141 Wash.App. 1010

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

Linda L. RHYNE, Respondent,
v.
PORTER'S AUTOMOTIVE SERVICE d/b/a Dixie'S Barbeque, Gene A. Porter and Dixie Porter, husband and wife and their marital community, Appellants.

No. 57522–8–I. | Oct. 22, 2007.

Appeal from King County Superior Court; Honorable Theresa B. Doyle, J.

Attorneys and Law Firms

Lish Whitson, Lish Whitson PLLC, Seattle, WA, for Appellants.

Leslie A. Drake, Richard W. Hively Jr., G. Michael Zeno Jr., Zeno Drake & Hively PS, Kirkland, WA, for Respondents.

UNPUBLISHED OPINION

BECKER, J.

***1** Appellants challenge a judgment entered on a verdict for the plaintiff in a sexual harassment lawsuit. At issue is the trial court's decision to exclude defense witnesses whose expected testimony was not timely disclosed to the plaintiff. We reject the argument that the trial court imposed an unjust sanction. There was no valid excuse for the delay, and the lesser sanction of continuing the trial for a second time would have unduly prejudiced the plaintiff.

Plaintiff Linda Rhyne sued Gene Porter, his wife, and their business. After a bench trial in November 2005, the court found that Rhyne had experienced sexual harassment in the workplace at the hands of her employer, Gene Porter; that it was sufficiently pervasive to create an abusive working environment forcing Rhyne to quit; and that Rhyne was constructively discharged. The court awarded damages totaling $342,722.64. On appeal, the Porters contend the court erred in excluding their expert witness from testifying at trial. The court excluded the expert because the expert's findings based on a CR 35 exam were not disclosed to Rhyne until two weeks before trial. The expert would have testified that Rhyne was feigning mental conditions in order to substantiate her claims of sexual harassment.

A trial court's decision to exclude a witness is reviewed for an abuse of discretion. *Lancaster v. Perry*, 127 Wn.App. 826, 830, 113 P.3d 1 (2005). With regard to alleged discovery violations, it is an abuse of discretion to exclude testimony as a sanction absent a showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn.App. 65, 70,155 P.3d 978 (2007), citing *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987). Although *Peluso* states that this standard is “more rigorous” than the usual abuse of discretion standard, in reality what it does is establish the parameters of the trial court's discretion.

The trial was originally set to begin on August 22, 2005. Since Rhyne's mental condition was a central issue in the controversy, the Porters asked Rhyne to submit to a CR 35 exam. Rhyne agreed to this request in May 2005. The Porters asked for a continuance because their expert needed additional time to complete the CR 35 exam. Rhyne agreed to this change in schedule

and the trial was continued. The revised discovery cut-off date was September 19, 2005. The trial was reset for November 7, 2005.

The Porters retained their new expert witness, Dr. Olsen, on August 17, 2005. Despite the looming discovery cutoff of September 19, the Porters were slow in arranging for the CR 35 exam. Dr. Olsen interviewed Rhyne on October 7 and 14. Rhyne was informed that the report would be available for review on October 28 and Dr. Olsen would be available for a deposition during the week of November 7, the same week the case was set for trial. Rhyne responded that this schedule would not give her time to adequately prepare to defend herself against Dr. Olsen's findings.

***2** The Porters moved for a second continuance on October 19, 2005. The Porters explained to the court the timing problem with Dr. Olsen's report. Rhyne opposed the motion, arguing that the Porters had created the scheduling difficulties and there were no extraordinary circumstances that would merit a second continuance. [1] Rhyne claimed that the delay was a result of the Porters' own scheduling problems with Dr. Olsen. The Porters argued that the proper remedy for their noncompliance with the case schedule was imposition of terms, not denial of a continuance. After reviewing detailed briefing from both parties, Judge Yu denied the Porters' request for a continuance, finding they had not shown extraordinary circumstances. The Porters have not assigned error to the denial of their motion to continue.

Rhyne received Dr. Olsen's report on October 24. She moved in limine on October 26 to exclude Dr. Olsen's testimony. Rhyne said she did not have enough time to submit Dr. Olsen's report to another expert for review or prepare to depose Dr. Olsen before the November 7 trial date. She argued that the late disclosure of Dr. Olsen's testimony barred him from testifying at trial under King County Local Rule 26(b). “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.” KCLR 26(b)(1). “Disclosure of witnesses under this rule shall include the following information ... A summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications.” KCLR 26(b)(3) and 26(b)(3)(c). “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.” KCLR 26(b)(4).

The Porters opposed the motion to exclude Dr. Olsen's testimony. Judge Doyle, who was presiding over the trial, heard oral argument on the motion on November 9. The Porters did not ask Judge Doyle to reconsider Judge Yu's ruling. They merely argued that Rhyne had enough time after receiving Dr. Olsen's report to be able to respond to it at trial. Judge Doyle questioned the Porters' attorney on the reasons why Dr. Olsen's report was untimely. It came out that the holdup was attributable to the Porters' delay in paying Dr. Olsen the advance deposit without which he would not begin his work:

> MR. SIMMONS: As defense counsel, I am not doing this case on a contingent fee, and I am not advancing costs, things like expert witnesses.... So I wasn't able to actually get Doctor Olsen to do anything until I was in a position to pay his deposit. So, there was some delay on account of that.
>
> ....
>
> THE COURT: So, you retained Doctor Olsen on or about August 17th, is that correct?
>
> MR. SIMMONS: Yes, ma‘am.
>
> THE COURT: But he didn't get started doing the work until when, because of a delay in payment?
>
> ***3** MR. SIMMONS: I can't say, because I don't know. I know there was a delay. I just don't know how much of a delay.
>
> THE COURT: Okay.... It looks like it was more than two months after he was retained before he filed his report.
>
> ....

