

2009

Wayne L. Welsh and Carol Welsh v. Hospital Corporation of Utah, Lakeview Hospital : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

WAYNE L. WELSH and CAROL WELSH, :

Plaintiffs/Appellants, :

v. :

HOSPITAL CORPORATION OF UTAH :
d/b/a LAKEVIEW HOSPITAL, :

Defendant/Appellee. :

Case No. 20090361-CA

Trial Court No. 060700106

REPLY BRIEF OF APPELLANTS

APPEAL FROM A DECISION OF THE SECOND JUDICIAL DISTRICT COURT

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ARGUMENT

Appellants and counsel acknowledge it is a trial court's prerogative to move cases along at an orderly pace to promote justice. However, this practical goal is not inflexible and must adjust, in the interests of justice, to preserve a court's overarching goal of allowing the parties to seek redress for injuries and the resolution of disputes on their merits and in a fundamentally fair way. *See, e.g., Carmen v. Slavens*, 546 P.2d 601, 603 (Utah 1976) (noting the fundamental principle that "reason and justice shall prevail over the arbitrary and uncontrolled will of any one person," including "courts and judges," and that "[i]t has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy."); *accord Boice ex. rel. Boice v. Marble*, 1999 UT 71, ¶10, 982 P.2d 565 ("[J]ustice and fairness will require that a court allow a party to designate witnesses, conduct discovery, or otherwise perform tasks covered by a scheduling order after the court-imposed deadline for doing so has expired.").

The present case provides just such a situation. The Appellants Wayne and Carol Welsh (the "Welshes") have suffered severe permanent injuries as a result of Defendant/Appellee Hospital Corporation of Utah d/b/a Lakeview Hospital's ("Lakeview") negligence. Lakeview left Mr. Welsh, the former State Auditor, unattended on an elevated metal examination table despite the fact that he came to the hospital for treatment following a syncope and complaints of dizziness and nausea. While unattended, Mr. Welsh fell off the table, resulting a fracture to his skull, subdural hematoma, coma, and permanent brain damage from which Mr. and Mrs. Welsh will

likely never recover their former quality of life. (R. 2-9; 218-19.) The Welshes came to court to obtain redress for their devastating injuries. The litigation has encountered delays as a result of the actions of both parties' counsel.

Unfortunately, the trial court has let its practical goal of moving the case at an orderly pace overshadow its primary purpose and function of providing a fair forum for litigants to seek redress for injuries. Distressingly, the trial court has acted both arbitrarily and contrary to law in doing so. For example, in its haste to sanction the Welshes, the trial court ignored that:

- The Welshes obtained new counsel on November of 2008. The Welshes' new counsel requested a minor 39-day extension to designate experts and submit initial expert reports. This request would not have delayed resolution of the case a single day, as it did not propose changes to any other dates in the scheduling order, including the yet-to-be-scheduled trial date. (R. 71-74, 76.)
- The trial court initially granted the requested extension on December 29, 2008 ("December 29, 2008 Ruling"), before abruptly changing its mind and imposing sanctioning against the Welshes *sua sponte* on January 22, 2009. Notably, the Welshes had already designated experts and submitted expert reports pursuant to the extended deadline as of January 22, 2009 and mediation had been scheduled. (See Addenda A & C to the Welshes' opening Brief.)
- Utah law and constitutional principles of due process require the trial court to find intentional misconduct by the Welshes themselves, before sanctioning the Welshes. The trial court did not make any such findings before sanctioning the Welshes on January 22, 2009. (See Addendum A.) Nor is there any evidence in the record to support a finding that the Welshes or their counsel intentionally disregarded any orders. There is no evidence that the Welshes—the sanctioned parties—are responsible for any of the delays in the case.
- Counsel for both the Welshes and Lakeview contributed to the delays in this case. Yet, the trial court chose to harshly punish only the Welshes

simply because their counsel happened to seek the last extension—an extension that in no way would have delayed the trial.

- Neither the Welshes nor any of their attorneys disregarded any dates imposed by the scheduling orders. Rather the Welshes’ counsel properly filed a Motion to request an extension of time where an extension was needed and complied with the trial court’s deadlines.
- Lakeview has never asserted, and could not assert, that it would have suffered prejudice from the requested extension.

