

2010

Kim Dahl v. Brian C. Harrison, an individual; and Brian C. Harrison, P.C., a Utah professional corporation : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIM DAHL,

Appellant,

vs.

BRIAN C. HARRISON, an individual;
and BRIAN C. HARRISON, P.C., a Utah
professional corporation,

Appellees.

REPLY BRIEF

Appellate Case No. 20100553

District Court No. 070403005

Reply Brief of Appellant

Appeal from the Fourth District Court, Utah County, Judge Claudia Laycock

Oral Argument Requested

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ARGUMENT

- I. The trial court abused its discretion when it struck Ms. Dahl's expert reports rather than allow Ms. Dahl the opportunity to amend her disclosures.

Ms. Dahl timely filed her expert witness reports and disclosures on September 8, 2008.

A. ABUSE OF DISCRETION.

For at least two reasons, the trial court abused its discretion by striking Ms. Dahl's expert reports: First, Mr. Harrison failed to confer in good faith with counsel, as required in Utah R. Civ. P. 37(a)(2)(A), regarding the adequacy of Plaintiff's disclosures; and second, the court denied Ms. Dahl's request for more time to file amended reports which were tendered to the court on December 16, 2008.

1. Mr. Harrison failed to confer in good faith with counsel.

Ms. Dahl submitted her expert disclosures on September 8, 2008. Though the disclosures contained much of the requirements of Rule 26 of the Utah Rules of Civil Procedure, Mr. Harrison believed the reports did not meet all the requisites. Rule 37 provides that if a party's disclosures fail to comply with Rule 26(a), "any other party may move to compel disclosure and for appropriate sanctions." At that point, if Mr. Harrison determined that the disclosure was deficient, he was obligated under Utah R. Civ. P. 37(a)(2)(A), "in good faith" to meet and confer with counsel for Ms. Dahl "in an effort to secure the appropriate disclosure."

However, Mr. Harrison failed to confer in good faith with counsel, pursuant to Utah R. Civ. P. 37(a)(2)(A), about his claim that the disclosures were inadequate. His motion to the court should have contained a certification that he has attempted to confer with the offending party in good faith to obtain the disclosures prior to petitioning the court. Again Mr. Harrison failed to comply.

Mr. Harrison failed to comply with the spirit or even the letter of the law in Utah R. Civ. P. 37(a)(2)(A). The policy of such rule appears to avoid unnecessary law and motion over issues that could be remedied informally. Mr. Harrison made no effort to meet and confer in good faith with Ms. Dahl regarding the alleged deficiency of her expert disclosures as required by court rule. Instead, Mr. Harrison immediately sought the most punitive measure possible as a discovery sanction by filing a motion to strike Ms. Dahl's disclosures. Rather than require Mr. Harrison first to comply with the discovery rules himself, the court granted the ultimate sanction without requiring compliance by Mr. Harrison himself. This was an abuse of discretion.

2. The court denied Ms. Dahl's request for more time to file amended reports which were tendered to the court on December 16, 2008.

The existing discovery order in this case for designation of experts was amended on August 7, 2008 and a new scheduling order was to be prepared.¹ While the granting

¹ The trial court held oral argument on August 7, 2008, during which the court extended expert discovery deadlines. Mr. Harrison was instructed to prepare the written order of the new discovery deadlines. However, he failed to do so. As a result, the court never entered a written order on the new deadlines. The trial court then improperly entered extreme sanctions that gutted Ms. Dahl's case, on an order that had never been entered. See *Berrett v. Denver and Rio Grande Western R. Co., Inc.*, 830 P.2d 291, 296 (Utah Ct. App. 1992) (declining to affirm the trial court's sanction of excluding witnesses under Rule 37(b)(2) when no scheduling order was entered).

of the motion to amend expert discovery was appropriate, Ms. Dahl claims on appeal that even the extension of expert discovery for another 32 days to September 8, 2008 was too restrictive because the court had not ruled on the dispositive Motion for Summary Judgment and because the record in this case was voluminous and expensive for an expert witness to review. Further, Ms. Dahl did obtain an amended expert report to address the issues of deficiency and this amendment was offered to the court on December 16, 2008, more than ten months before trial in this case. Given these reasons, it was an abuse of discretion for the court not to receive the amended report.

