereby certify that a copy of the Notice of Perpetuation Deposition of Gregory Norling, M.D. was forwarded for service upon the counsel of record:

<p>Attorney for defendant:</p> <p>Sylvia J. Hall MERRICK, HOFSTEDT & LINDSEY, P.S. 3101 Western Ave, Suite 200 Seattle, WA 98121</p>
<p>SENT VIA:</p> <p><input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Facsimile</p>

DATED this 1st day of August, 2011.



Jen L. Bassetti
Paralegal

EXHIBIT

D



LAW OFFICE OF
DAVID A. WILLIAMS

Nine Lake Bellevue Drive, Suite 101 Bellevue Washington 98005

To:	Sylvia J. Hall MERRICK, HOFSTEDT & LINDSEY, P.S.	From:	Jen L. Bassetti
Fax:	(206) 4672689	Phone:	(206) 682-0610
Pages (Including Cover):	4	Date:	August 1, 2011
Re:	Monti Darnall		

URGENT For Your Records Action Required Hard Copy Will Follow

Please find enclosed the Notice of Perpetuation Deposition for Amy Richardson, DPM. If you have any questions, do not hesitate to call.

Sincerely,

Law Office of David A. Williams

This facsimile message is for the sole use of the intended recipient(s) and contains confidential and privileged information. Any unauthorized review, use, disclosure, or distribution of this facsimile is PROHIBITED. If you are not the intended recipient, please destroy all paper/electronic copies of this document and notify the original sender.

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MONTI DARNALL,

Plaintiff,

NO. 10-2-09322-2 SEA

vs.

JEFF DALTON,

Defendant.

NOTICE OF PERPETUATION
DEPOSITION OF AMY RICHARDSON,
D.P.M.

TO: Amy Richardson, D.P.M.

AND TO: Sylvia Hall, Attorney for Defendant:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE THAT the perpetuation testimony of Amy Richardson, D.P.M., will be taken upon oral examination at the request of the Plaintiff in the above-entitled action before a court reporter and notary public at the following:

Date: Thursday, August 11, 2011

Time: 8:30 AM

Location: Factoria Foot & Ankle Clinic
4140 Factoria Blvd SE #1B
Bellevue, WA 98006

Reporter: Yamaguchi & Associates

NOTICE OF PERPETUATION
DEPOSITION OF AMY RICHARDSON, D.P.M. - 1

DAVID A. WILLIAMS
9 Lake Bellevue Drive, Suite 104, Bellevue, WA 98005
Telephone (425) 646-7767 - Facsimile (425) 646-1011

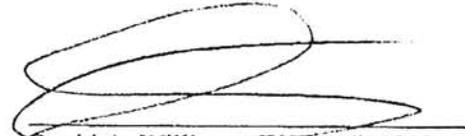
1 The said oral examination to be subject to continuance or adjournment from time to time or place
2 to place until completed, and to be taken on the grounds and for all purposes pursuant to court rules. It is
3 for the purpose of preserving the witness' testimony for trial.

4

5 DATED this 1st day of August, 2011.

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David A. Williams, WSBA #12010
Attorney for Plaintiff

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DECLARATION OF SERVICE

I hereby certify that a copy of the Notice of Perpetuation Deposition of Amy Richardson, D.P.M. was forwarded for service upon the counsel of record:

Attorney for defendant: Sylvia J. Hall MERRICK, HOFSTEDT & LINDSEY, P.S. 3101 Western Ave, Suite 200 Seattle, WA 98121
<u>SENT VIA:</u> <input checked="" type="checkbox"/> US Mail <input checked="" type="checkbox"/> Facsimile

DATED this 1st day of August, 2011.