These facts required the trial court to exercise temperance in order to promote and preserve fairness and justice, not to harshly sanction the Welshes by precluding their use of expert testimony for filing a Motion, before expiration of the existing deadline, seeking a minor extension of time to designate experts and submit expert reports. *See, e.g., United States v. Golyvansky*, 291 F.3d 1245, 1249 (10th Cir. 2002) (“It would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings.”). Instead of using its authority to promote justice, the trial court ordered that the trial be unfairly weighted to Lakeview’s favor, simply because Lakeview happened to not seek the last extension.

Lakeview, for its part, attempts to justify the trial court’s ruling to preserve the unexpected and unearned benefit it has received. However, in doing so, Lakeview mischaracterizes the facts and misinterprets the requirements of Utah law.

I. LAKEVIEW MISCHARACTERIZES THE FACTS TO IMPROPERLY MAKE ITSELF LOOK BLAMELESS FOR THE DELAYS IN THIS CASE AND TO TRY TO SUPPORT THE TRIAL COURT’S FINDING OF WILLFULNESS.

Lakeview acknowledges that Utah law authorizes sanctions only upon a finding that “(1) the party’s behavior was willful; (2) the party has acted in bad faith; (3) the

court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process.” *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶25, 199 P.3d 957 (quotations and citation omitted).

Lakeview cannot dispute that the trial court failed to make the requisite findings prior to sanctioning the Welshes in its January 22, 2009 Order denying the Welshes’ Motion for an Enlargement of Time (“January 22 Order”). There was no evidentiary basis to support such findings then, and there is no such basis now, notwithstanding the trial court’s attempt to justify the sanctions after-the-fact in its April 14, 2009 Order denying the Welshes’ Motion for Relief from Order and for Entry of Order Enlarging Time (“April 14 Order”). This is reversible error.

A. Lakeview Mischaracterizes the Facts to Try to Create an Evidentiary Basis for the Sanctions.

Cognizant of the fact that the sanctions lack evidentiary support, Lakeview attempts to manufacture a pattern of intentional dilatoriness and willful disobedience by the Welshes to justify the sanctions. Lakeview claims the “Welshes are appealing the trial court’s denial of *their* fifth request for additional time” and that the “Welshes’ counsel failed to adhere to the trial court’s fourth scheduling order.” (Lakeview’s Brief, p. 3 (emphasis added) (original emphasis omitted).) Lakeview’s brief is replete with accusations that the Welshes’ repeatedly failed to comply with the trial court’s scheduling orders. (*See id.*, p. 13, 24, 26-28.) These are blatant mischaracterizations.

1. Lakeview contributed to the delays in this case.

Contrary to Lakeview's insinuation, neither the Welshes nor their counsel unilaterally sought five extensions of the scheduling order. Rather, prior to the Welshes' November 26, 2008 Motion for an Enlargement of Time, the parties' stipulated to each amended scheduling order. (R. 42-47; 50-55; 61-66.) Lakeview's counsel prepared two of the amended scheduling orders—the February 11, 2008 and the September 30, 2008 Scheduling Orders—which indicates that it was primarily Lakeview that sought those extensions. (R. 50-55; 61-66.) Lakeview's counsel clearly sought, utilized and voluntarily consented to the extended schedule provided by each stipulated scheduling order as much as the Welshes' counsel. For example, prior to the first amended scheduling order, entered on May 25, 2007, Lakeview's counsel requested an additional month to conduct expert discovery, which request the Welshes' then-counsel, Nathan Wilcox, accommodated. (*See* May 4, 2007 Letter from Mr. Wilcox to Mark Riekhof, Lakeview's counsel, R. 355, attached as Addendum D to the Welshes' opening Brief.) This Court must reject Lakeview's disingenuous attempts to re-color the facts to make itself and its counsel appear blameless for the delays in this case.

In imposing sanctions against the Welshes, the trial court ignored Lakeview's counsel's participation in delaying this case. In fact, the trial court completely ignored that Lakeview's counsel delayed final resolution of this matter as well. The Welshes' November 26, 2008 Motion for Enlargement of Time sought only to change the expert disclosure date, with no corresponding change to the deadlines for expert depositions, dispositive motions, or readiness for trial. (R. 72-74.) Thus, the extension sought by the

Welshes' counsel in November 2008 would not have resolved this case any sooner than that contemplated by the September 30, 2008 Scheduling Order.