While this court has held that case management orders “are necessary to expedite the flow of cases,” *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993), this Court has also found in other cases that a trial court’s “desire to move [the] case forward” can amount to an abuse of its discretion. *See Welsh v. Hosp. Corp. of Utah*, 2010 UT App 171, ¶ 19, 235 P.3d 791. Mr. Harrison makes much of the difference in facts between *Welsh* and the present case to suggest that the principles enunciated in *Welsh* do not apply here. However, equally compelling, although different, facts should result in application of similar limits to discretion as those outlined in *Welsh*.

In this case a motion for summary judgment filed by Mr. Harrison had justifiably delayed the obtaining of a full expert report.² In fact, the court permitted a thirty day extension relative to expert discovery because of this intervening factor. The Motion to

² The Motion for Summary Judgment was filed on April 28, 2008. Plaintiff’s Motion to Amend Scheduling order was filed on May 14, 2008, alleging among other things that the filing of the Motion for Summary Judgment prior to the deadline to designate expert witnesses may affect the Plaintiff’s ability to call expert witnesses.

Amend Scheduling Order was granted in relation to designation of experts on August 7, 2008. However, the new deadline was set for September 8, 2010, just 32 days after the motion was granted.

Ms. Dahl timely filed her expert disclosures under the orally announced amended deadline. Thereafter Mr. Harrison filed a motion to strike the designation. As discussed above, the motion came without any informal attempt to resolve the alleged deficiencies. Notably, the Motion for Summary Judgment had not yet been ruled on. Not until October 20, 2008 was the Motion for Summary Judgment denied, by a written Ruling, after the motion had been taken under advisement on August 7, 2008. Because the dispositive motion was still pending at the time of the expert discovery deadline, Ms. Dahl was still in the quandary of having to incur substantial expense for an expert report without knowing whether the court would in fact allow her case to proceed to trial. Ms. Dahl's expert report disclosed the basic information of her expert's qualifications, rates, contact information and subject matter but did not include a detailed review of the opinions or the basis for such.

The underlying divorce case in which the claimed malpractice occurred had been pending since October, 2006 and involved voluminous records, including, among other things 1000 pages of supervised visitation notes and a court file approaching 10 volumes. In order for the experts to prepare a report of their conclusions for the court, it would

require review of these records. The difficulty of incurring such expense without a ruling from the court put Ms. Dahl in this difficult position.³

Immediately after the Motion for Summary Judgment was denied, Ms. Dahl asked her liability expert to begin reviewing her file. By the time of oral argument on the motion to strike on December 16, 2008 (still over 10 months before trial) Ms. Dahl had an amended report of Mr. Olsen which she asked the court to receive. The court denied her request. Plaintiff's amended expert report was prepared and proffered to the court within sixty days of the court's ruling on the Motion for Summary Judgment. The court refused to receive the amended report on December 16, 2008 because it was submitted after the amended scheduling order designation date of September 8, 2008. The trial court's failure to allow Ms. Dahl leave to amend her disclosures was an abuse of discretion. *See Welsh v. Hosp. Corp. of Utah*, 2010 UT App 171, ¶ 17, 235 P.3d 791.

Mr. Harrison next claims that the trial court properly found that the expert reports did not comply with Rule 26(a)(3)(B). This was not challenged by Ms. Dahl. What she challenges on appeal was the fact that the trial court abused its discretion by striking the reports without granting leave to amend the reports, a decision that essentially gutted her case, a decision that was not employed with "caution and restraint" as required by this Court in *Welsh*. 2010 UT App 171, ¶ 10.

The similarities between *Welsh* and the present case support application of the *Welsh* principle that excluding a witness is "extreme" and should be employed only with

³ The divorce case below was still pending during these proceedings. Ms. Dahl had not been awarded any temporary alimony or any access to a marital estate worth over \$8 million.

caution and restraint. *See Welsh*, 2010 UT App 171, ¶ 10. For example, a key factor in *Welsh* was that the nonmoving party had time to depose the experts, designate rebuttal experts, and otherwise prepare for trial, and thus, any prejudice would be minimized. *Welsh*, 2010 UT App 171, ¶ 16. This factor applies with equal force in the present case. Even with an opportunity to amend Ms. Dahl's disclosures, Mr. Harrison would have had ample time to depose the two experts listed by Ms. Dahl, designate any rebuttal experts, and otherwise prepare for trial, especially when a trial date had not been set. Another similarity between the plaintiffs in *Welsh* and Ms. Dahl was that the effect of excluding experts was "devastating." *See id.* ¶ 17. In both cases, expert witnesses were essential to the case. *Id.*