 Jen L. Bassetti
 Paralegal

APPENDIX 3

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

MONTI DARNALL,)	
)	
)	NO. 10-2-09322-2
Plaintiffs,)	
)	
v.)	MOTION TO QUASH THE
)	PERPETUATION DEPOSITIONS OF
JEFF DALTON,)	GREGORY NORLING, M.D. AND AMY
)	RICHARDSON, D.P.M.
Defendants.)	
)	
)	

I. RELIEF REQUESTED

Defendant Jeff Dalton requests that this Court enter an order quashing the perpetuation deposition of Gregory Norling, M.D.

II. STATEMENT OF FACTS

The discovery cutoff date for this case was on June 27, 2011. Defendant moved to exclude Gregory Norling, M.D. as a witness in this trial pursuant to Civil Rule 26 and Local Rule 26. This court granted the motion on July 18, 2011. On July 19, 2011 defense counsel received a letter from plaintiff’s counsel stating that he would not extend the discovery cutoff for Dr. Norling or any other witness.¹ Plaintiff’s counsel also stated that he would take the perpetuation deposition of Dr. Norling whether defense counsel attended or not. Defense counsel was placed in the precarious situation of either not attending the perpetuation deposition of Dr. Norling when the deposition could later be admitted at trial or, in the alternative, attending the deposition

¹ Declaration of Sylvia J. Hall (“Hall Decl.”), Exhibit A

1 of Dr. Norling without the ability to take the discovery deposition or otherwise cross-examine
2 Dr. Norling before the deposition. Defense counsel also runs the risk that attending the
3 deposition would constitute a waiver of any objections or be seen as diminishing the prejudice to
4 the Defendant.

5 On August 1, 2011, defense counsel sent a letter to plaintiff's counsel objecting to the
6 perpetuation deposition of Dr. Norling but providing all of the dates prior to the trial on which
7 defense counsel was available.² Later on August 1, defense counsel received the Notice of
8 Deposition scheduling the perpetuation depositions of Dr. Norling for August 3, 2011 at 5 p.m.³
9 and the perpetuation deposition of Amy Richardson, DMP for August 11, 2011 at 8:30 a.m.⁴

10 Even though the discovery cutoff date has passed, defense counsel did not initially
11 oppose the perpetuation deposition of Amy Richardson, D.P.M. Defense counsel called
12 plaintiff's counsel to schedule the discovery deposition of Dr. Richardson prior to the
13 perpetuation deposition pursuant to CR 32(a)(5)(B). Defense counsel refused to allow the
14 discovery deposition of Dr. Richardson because the discovery cutoff had passed. For the reasons
15 set forth in the argument section below, defense counsel is bringing the instant motion to quash
16 the perpetuation depositions of Gregory Norling, M.D. and Amy Richardson, D.P.M.

17 III. STATEMENT OF THE ISSUES

18 1. Whether the Court should allow Plaintiff to take the perpetuation deposition of a
19 witness that has been excluded from testifying at trial.

20 2. Whether the Court should allow the perpetuation deposition of an expert who was
21 not disclosed in compliance with rules 26(b)(5)(A)(i), 33, or 34.

22 3. Whether the Court should allow the perpetuation deposition of a treating provider
23 to proceed after the discovery cutoff date when opposing counsel refuses to allow the discovery
24 deposition of the provider beforehand based on the passing of the discovery cutoff date.

25 ² Hall Decl, Exhibit B

26 ³ Hall Decl. Exhibit C

⁴ Hall Decl., Exhibit D

1 **IV. EVIDENCE RELIED UPON**

2 This motion is based upon the Declaration of Sylvia J. Hall, the exhibits attached thereto,
3 and the pleadings and record on file with this Court.

4 **V. ARGUMENT AND AUTHORITY**

5 **A. This Court should quash the perpetuation deposition of Dr. Norling.**

6 **1. Dr. Norling has been excluded as a witness from this trial.**

7 Gregory Norling, M.D. was excluded as a witness from this trial on July 18, 2011 when
8 this Court granted Defendant's motion to exclude him from trial. Plaintiff did not file a motion
9 to amend or revise the order excluding Dr. Norling. Dr. Norling has been excluded as a witness
10 at trial and Defendant should not have to take the time or incur the expense of attending the
11 perpetuation deposition of an excluded witness.