The trial court arbitrarily decided to sanction the Welshes just because their counsel happened to seek the last alteration of the Scheduling Order, without regard for the conduct of Lakeview beforehand, and no matter how ultimately insignificant the proposed alteration. This is not consistent with the tempered use of judicial discretion required by the Supreme Court. *See Carmen, supra*.

2. Neither the Welshes nor their counsel failed to comply with the trial court's scheduling orders.

Equally baseless is Lakeview's argument that the Welshes and their counsel failed to comply with the trial court's scheduling orders. In support of this argument, Lakeview first asserts that the Welshes repeatedly failed to appear for their depositions. This is a misrepresentation. Notably, Lakeview provides *no record support* for this accusation. Lakeview does not provide a single record cite where it (a) sent a letter to the Welshes' counsel discussing an alleged failure to appear, (b) filed a motion to compel their appearance or sought sanctions for nonappearance, or (c) any other evidence that the rescheduling of the Welshes' depositions was as a result of their failure to appear to a properly noticed deposition. Rather, Lakeview directs this Court only to the fact that the Welshes' depositions were noticed several times, and insinuates that the rescheduling was necessitated by their failure to appear. This unsupported allegation is not true and must be rejected. In fact, both Wayne and Carol Welsh have been deposed, making the argument immaterial as well.

However, there is ample evidence in the record that Lakeview failed cooperate in discovery by not making its employees available for deposition, including Allen Kunnard, a key witness to Lakeview's negligence, despite repeated requests from the Welshes' counsel. (See the Welshes' Opening Brief, Fact Nos. 5, 7 10, 13, 16, and 29; Addenda D, E, G, and J.) The Welshes' counsel still has been unable to depose Mr. Kunnard, as Lakeview refused following the trial court's January 22 Order. Lakeview's refusal to cooperate in discovery in this regard was one of the primary reasons the Welshes were forced to request additional time to complete their expert reports, as Mr. Kunnard's deposition would have been beneficial for the expert's analysis. When it became clear that Lakeview and/or its counsel were simply delaying discovery, the Welshes' counsel proceeded as expeditiously as possible to produce its reports without the benefit of the depositions. While this was not the preferred course of action, the Welshes and their counsel were diligently trying to "move this case forward" as admonished by the Court. (See September 30, 2008 Scheduling Order, Addendum F to the Welshes' Opening Brief.) Accordingly, unlike Lakeview's unsubstantiated allegations, the Welshes' have provided record support of Lakeview's noncompliance.¹

Second, Lakeview seeks refuge from its own dilatory tactics by claiming the Welshes failed to comply with the trial court's scheduling orders by not conducting

¹ Lakeview claims that the Welshes' counsel should have issued depositions notices for Lakeview's employees. In retrospect, it appears Lakeview is correct. The Welshes' counsel sought to work with Lakeview and its counsel to schedule depositions at mutually convenient times, in accordance with the Standards of Professionalism and Civility promulgated by the Supreme Court. See Utah R. Prof'l Conduct 14-301, Standards 6, 10, and 15. This effort at professionalism and civility was apparently misplaced.

discovery prior to the dates imposed by the scheduling orders. This is a misnomer. Neither the Welshes nor their counsel disregarded the fact discovery deadline; rather, they exercised their prerogative not to serve written discovery requests on Lakeview.

Lakeview's alternative argument that the Welshes failed to depose Lakeview's employees within the fact discovery cutoff is also a misnomer. Both the Welshes' counsel and Lakeview's counsel, by agreement, scheduled depositions for after the close of fact discovery. (*See* R. 361-62, 366.) Clearly, Lakeview shares the blame for the delays in this case and the trial court should not have rewarded Lakeview's actions and inactions by preventing the jury from hearing the best evidence available.

Finally, Lakeview claims that the Welshes disregarded the trial court's scheduling order by filing a Motion seeking an extension to submit initial expert reports "after being expressly warned" that "the case would be dismissed if it was not moved along." (Lakeview's Brief, pp. 26-27.) This argument is difficult to understand. Filing a Motion requesting an extension of a deadline does not constitute willful disregard for either the deadline or the Order containing that deadline.