In his brief, Mr. Harrison claims the present case is "nothing like" *Welsh*, but is like *Arnold v. Curtis*, 846 P.2d 1307 (Utah 1993). However, in *Arnold*, the party never requested a change in the scheduling order and did not file a designation of witnesses as ordered by the court. *Arnold*, 846 P.2d at 1309-10.

This Court applied *Welsh* principles in *Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, 241 P.3d 375, another case with facts different from *Welsh*, stating that the limits to trial court discretion announced in *Welsh* set the "outer limits" on the discretion of a trial court to act in setting scheduling orders and imposing sanctions. *Id.* at ¶¶ 11-12. Because there was ample time to conduct discovery after December 16, 2008 and because the delay in presenting the amended liability expert report of Mr. Olsen was due to legitimate financial concerns, the trial court abused its discretion by not receiving the amended report and by not extending expert discovery beyond the time of

its decision on the Motion for Summary Judgment. There was no reason to extend discovery to accommodate the dispositive motion in the first instance but then to deny the same motion in the second instance.

B. RULE 37(F) SANCTIONS.

Mr. Harrison argues that Rule 37(f) automatically leads to exclusion of the expert witnesses and that the exclusion is “self-executing.” However, Rule 37(f) provides that “in lieu” of exclusion, the court “may take any action authorized by Subdivision (b)(2),” which outlines alternative sanctions such as ordering the party or attorney to pay reasonable expenses. *See Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775 (Rule 37 gives trial court discretion to employ alternative sanctions in lieu of exclusion); *Welsh*, 2010 UT App 171, ¶ 9 (excluding evidence is one of the sanctions that “may” be imposed and the choice of the appropriate discovery sanction is primarily the responsibility of the trial judge”). Under the principles of *Welsh* and the discretionary language of Rule 37, the trial court had the ability and the duty to apply other sanctions instead of striking expert testimony altogether—testimony which is critical to prove legal malpractice. Additionally, despite Mr. Harrison’s assertions, Rule 37 does not require a showing of good cause to escape exclusion. Rather, the rule states without qualification that the court may choose another action in lieu of exclusion.

C. MARSHALING.

In his brief, Mr. Harrison also asserts that Ms. Dahl has failed to marshal the evidence regarding willfulness or bad faith. However, as stated in its initial brief, the court in *Welsh* determined that it “need not resolve the question of willfulness” if it

concludes that the trial court abused its discretion in its “choice of an appropriate sanction.” 2010 UT App 171, ¶ 9. Ms. Dahl asserts that the trial court chose an inappropriate sanction and thus, need not marsh any evidence regarding this claim.

In sum, exclusion of an expert witness is an extreme sanction that effectively decides the outcome of a legal malpractice case before ever beginning trial. *Welsh*, 2010 UT App 171, ¶ 17 (finding that exclusion would be “potentially devastating). The court’s refusal to allow the timely designated expert witnesses to testify or to allow Ms. Dahl leave to amend their reports was an abuse of discretion. *See id.* The trial court’s discretion, while expansive, was not unlimited, especially when the decision effectively decided the outcome of the malpractice case before ever beginning trial. *See id.* ¶¶ 17, 19. As stated by this Court in *Welsh*, “[o]n occasion, justice 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.” *Id.* ¶ 10 (quoting *Boice v. Marble*, 1999 UT 71, ¶ 10, 982 P.2d 565). This Court should remand this case back to the trial court for a new trial on the issue of liability.

II. It was legal error for the trial court to grant Mr. Harrison’s Protective Order and the Trial Court abused its discretion when it denied Ms. Dahl’s Motion to Extend Factual Discovery.

It is undisputed that Ms. Dahl served written discovery requests within the time allotted for factual discovery in the parties’ stipulated scheduling order. However, the trial court granted a protective order to Defendant because the responses to plaintiff’s

responses were not due until after the fact discovery period ended under the scheduling order. The court's entry of a protective order was an error of law and should be reversed. The interpretation of a rule of procedure is a question of law that this Court reviews for correctness. *Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 11, 238 P.3d 1035.

