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Washington State Supreme Court

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Court of Appeal Cause No. 714449-I

91580-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MONTI DARNALL

Appellant,

v.

JEFF DALTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent Jeffrey Dalton is the Defendant in this personal injury action and was the Respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioner Monti Darnall is seeking review of the unpublished opinion of Division One of the Court of Appeals filed on March 9, 2015. The opinion was made without oral argument. Petitioner Darnall's Motion for Reconsideration was denied by order dated March 25, 2015.

III. ISSUES PRESENTED FOR REVIEW

(1) Whether Plaintiff/Petitioner Darnall failed to disclose Dr. Gregory Norling in compliance with the Order Setting Case Schedule.

(2) Whether Plaintiff/Petitioner Darnall failed to properly answer interrogatories and requests for the production of documents regarding the opinions of Dr. Gregory Norling.

(3) Whether the Honorable Palmer G. Robinson abused her discretion by requiring Plaintiff/Petitioner Darnall to pay the reasonable expenses, including attorney fees, caused by her failure to properly answer discovery requests and her failure to properly disclose Dr. Norling.

(4) Whether CR 54(b) has any relevance in this case.

IV. INTRODUCTION

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. Plaintiff filed her lawsuit on March 5, 2010. The case was initially scheduled for trial on August 15, 2011 with a discovery cutoff date of June 27, 2011, a primary witness disclosure deadline of March 14, 2011 and an additional witness disclosure deadline of April 25, 2011. Plaintiff did not disclose her only medical expert as a part of her Primary Witness Disclosure. Plaintiff did provide the name of her sole medical expert witness in her Additional Witness Disclosure dated April 25, 2011, but that disclosure stated that the expert witness would not examine the Plaintiff until June.

Defense counsel moved to exclude expert witness after the discovery cutoff period passed without any communication from Plaintiff's counsel regarding the examination or the expert's findings. Plaintiff failed to provide the required disclosure in accordance with the Order Setting Case Schedule, discovery requests and the Civil Rules. Dr. Gregory Norling was properly excluded as a witness at trial by Judge Eadie and Judge Robinson did not abuse her discretion by granting Defendant his fees regarding Dr. Norling after allowing Dr. Norling to testify as a witness at trial. Plaintiff's appeal is her attempt to avoid any consequences for her failure to operate in accordance to the well-established rules regarding discovery. The rulings of the court below

should be affirmed.

V. COUNTER-STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on March 20, 2007. Plaintiff filed her lawsuit on March 5, 2010. CP 277. The importance of Dr. Norling's testimony in this case cannot be overstated. Plaintiff Darnall was only seen by a medical provider on a few occasions in the six years between the motor vehicle accident through the trial date. CP 454-456. Plaintiff did not submit any of her medical records as exhibits at trial. *Id.* None of Plaintiff's treating providers testified that Plaintiff's injuries were related to the March 20, 2007 motor vehicle accident. *Id.*; CP 493. Dr. Gregory Norling was plaintiff's only medical causation witness. CP 454-456. He was not disclosed in Plaintiff's answers to interrogatories; he was not disclosed in Plaintiff's Primary Witness Disclosure (CP 1-4); and only Dr. Norling's name and address were provided in the April 25, 2011 Additional Witness Disclosure. CP 59-86. The April 25, 2011 disclosure did not provide any substantive information regarding Dr. Norling's opinions and/or expected testimony because Dr. Norling never intended to examine plaintiff until the eve the of the discovery cutoff period (**June 2011**). *Id.*

Defendant Dalton propounded discovery to Plaintiff requesting the names and opinions of the expert witnesses on May 17, 2010. The discovery cutoff date was June 27, 2011 (CP 277)- over one year after Defendant Plaintiff failed to provide the opinions of any experts who planned to testify at trial in her discovery responses. After the discovery cutoff period passed without any communication from plaintiff's counsel regarding Dr. Norling's opinions, Defendant moved to exclude Dr. Norling as a trial witness. CP 9-16. No information was provided regarding plaintiff's expert witness prior to notifying plaintiff's counsel that a motion would be filed to exclude Dr. Norling as a witness. *Id.* Judge Eadie signed the order granting the motion to exclude Dr. Norling on July 18, 2010. CP 52-53. Plaintiff did not move for reconsideration of the order. 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. Due to plaintiff's failure to provide the opinions and expected testimony of Dr. Norling prior to the discovery cutoff date, Defendant was never afforded the opportunity to depose Dr. Norling prior to his perpetuation deposition.

On August 15, 2011, the date that was to be the first day of trial, plaintiff moved to "revise" Judge Eadie's order excluding Dr. Norling as a

witness. CP 126-189. Judge Barnett advised plaintiff's counsel that she did not have the authority to revise the ruling of a Superior Court Judge. CP 218-219. Judge Barnett did allow plaintiff to seek discretionary review of the order excluding Dr. Norling.

Plaintiff filed her motion for discretionary review seeking relief under CR 54(b). The Court of Appeals denied the motion and informed plaintiff that CR 54(b) did not apply to facts of this case. Plaintiff requested modification of the Commissioner's ruling which was also denied. The case was then remanded back to the trial court.