Contrary to Lakeview's argument, this conclusion is not changed by the trial court's admonishment in the September 30, 2008 Scheduling Order: "Last amended order. Case to be moved along or it will be dismissed." (September 30, 2008 Scheduling Order, Addendum F to the Welshes' Opening Brief.) It is not sanctionable conduct to file a motion pursuant to Rule 7 asking the Court for a modest extension. A motion is *the* permissible means by which a party makes "an application to the court for an order," including an order for an extended deadline. Utah R. Civ. P. 7(b)(1). Even the case law

cited by Lakeview does not support this proposition. In *Arnold v. Curtis*, 846 P.2d 1307 (Utah 1993), for example, the Supreme Court affirmed the trial court's imposition of sanctions for the plaintiff's late filing of an expert affidavit "in view of the fact that [plaintiff] did not at any time ask to be relieved of the time requirement of the [scheduling] order." *Id.* at 310. Indeed, as Lakeview acknowledges, in the September 30, 2008 Scheduling Order, the trial court expressly authorized the parties to file "motions" if "the Court needs to intervene in discovery." (September 30, 2008 Scheduling Order, R. 67 & Addendum F to the Welshes' opening Brief.)

Moreover, the Welshes' Motion for an Enlargement of Time did not seek to delay the case from being "moved along." No other dates in the September 30, 2008 Scheduling Order, including the yet-to-be-scheduled trial date, were to be changed. (R. 71-74.) There was no prejudice to Lakeview or the trial court from the Welshes' Motion. Tellingly, Lakeview has never claimed prejudice. Simply put, the trial court's granting of the Motion would not have prolonged ultimate resolution of the case or prejudiced any party. The trial court recognized this, at the outset at least, by granting the Welshes' Motion on December 29, 2008, (*see* Addendum C), before abruptly and inexplicably changing its mind on January 22, 2009 and reversing its prior ruling.

In fact, Lakeview's own conduct before this Court undermines its argument. For example, Lakeview sought and obtained two extensions of time to file its brief on appeal,² even though second extensions are "not favored." *See* Utah R. App. P. 22(b)(1). By Lakeview's own argument, it violated this rule by seeking a disfavored second

² (*See* Court's Docket, attached as Addendum A to this Reply Memorandum.)

extension. Lakeview further filed a Motion to Correct the Record on Appeal pursuant to Rule 11(e) of the Appellate Rules the same day it filed its brief. (See Addendum A to this Reply Brief.) Lakeview’s Brief discussed the allegedly omitted pleading, and Lakeview attached the pleading to its brief—all *before* its Motion to Correct the Record was fully briefed, let alone granted. See, e.g., *State v. Law*, 2003 UT App 228, 75 P.3d 923 (noting the general rule that appellate courts may not consider matters outside of the record and observing that “although the record may be supplemented if anything material is omitted, it may not be done by simply including the omitted material in the party’s addendum.”). Should Lakeview have been sanctioned for filing a disfavored Motion for a second enlargement of time or attaching pleadings to its brief that it believed were outside of the record?³ Of course not, because filing a Motion is the proper way to request relief, even if it is not favored; because Lakeview’s actions caused no prejudice to any party; and because sometimes technical rules need to be relaxed in favor of the Court’s loftier goal of considering the merits of a controversy on all of the facts.

Accordingly, Lakeview’s arguments regarding the Welshes’ and their counsel’s conduct are nothing more than disingenuous attempts to create a pattern of intentionally dilatory conduct by the Welshes to belatedly justify the trial court’s award of sanctions. Lakeview’s own conduct in this case shows that it is far from blameless for any delays. Once Lakeview’s factual mischaracterizations are stripped away, it is clear that there was

³ After filing its brief, Lakeview later withdrew its Motion to Correct the Record, claiming it overlooked that the allegedly omitted pleading was, in fact, in the record.

no evidentiary basis to support the trial court's award of sanctions against the Welshes or their counsel.

B. The Trial Court's Implication of Willful Noncompliance by the Welshes in its April 14 Order was Error.

As indicated in the Welshes' opening Brief, pp. 28-30, the trial court did not make any of the four requisite findings of intentional misconduct by the Welshes prior to imposing sanctions against the Welshes in its January 22 Order. No such facts exist. Lakeview argues that this error was cured by the trial court's April 14 Order, where the trial court attempted to justify the sanctions after-the-fact by implying willful noncompliance from the facts that the expert designations and reports were not submitted by December 1, 2008 deadline and the Welshes asserted neither surprise nor unforeseen circumstances as an excuse. (See Lakeview's Brief, p. 24; April 14 Order, p. 10.) Lakeview's argument is meritless.