12 **2. Defendant was not given adequate notice of Dr. Norling's perpetuation deposition.**

13 Defendant received the Notice of Deposition for Dr. Norling's perpetuation deposition on
14 August 1, 2011. The notice scheduled Dr. Norling's deposition for August 3, 2011 at 5 p.m.
15 Civil Rule 30 governs depositions upon oral examination. Civil Rule 26(b)(1) reads in pertinent
16 part:

17 A party desiring to take the deposition of any person upon oral examination shall
18 give reasonable notice in writing of not less than 5 days (exclusive of the day of
19 service, Saturdays, Sundays and court holidays) to every other party to the
action...

20 Defense counsel was served with the notice of deposition on August 1, 2011. Assuming the
21 perpetuation deposition is allowed to occur at all, it should not have been noted prior to August
22 8, 2011.

23 **3. The transcript of Dr. Norling's deposition cannot be used at trial.**

24 Civil Rule 32 governs the use of depositions at trial. CR 32(a)(5)(B) states:

25 [t]he deposition of a health care professional, even though available to testify at
26 trial, taken with the expressly stated purpose of preserving the deponent's
testimony for trial, may be used if, before the taking of the deposition, there has

1 been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i),
2 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate
3 opportunity to prepare, by discovery deposition of the deponent or other means,
4 for cross examination of the deponent.

5 Defendant never had the opportunity to depose Dr. Norling prior to the discovery cutoff date.
6 Plaintiff's counsel made it clear in his July 19, 2011 letter that he would not allow Defendant to
7 take the discovery deposition of Dr. Norling prior to the perpetuation deposition. Plaintiff also
8 failed to supplement her discovery responses regarding Dr. Norling pursuant to Civil Rules
9 26(b)(5)(A)(i), 33 and CR 34 prior to the discovery cutoff date. Consequently, the deposition of
10 Dr. Norling cannot be used at trial.

11 **B. This Court should quash the perpetuation deposition of Amy Richardon, D.P.M.**

12 **1. Plaintiff is not allowed to schedule depositions after the discovery cutoff date.**

13 Parties may obtain **discovery** by depositions upon oral examination or written questions.
14 CR 26(a). (emphasis added) It is undisputed that taking depositions is a form of discovery. CR
15 26 and CR 30. The discovery cutoff date in this case was on June 27, 2011 and trial is in less
16 than two weeks. Defense counsel should not have to prepare for depositions while
17 simultaneously preparing for trial. This defeats the purpose of having the discovery cutoff date
18 over a month prior to the start of trial.

19 **2. If the perpetuation deposition of Amy Richardson, D.P.M. is allowed, Defendant is
20 entitled to take her discovery deposition prior to the perpetuation deposition.**

21 Plaintiff plans to take the perpetuation deposition of Dr. Richardson after the discovery
22 cutoff date but refuses to allow defense counsel to take the discovery deposition of Dr.
23 Richardson because the discovery cutoff date has passed. Plaintiff should not be allowed to
24 unilaterally conduct discovery after the cutoff date. The perpetuation deposition of Dr.
25 Richardson should not be allowed and cannot be used at trial if defense counsel is not permitted
26 to take her discovery deposition beforehand. CR 32(a)(5)(B).

///

MOTION TO QUASH THE PERPETUATION DEPOSITION OF GREGORY
NORLING, M.D. - 4

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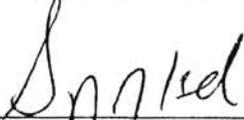
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VI. PROPOSED ORDER

A proposed order accompanies this motion.

DATED this 2 day of August, 2011.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By 
Sylvia J. Hall, WSBA #38963
Of Attorneys for Defendants Dalton