Judge Palmer Robinson of the King County Superior Court reinstated Dr. Norling as a trial witness in exchange for granting Defendant the fees and costs related to the exclusion of Dr. Norling. CP 395-397. The order was entered on June 14, 2012. *Id.* Defendant submitted a subsequent motion to recover the costs incurred at the trial and appellate court level regarding Dr. Norling. CP 282-283. Judge Robinson entered the order granting fees on July 20, 2012. CP 365-367. Plaintiff did not move for reconsideration regarding Judge Robinson's order allowing Dr. Norling as a witness and granting Defendant fees and costs related to Dr. Norling or the order Judge Robinson entered regarding the specific amount of the sanction.

In November 2013, this case was tried to a jury verdict before Judge *pro tem* Charles Mertel. CP 494. Defendant requested an offset for the fees and costs awarded in Judge Robinson's July 20, 2012 order. The remaining amount of the verdict was paid and the parties entered partial satisfaction of judgment. Prior to the entry of final judgment, plaintiff filed a motion to revise Judge Robinson's July 20, 2012 order pursuant to CR 54(b). CP 495-524.

III. ARGUMENT

1. Judge Eadie did not abuse his discretion in excluding Dr. Norling.

There can be no doubt that Dr. Norling was not disclosed in accordance with the Order Setting Case Schedule. There can be no doubt that Plaintiff failed to disclose Dr. Norling in her answers to the interrogatories pertaining to expert witnesses. The trial of the case was scheduled to commence on August 15, 2011. Plaintiff's counsel was told that the motion to exclude Dr. Norling would be filed during the July 5, 2011 discovery conference regarding the issue. CP 9-16. The motion was filed on July 8, 2011 prior to the receipt of Dr. Norling's opinions. It is clear that the only reason the opinions of Dr. Norling were *ever* sent to defense counsel is because the motion to exclude him was to be filed. Dr.

Norling was plaintiff's sole expert witness. Defendant was entitled to his opinions by the Primary Witness Disclosure deadline of March 14, 2011.

When a court excludes a witness based on a discovery violation, the record must reflect: 1) the Court's consideration of a lesser sanction; 2) the willfulness of the violation; and 3) the substantial prejudice arising from it. *Mayer v. Sto Industries*, 156 Wn.2d 677, 699, 132 P.3d 115 (2006); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-496, 933 P.2d 1036 (1997). All three *Burnet* factors were met regarding the exclusion of Dr. Norling as a witness. CP 9-16; CP 40-48.

No lesser sanction would have been appropriate given the rapidly approaching trial date. There was not an alternative sanction that would not have substantially prejudiced the Defendant. The weight of being a defendant in a lawsuit is not unsubstantial. In the instant case the trial was delayed for over two and a half years as a result of plaintiff's failure to properly disclose Dr. Norling. 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.

Plaintiff's discovery violations were willful. Plaintiff was not examined by Dr. Norling until June 21, 2011 when the discovery cutoff date was June 30, 2011. Plaintiff never had any intention to provide Dr.

Norling's opinions in accordance with the deadlines in the Order Setting Case Schedule and discovery requests.

Defendant was substantially prejudiced by Plaintiff's untimely disclosure. The discovery rules are implemented to prevent parties from being blindsided at trial. This case involved a plaintiff who had a total of three doctor's visits from March 20, 2007 through the date of trial that were related to this accident. After the discovery cutoff date Dr. Norling expressed opinions regarding plaintiff's possible need for surgery and expensive medication. The purpose of the case management schedule and disclosure deadlines is to have an orderly process by which a case can proceed. Requiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion. Allowing disclosures to be made in the manner suggested by Plaintiff in this case would frustrate the purpose of the scheduling rules. *Lancaster v. Perry*, 127 Wn. App. 826, 833, 113 P.3d 1 (2005). This is precisely the type of late disclosure the discovery rules are designed to prevent. Dr. Norling's original exclusion was warranted.

2. Judge Robinson's award of attorney fees was justified under the Civil Rules.

Rulings on discovery are reviewed for abuse of discretion. *Mayer v. Sto Industries, Inc.* 156 Wn. 2d 677, 132 P. 3d 115 (2006). Judge Robinson did not abuse her discretion in awarding defendant his attorney

fees and costs pertaining to the exclusion of Dr. Norling. Dr. Gregory Norling was plaintiff's only medical causation witness. He was not an additional witness whose testimony was only relevant after defendant disclosed his primary witnesses. Dr. Norling was a primary witness whose opinions should have been disclosed by the March 14, 2011 deadline for the disclosure of possible primary witnesses. At the very latest, plaintiff was required to disclose the opinions and expected testimony of Dr. Norling by the April 25, 2011 deadline for the disclosure of additional witnesses.

King County Local Rule 26(k) governs the disclosure of witnesses.