In fact, the argument that sanctions can be imposed based on the mere failure to meet a deadline has been expressly rejected. In *Kilpatrick*, the Supreme Court made clear, by stating as a *point heading*, that "*The Fault Requirement Cannot Be Satisfied by Mere Noncompliance Absent Any Additional Evidence of Willful Behavior.*" 2008 UT 82, at Section III(B) (between ¶¶30 and 31). The Supreme Court observed that ascribing "fault" from the mere failure to meet a deadline is tantamount to "strict liability," which is inconsistent with Utah law. *Id.* at ¶¶32-33. Nevertheless, this is precisely what the trial court did in the present case. Failure to provide an excuse such as surprise or unforeseen circumstances for noncompliance does not qualify as "additional evidence of

willful behavior.” *Id.* at Section III(B) (capitalization omitted). To the contrary, the record is devoid of any willful noncompliance by the Welshes or their counsel. *See id.* at ¶30 (observing that, to impose sanctions, the “record in this case” must “demonstrate willful disobedience of the CMO [Case Management Order].”). Rather, as indicated, the Welshes filed a Motion for a minor extension of time to designate experts and submit expert reports, prior to expiration of the existing deadline, which caused no prejudice to either Lakeview or the trial court.

Moreover, the trial court’s also erred by attempting to make findings to justify the sanctions after they had already been imposed. The sanctions were imposed *sua sponte* by the trial court, after the trial court had initially granted the motion for an extension. (See January 22 Order and December 29, 2008 Ruling, Addenda A and C to the Welshes’ opening Brief.) This deprived the Welshes of an opportunity to provide an excuse before they were sanctioned.

Indeed, the delays caused by Mr. Wilcox’s transition from private practice to general counsel of a Utah county company and the transfer of the case to new counsel at Clyde Snow & Sessions were unforeseen. But when the Welshes pointed out the lack of evidentiary basis for the sanctions in their Motion for Relief from the January 22 Order, the trial court did not grant the Welshes a hearing or initiate other fact finding procedures. Instead, the trial court made *post hoc* findings to justify the sanctions in its April 14 Order denying the Welshes Motion for Relief from the January 22 Order. (See April 14 Order, Addendum B to the Welshes’ opening Brief). This deprived the Welshes of any

opportunity to meaningfully address the alleged conduct for which they were sanctioned, which is error and, as discussed below, a violation of due process.

C. The Welshes Themselves are Completely Blameless for Any Delays, Making the Imposition of Sanctions Against them Personally an Independent Abuse of Discretion.

The trial court further abused its discretion by imposing sanctions against the Welshes' personally, without any evidence to support even an inference of intentional misconduct by the Welshes. "[W]here discovery sanctions are concerned, 'if the fault lies with the attorneys, that is where the impact of the sanction should be lodged.'"

Kilpatrick, 2008 UT 82 at ¶39 (citation omitted). There are no facts in the record to suggest that the Welshes were personally aware of the dates in the September 30, 2008 Scheduling Order. More important, there is no evidence that the Welshes personally sought to amend any of the scheduling orders or caused any of delays. This lack of evidence is fatal to the trial court's imposition of sanctions against the Welshes.

Notwithstanding the complete lack of sanctionable conduct by the Welshes, Lakeview curiously argues the sanctions were appropriate because the "barring of expert witnesses is not a sanction aimed directly at the Welshes, as opposed to a monetary fine, a finding of contempt of court, or a complete dismissal of the complaint." (Lakeview's Brief, p. 29.) This could not be further from the truth. The claims in this case belong to the Welshes, not their attorneys. A sanction excluding evidence is directed at the party because it may affect the party's ability to recover on his or her claim. By contrast, a sanction against the attorney would be a monetary fine against the attorney personally.

Lakeview also asserts that the “supreme court in *Kilpatrick* recognized that sanctions lodged against an attorney will typically impact a client.” (Lakeview’s Brief, p. 29.) This argument belies the point: sanctions were not lodged against the Welshes’ counsel, but against the Welshes themselves.