Mr. Harrison admits that no Utah law prohibits filing factual discovery requests up to the discovery deadline. Rather, he asks this court to make "clear and binding" law that discovery requests are untimely unless served so that the responses are due before discovery is complete. Impliedly, Mr. Harrison also wants this court to make such law retroactive to validate the trial courts protective order. The protective order essentially held that because there was insufficient time for the full response period for the discovery under Utah Rules of Civil Procedure, the defendants' response to the plaintiff's discovery could not be compelled.⁴ In fact the defendants did not respond to the discovery propounded by the plaintiff.

Because it was legal error for the trial court to enter a protective order, the trial court's protective order should be reversed and this case should be remanded for full discovery and a new trial.

Alternatively, the trial court should have exercised its discretion in favor of allowing factual discovery, especially when a trial date has not been set and no prejudice would have resulted. Although Utah appellate courts have upheld protective orders and

⁴ After the withdrawal of the motion to disqualify there was insufficient time to propound even a set of written interrogatories or requests for production in time to receive a response from the other party prior to the discovery cutoff on April 1, 2008.

denied additional time in cases involving extreme factual scenarios, *see e.g., Richards v. Brown*, 2009 UT App 315, ¶¶ 55-56, 222 P.3d 69 (upholding a protective order and denying additional discovery because party failed to participate in scheduling order and trial was less than two weeks away), the instant case does not have such an extreme fact scenario or an imminent trial date that binds the court.

Factual discovery was delayed in this case for a legitimate reason. A Motion to Disqualify Counsel⁵ was filed soon after the stipulated abbreviated scheduling order was agreed upon. (Record at 30.) As a result of the Motion to Disqualify Counsel, counsel for Ms. Dahl understandably held off. Counsel, in reliance upon that motion, waited until the motion to disqualify was decided to propound discovery. Principles of equitable estoppel dictate that Mr. Harrison should not benefit from harm caused by his own action. *See Youngblood v. Auto-Owners Ins. Inc.*, 2005 UT App. 154, ¶ 12, 111 P.3d 829. Therefore, this court should remand this case back to the district court for a new trial and to allow Ms. Dahl a fair opportunity to discover the pertinent facts of this case in order to have her case fairly heard at trial.

It was not harmless error to deny Ms. Dahl the ability to conduct fact discovery and to strike her expert witnesses when legal malpractice is fact sensitive and requires expert testimony. Mr. Harrison claims that even if Ms. Dahl were afforded the opportunity to conduct fact and expert discovery, she still would fail to prove the

⁵ The Motion to Disqualify Counsel filed by Mr. Harrison on November 8, 2008, was not resolved by stipulation until February 12, 2008. The Motion to Disqualify was withdrawn on March 4, 2008, less than one month prior to discovery cut off. Since written discovery had to be propounded 30 days prior to the discovery cut off, there was insufficient time to propound discovery after withdrawal of the Motion.

necessary element of causation. Mr. Harrison's proffer that he only possesses information concerning duty and breach is noteworthy. However, without the ability to conduct fact discovery, Ms. Dahl was placed at a severe disadvantage in gathering the necessary facts to present evidence on the issue of causation. The court's exclusion of expert witnesses and closure of fact discovery transforms the trial from a trial on the merits to a procedural dismissal of the case.

One of the key facts determined by the court was the sequence of events on the date of the stipulation Mr. Harrison entered outside of Ms. Dahl's presence. Without phone records to back up his story, Mr. Harrison testified that he called Ms. Dahl after the hearing. Had Ms. Dahl demonstrated that no such call were placed, this testimony would likely have affected the court's perception of credibility as well as its findings that Ms. Dahl was informed about the stipulation in court. (Record at 1739 pp. 44: 1-11; 98:11-24.) These facts go to the ultimate issue about whether Mr. Harrison was liable for stipulating to give away substantial rights of his client, including possession of her home and the ability to visit her children unsupervised, without his client's permission. The elimination of Ms. Dahl's ability to conduct factual discovery was not harmless error.