The rule states:

- (1) *Disclosure of Primary Witnesses:* Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.
- (2) *Disclosure of Additional Witnesses:* Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons *whose knowledge did not appear relevant until the primary witnesses were disclosed* and whom the party reserves the option to call as witnesses at trial. (emphasis added).
- (3) *Scope of Disclosure:* Disclosure of witnesses under this rule shall include the following information: Experts. *A summary of the expert's opinions and the basis therefore* and a brief description of the expert's qualifications. (emphasis added).
- (4) *Exclusion of Testimony.* Any person not disclosed in compliance with this rule may not be called to testify at

trial, unless the Court orders otherwise for good cause and subject to such conditions as justice requires.

Plaintiff did not disclose Dr. Norling in compliance with LCR 26(k). 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. It is undeniable that Dr. Norling was not properly disclosed in compliance with KCLR 26(k) or the Order Setting Case Schedule. The untimely disclosure was also not in compliance with the interrogatories regarding expert witness testimony or the requests for production of documents requesting expert opinions and reports.

The Case Schedule provided the deadlines for the disclosure of primary witnesses, the disclosure of additional witnesses, and the deadline for all discovery to be completed. The Order Setting Case Schedule specifically states that “[p]enalties, including but not limited to sanctions set forth in Local Civil Rule 4(g) and Rule 37 of the Superior Court Civil Rules may be imposed for non-compliance.”(emphasis added). KCLR 4(g) reads in pertinent part:

Enforcement; Sanctions; Dismissal; Terms.

(1) Failure to comply with the Case Schedule may be grounds for imposition of sanctions, including dismissal, or terms.

...

(3) If the Court finds that an attorney or party has failed to comply with the Case Schedule and has no reasonable excuse, the Court may order the attorney or party to pay monetary sanctions to the Court, or terms to another party who has incurred expense as a result of the failure to comply, or both; in addition, the Court may impose such

other sanctions as justice requires.

(4) As used with respect to the Case Schedule, “terms” means costs, attorney fees, and other expenses incurred or to be incurred as a result of the failure to comply...(emphasis added)

Civil Rule 37(b) governs discovery sanctions for failure to comply with an order. CR 37(b) reads in pertinent part:

[i]n lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. (emphasis added)

Plaintiff failed to timely and properly disclose Dr. Gregory Norling in accordance with LCR 26(k), Civil Rules 33 and 34 and the order setting case schedule. The costs and fees that were awarded by way of Judge Robinson’s June 13, 2012 and July 20, 2012 orders were the fees and costs incurred by defendant based solely on plaintiff’s failure to properly and timely disclose Dr. Norling. Judge Robinson did not abuse her discretion in awarding defendant his attorney fees and costs.

3. Pro Tem Judge Mertel did not err in incorporating Judge Robinson’s sanctions into the judgment.

Pro Tem Judge Mertel did not have the authority to ‘revise’ Judge Robinson’s order pursuant to CR 54(b). Judge Robinson’s orders allowing defendant to request fees and granting a specific amount of fees

were entered on June 14, 2012 and July 20, 2012 respectively. Plaintiff did not seek 'revision' of the orders until December 17, 2013. Plaintiff's application of CR 54(b) to "revise" orders after the time period authorized under CR 59(b) has already been refuted by the trial court and the Court of Appeals. Plaintiff has not provided any authority for her contention that CR 54(b) allows any order to be revised until there is a final judgment. Such a reading of CR 54(b) would render the time provisions of CR 59(b) and CR 6(b) meaningless.

4. Defendant Dalton is entitled to his attorney's fees and costs for this appeal under RAP 18.1.

Attorney fees are recoverable if authorized by statute, contract or on equitable grounds. RAP 18.1 states that if applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless the statute specifies that the request is to be directed to the trial court. Judge Robinson's June 14, 2011 Order authorized Defendant to recover attorney fees based on responding to plaintiff's motions regarding the exclusion of Dr. Norling. The instant appeal falls into the category outlined by Judge Norling. Defendant requests his attorney fees in responding to Plaintiff's appeal.

IV. CONCLUSION

Discovery rulings are reviewed for abuse of discretion. Judge Eadie did not abuse his discretion in initially excluding Dr. Norling. Judge Robinson did not abuse her discretion in allowing Dr. Norling as a witness but granting Defendant the attorney fees and costs incurred pertaining to Plaintiff's improper disclosure and discovery violation regarding Dr. Norling. Judge Mertel did not err by incorporating Judge Robinson's order into the final verdict. Defendant is entitled to fees and costs incurred in responding to plaintiff's appeal.

Respectfully Submitted this 15 day of May, 2015.

MERRICK, HOFSTEDT & LINDSEY, P.S.

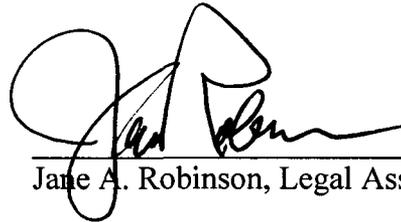
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CERTIFICATE OF MAILING

I hereby certify that on this 15th day of May, 2015, I caused a true and correct copy of the foregoing to be delivered to all counsel of record in the following manner:

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