Moreover, Lakeview mischaracterizes the Supreme Court’s statement in *Kilpatrick*. Contrary to Lakeview’s representation, there were no sanctions lodged against the attorney in *Kilpatrick*; the trial court dismissed the case because the plaintiff violated the scheduling order by failing to obtain an autopsy in an asbestos-related tort case. *See Kilpatrick*, 2008 UT 82 at ¶24. The Supreme Court reversed because there was no indication that the plaintiff “willfully” disregarded the scheduling order even though she failed to preserve evidence. *See id.* at ¶¶24-39. The Supreme Court based its decision, in part, on the fact that it was unclear who was at fault for the noncompliance—the client or the attorneys—because “*our case law resists sanctioning a party whose noncompliance is due to someone else’s failure.*” *See id.* at ¶¶36, 39 (emphasis added). The Supreme Court noted, however, that “even in the absence of a direct sanction against a client, the truth of the matter is that an attorney’s failure will typically impact the client.” *Id.* at ¶39.

Thus, contrary to Lakeview’s insinuation, the *Kilpatrick* court did not hold that the conduct of the attorney may be imputed to justify sanctions against the client, or vice-versa. Rather, the Supreme Court merely observed the general proposition that an inadvertent failing by an attorney, or poor lawyering, may negatively impact a client, even if this would not justify a sanction. *Kilpatrick* reaffirms the general rule that

sanctions may only be imposed where there is willful misconduct by the person being sanctioned. *See id.* at ¶36 (“We believe that [a sanction] is unjust when it is imposed against a person who had absolutely no fault for the discovery violation at issue....” (alteration in original) (quoting *Depew v. Sullivan*, 2003 UT App 152, ¶¶36-37, 71 P.3d 601)).

In the present case, the record is devoid of any evidence of willful noncompliance by the Welshes. Indeed, Mr. Welsh suffered severe brain damage as a result of Lakeview’s negligence and cannot be faulted for any delays. While the trial court would have been justified in sanctioning neither the Welshes nor their counsel, the trial court clearly abused its discretion in sanctioning the Welshes.

II. LAKEVIEW’S CASES ARE DISTINGUISHABLE.

Lakeview cites to several cases on pages 21-22 and 24 of its Brief that Lakeview claims support the trial court’s decision to impose sanctions for discovery violations. The Welshes do not dispute that the trial court has general authority, upon a proper evidentiary basis, to impose sanctions for discovery violations. However, all of the cases cited by Lakeview are distinguishable from this case based on the following key facts:

- There is no evidence of willful noncompliance by the Welshes nor their counsel. Rather than simply disregard the deadline for submitting expert disclosures and reports, the Welshes filed a Motion for an Enlargement of time, prior to expiration of the deadline, requesting a modest 39-day extension. (R.72-74; *See also* Section I, above.)
- The Welshes’ Motion for Enlargement of Time caused no prejudice to Lakeview or the trial court, as it would not have changed any other dates in the September 30, 2008 Scheduling Order, including the deadlines for completion of expert discovery, dispositive motions, and the yet-to-be-scheduled trial date. Tellingly, *Lakeview has never argued it would have*

been prejudiced by the extension. (R. 72-74; *see also* September 30, 2008 Scheduling Order.)

- Prior to sanctioning the Welshes on January 22, 2009, the trial court granted the Welshes' Motion for Enlargement of Time on December 29, 2008. The Welshes incurred significant cost in preparing their expert reports and submitted them by the extended deadline imposed by the trial court in its December 29, 2008 Ruling. (R.140-42; 202-03; 241-46; 273, 279, 272-96.)
- Lakeview's counsel was a significant contributor to the delays in this case. (*See* Section I(A), above.)
- The Welshes obtained new counsel, Rodney Snow and Matthew Steward, in November 2008, just prior to the expert discovery deadline. (R. 71-72; 76.)

Accordingly, regardless of the trial court's general authority to impose sanctions for discovery violations established by these cases, the facts and circumstances of the present case do not warrant sanctions.

III. THE TRIAL COURT ERRED WHEN IT REVERSED ITS DECEMBER 29, 2008 RULING GRANTING THE WELSHES' MOTION FOR ENLARGEMENT OF TIME BECAUSE THE WELSHES RELIED ON THIS ORDER.

Lakeview acknowledges that the trial court's December 29, 2008 Ruling was a minute entry by the trial court granting the Welshes' Motion. Indeed, this is indisputable. However, Lakeview argues that the trial court had the authority to change its mind under Rule 54(b) of the Utah Rules of Civil Procedure because the trial court's December 29, 2008 Ruling was not a binding order of the trial court. Lakeview is wrong.