III. The Trial Court erred by awarding Mr. Harrison \$2,400 in attorney's fees for Ms. Dahl's filing her Motion to Allow Expert Testimony.

Mr. Harrison has not shown that the attorney fees were permitted either by statute or contract. Mr. Harrison claims in his brief that Ms. Dahl has failed to marshal the evidence in her challenge to the trial court's findings of "bad faith," and as a result, she

cannot challenge the award of attorney fees as a sanction. However, as discussed in her initial brief, attorney fees can only be brought if an action is without merit.⁶ She claims that rather than a claim or action, she had filed a motion and thus, attorney fees could not be awarded under UTAH CODE ANN. § 78B-5-825. Because Ms. Dahl's argument is a legal argument, not a challenge to the court's finding of "bad faith", Ms. Dahl is not required to marshal the evidence. *See Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 8, 122 P.3d 556 (whether trial court properly interpreted legal prerequisites for award of attorney fees under statute is a question of law); *Carsten v. Carsten*, 2007 UT App 174, ¶ 7, 164 P.3d 429 (no need to marshal if not challenging factual findings).

Further, Mr. Harrison argues that *Rohan v. Boseman*, 2002 UT App 109, 46 P.3d 753 stands for the proposition that UTAH CODE ANN. § 78B-5-825 is applicable to the filing of motions as well as the filing of claims or causes of action. *Rohan* runs contrary to the language of § 78B-5-825. In *Rohan*, this court agreed with the trial court's award of attorney's fees under the statute when the trial court awarded fees for bringing a renewed motion for continuance or voluntary dismissal under the ADA. *Rohan*, 2002 UT App 109, ¶ 37-38.

There is little to no reasoning as to why the attorney fee award was upheld or what arguments were made against such a result under § 78B-5-825. No other cases since *Rohan* have applied § 78B-5-825 to a motion. As set forth in Ms. Dahl's initial brief,

⁶ Although the court strongly hinted (R. 1741 p. 36) that she would not grant a second motion to extend, Plaintiff did not act in bad faith by filing such a motion. In fact, Plaintiff had to file such a motion to preserve her claim that the intervening ruling on the Motion for Summary Judgment after the first extension of time and the preparation of an amended expert report, over six months before trial was set, were equitable reasons for the court to allow more time for the submission of an amended expert report.

“action”, as used in § 78B-5-825, denotes the filing of the cause of action or the claim for relief, not the filing of a motion. In addition, the facts here are distinguishable. The plaintiff’s motion in the *Rohan* was filed the day before trial. *Id.* Here, the motion to allow Ms. Dahl’s expert witnesses to testify was filed ten months before trial and six months before trial was even set.

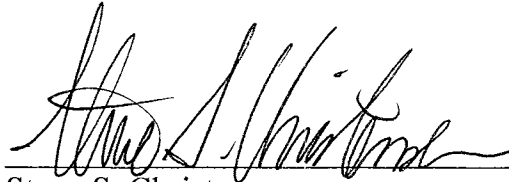
Mr. Harrison also argues that Utah R. Civ. P. 11 applies to counsel, not parties. However, the plain language of Rule 11 states that sanctions may be imposed upon parties. Rule 11(c) states that the court may “impose an appropriate sanction upon the attorneys, law firms, or *parties*.” (emphasis added). According to the language of § 78B-5-825 and Rule 11, a court may not impose sanctions for filing a motion under § 78B-5-825. Instead, the avenue to impose sanctions for filing a frivolous motion is Rule 11. As stated in Ms. Dahl’s initial brief, Mr. Harrison did not comply with Rule 11 in order to make a request for sanctions under Rule 11. Therefore, the court’s award of fees under § 78B-5-825 was reversible error.

CONCLUSION

This Court should reverse the determinations of the trial court below because the lower court committed an error of law and abused its discretion in denying Ms. Dahl’s motion to extend time to amend her expert witnesses’ reports, in failing to grant an extension to allow Ms. Dahl to conduct fact discovery, and in improperly awarding attorneys fees without a statutory basis. Ms. Dahl respectfully requests that this case be remanded to the trial court for additional discovery and a new trial on the bifurcated issue of liability.

Respectfully submitted this 27th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPELLANT'S
REPLY BRIEF was mailed to the following on the 27th day of April, 2011:

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