Rule 54(b) permits a trial court, in certain circumstances, to change its nonfinal decisions. Here, however, the trial court did not rely on Rule 54(b) as the grounds for changing its decision. Rather, the trial court purported to rely on Rule 60(a), which is

clearly not applicable for the reasons set forth in the Welshes' opening Brief, pp. 23-25. More important, Lakeview ignores that the December 29, 2008 Ruling was relied upon by the Welshes before it was reversed. Specifically, based upon the trial court's ruling, the Welshes incurred significant costs in submitting their expert reports by the revised deadline. All of this was done *before* the trial court reversed itself on January 22, 2009.

The present situation is not a good fit for Rule 54(b), which is generally reserved for reconsideration of an issue previously ruled upon after new facts suggest that the initial ruling was incorrect. Rule 54(b) should not be used to justify a simple changing-of-the-mind, particularly when nothing actually changes between the time a motion is first considered, and when it is reconsidered. Utah's jurisprudence promotes a "judicial policy favoring finality." *See Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶36, 201 P.3d 966. The doctrine of "law of the case," for example, provides that "a decision made on an issue during one stage of a case is binding in successive stages of the same litigation." *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 26, 196 P.3d 588 (citation and internal quotation marks omitted); *accord See State v. Ruiz*, 2009 UT App 121, ¶ 10, 210 P.3d 955 ("The rationale underlying the [law of the case] doctrine 'is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and rulings upon the same proposition in the same case.'" (citation omitted)).

This is particularly true in the present case, because of the type of ruling at issue. This was not a reconsideration of a ruling on a summary judgment motion, where a more developed record demonstrated that the initial ruling was contrary to law. Rather, the

December 28 Ruling granted a Motion to Enlarge Time for submitting expert reports, which were submitted in accordance with the revised deadline provided by that ruling. To change that ruling after the fact does not make sense and has no apparent purpose but to arbitrarily punish one of the parties—in this case the Welshes. In fact, for this Court to allow such an apparently groundless reversal sets a dangerous precedent. If the trial court can change its mind so capriciously in this instance, what is to prevent the trial court from now deciding it no longer wants to grant any of the amended scheduling orders, retroactively reinstating the first scheduling order, and dismissing the case for failure to meet the deadlines of the first scheduling order? Although such an occurrence seems implausible, it is not far afield from what the trial court did in reversing the December 29, 2008 Ruling. Accordingly, principles of justice, fairness and finality dictate that this Court should vacate the trial court’s January 22 and April 14 Orders and reinstate the December 29, 2008 Ruling.

IV. THE SANCTIONS VIOLATED THE WELSHES’ DUE PROCESS RIGHTS.

Due process requires, at a minimum, “notice and a right to respond before the sanctions of costs, expenses, or attorney’s fees are imposed.” *F.D.I.C. v. Daily*, 973 F.2d 1525, 1531 (10th Cir. 1992); *Morton v. Continental Baking Co.*, 938 P.2d 271, 280 (Utah 1997) (Stewart, J. dissenting) (observing that “constitutional due process rights may be violated if a court refuses to hear the merits of the case where there has *been a relatively trivial infraction of procedural rules.*” (emphasis added)). Lakeview asserts that neither a hearing nor fact finding proceedings were necessary to preserve the Welshes’ due

process rights because the facts justifying the sanctions are apparent on the record.

Lakeview also argues that the sanctions did not deprive the Welshes' of due process because they were given an opportunity to address the sanctions through their Motion for Relief from the January 22 Order. Both arguments are meritless.

As detailed above, Lakeview's first argument fails because there is no evidentiary basis apparent on the record to justify sanctions against even the Welshes' counsel, let alone the Welshes. (*See* Section I, above.) In addition, contrary to Lakeview's argument, it was not blameless for the delays in this case. (*See id.*)

Moreover, Lakeview misses the point. The trial court imposed *sua sponte* sanctions for failing to comply with the scheduling order on January 22, 2008, after the trial court had already granted the Welshes and their counsel an extension of time to submit expert reports on December 29, 2008. The Welshes were therefore not given notice or an opportunity to respond before these sanctions were imposed. The Tenth Circuit describes the problem with *sua sponte* sanctions in *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987):

[T]he determination to impose sanctions . . . involves another step—*placing the blame*. And there remains for consideration the defenses which might absolve the [sanctioned party] of the responsibility for taking the [action for which he was sanctioned]. This, we hold, justifies and requires notice and opportunity to be heard before final judgment.

Id. (emphasis added). Here, the trial court made no inquiry and ordered no hearing or fact-finding procedure to determine whether the Welshes were personally to blame or

whether they had any defenses that might absolve them of responsibility for the discovery violation.

That the Welshes were able to file a Motion for Relief from the January 22 Order does not cure the due process violation. Prior to imposing sanctions, the trial court failed to determine that the Welshes willfully failed to comply with the September 30, 2008 Scheduling Order. Once apprised of this omission by the Welshes, rather than grant them a hearing to discuss the sanctions or issue an order to show cause, in its April 14 Order the trial court made a finding of implied willfulness to try to support the sanctions after the fact. As such, the Welshes were never given an opportunity to address the alleged conduct for which they were sanctioned. Moreover, because no fact finding was done with respect to the sanctions, the record in this case did not change between January 22, 2009 and April 14, 2009. Thus, no new facts were developed to justify the sanctions. No evidence has ever existed that would support a finding of willfulness, bad faith or other intentional misconduct by the Welshes.


Finally, the trial court's admonishment to move the case along did not satisfy the Welshes' due process rights. At best, this would satisfy the notice aspect of due process, but not the required opportunity to be heard. However, that the admonishment was adequate notice is itself dubious. Based on the admonishment, the Welshes' counsel knew that the case needed to be moved along or it would be dismissed.⁴ The Welshes' Motion for an Enlargement of Time did not trigger this condition as it only sought a

⁴ As indicated, there is no evidence indicating that the Welshes *themselves* knew the contents of the September 30, 2008 Scheduling Order.

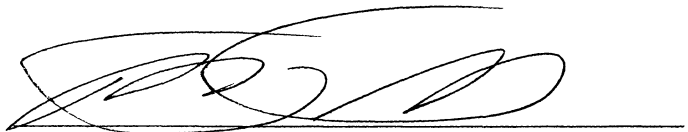
minor extension to designate experts and submit expert reports, not to change any other dates. Accordingly, the Motion would not have delayed ultimate resolution of the case, had the trial court not reversed its December 29, 2008 Ruling.

CONCLUSION

For the foregoing reasons, and those reasons set forth in the Welshes' opening Brief, the trial court's January 22, 2009 Order and April 14, 2009 Order must be reversed as erroneous, an abuse of discretion, and a violation of due process, and then remanded for further proceedings.

DATED this  22 day of December 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December 2009, two copies of the foregoing **REPLY BRIEF OF APPELLANTS** were sent via first class mail, postage prepaid, to the following:

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Tab A

Appellate Docket Search

Docket Information Case - 20090361

Utah Court of Appeals

Title: Welsh v. Hospital Corp.

Docket No: 20090361

Docket Date: 05/04/2009

Agency: SECOND DISTRICT, FARMINGTON

Case: 060700106

Status: At Issue

Date	Action	Disposition	Date
05/04/2009	Receipt for Payment		
05/04/2009	Petition for Interlocutory App	Granted	06/03/2009
05/18/2009	Extension of Time-Misc.	Granted	05/19/2009
05/19/2009	Extension Granted		
05/28/2009	Answer to Interlocutory Appeal		
06/01/2009	Transfer to CA per R. 42(a)		
06/01/2009	Received from Supreme Ct(Pour)		
06/01/2009	Courtesy Copy		
06/03/2009	Pet.-Interlocutory Appeal Gran		
06/11/2009	Transcript Not Required		
06/22/2009	Called for Record Index		
07/06/2009	Record Filed - Civil		
07/06/2009	Set Briefing Schedule		
07/30/2009	Misc. Letter		
08/14/2009	Extension of Time for Appellan Stipulatio		08/14/2009
09/10/2009	Appellant's Brief Filed		
09/23/2009	Brief on Disc filed		
09/23/2009	Certificate of Service		
09/28/2009	Misc. Letter		
10/06/2009	Extension of Time for Appellee Stipulatio		10/06/2009
11/09/2009	Extension of Time for Appellee Granted		11/10/2009
11/10/2009	Extension Granted		
11/17/2009	Misc. Letter		
11/19/2009	Motion-Supplement Record		
11/19/2009	Appellee's Brief Filed		
11/19/2009	Brief on Disc filed		
11/24/2009	Notice		
01/01/3000	Appellant's Reply Brief Due	Due	12/22/2009

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New Search