> THE COURT: Again, why couldn't he have done this work before late September? Was it because he hadn't been paid, basically?
>
> MR. SIMMONS: That's the only reason I know of. They don't start working until you give them a deposit. [2]

The court granted Rhyne's motion to exclude Dr. Olsen's testimony and report. The court explained the reasoning behind the decision:

> THE COURT: A number of discovery rules were violated, which then brings the court to the issue of whether the court should allow the witness to testify despite violations of discovery rules, because justice requires, and there has been good cause shown.
>
> The court doesn't find that to be true in this case, and that's because Doctor Olsen was retained—it looks like about the third week of August for whatever reason—there wasn't money to actually pay him until like late September or early October, and what happened then was a series of events which resulted in their report not getting to the plaintiff until about two weeks before trial.
>
> ....
>
> That is just not enough time. Two weeks really is not a reasonable amount of time for the plaintiff then to retain an expert witness, to review the report of Doctor Olsen, and then assist in deposing Doctor Olsen.
>
> There is really no other remedy for this. If the court were to allow Doctor Olsen to testify, despite the violations of discovery rules, then it really does put the plaintiff at a severe disadvantage. I'm sorry, but I just don't find good cause in the delay....
>
> So, for those reasons, the court will grant the plaintiff's motion to exclude Doctor Olsen. [3]

A trial court has broad discretion as to the choice of sanctions for violation of a discovery order. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Civil Rule 37 provides a general framework for reviewing sanctions imposed for discovery violations. *Allied Fin. Servs. v. Mangum*, 72 Wn.App. 164, 168, 864 P.2d 1 (1993). Civil Rule 37(b)(2) allows exclusion of testimony as a sanction for failing to comply with discovery deadlines:

> *Sanctions by Court in Which Action Is Pending.* If a party ... fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> ....
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

It is undisputed that the Porters failed to follow the case schedule for witness disclosure set by the trial court. In the context of CR 37 sanctions, a trial court may exclude testimony as a sanction for willful violation of a court order. "A violation of a court order without reasonable excuse will be deemed willful." *Allied*, 72 Wn.App. at 168. The Porters' violation was willful. Inability to pay for litigation expenses does not excuse compliance with discovery deadlines. Having decided to pursue a theory that Rhyne was fabricating her injuries, the Porters were responsible for handling the expense of presenting that defense in a timely fashion.

***4** In *Burnet*, a medical malpractice case, the plaintiffs filed a supplemental answer to interrogatories, adding to their lawsuit a claim that the physicians were not properly credentialed. The trial court agreed with the defendants that the plaintiffs had not sufficiently pleaded the credentialing claim. The court issued an order stating that "no claim of corporate negligence regarding credentialing is at issue in this litigation and there shall be no further discovery ... on that issue." *Burnet*, 131 Wn.2d at 491.

This court affirmed the trial court's order striking the claim. The Supreme Court reversed and remanded the case for further proceedings on the negligent credentialing claim because the trial court had not considered a lesser sanction before excluding the claim from the case:

> When the trial court "chooses one of the harsher remedies allowable under CR 37(b) ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial.

Burnet, 131 Wn.2d at 494, quoting *Snedigar v. Hodderson,* 53 Wn.App. 476, 487, 768 P.2d 1 (1989). The "harsher remedies" referred to in *Burnet* include the exclusion of testimony. *Mayer v. Sto Industries, Inc.,* 156 Wn.2d 677, 690, 132 P.3d 115 (2006).

Two decisions cited with approval in *Burnet* affirmed the exclusion of testimony when a party's disclosure of an additional witness inexcusably occurred right before trial. One of them was *Allied,* in which we held that a trial court had discretion to prohibit witnesses at trial as a sanction for the defendants' failure to submit a witness list. *Allied,* 72 Wn.App. at 165–66. Another was *Dempere v. Nelson,* 76 Wn.App. 403, 405, 886 P.2d 219 (1994), holding that the trial court had discretion to exclude an expert witness disclosed 13 days before trial. In *Burnet,* the plaintiffs gave notice of the credentialing claim much earlier. The *Burnet* court took that timeframe into account, noting that "a significant amount of time yet remained before trial" in contrast to sanctionable conduct that occurred "on the eve of trial" in *Allied* and *Dempere. Burnet,* 131 Wn.2d at 496. These cases show that the decision of the trial court in this case was not inherently unjust, given the time frame.

It is also clear that allowing Dr. Olsen to testify despite the late disclosure would have prejudiced Rhyne. The prejudice that can result when witnesses are allowed to testify despite late disclosure is discussed in *Lampard v. Roth,* 38 Wn.App. 198, 201, 684 P.2d 1353 (1984). In that case, the trial court was reversed for failing to exclude the testimony of 11 new witnesses who were not disclosed during the discovery period. "Permitting Roth's attorneys to speak to previously undisclosed witnesses before they testified did not permit reasonable preparation for effective cross examination or presentation of rebuttal witnesses. Roth's attorneys were required to conduct their investigation of the case while simultaneously involved in the course of the trial." *Lampard,* 38 Wn.App. at 201 (citation omitted).

***5** The Porters argue that the exclusion of their expert witness was nevertheless a reversible error considering that the lesser sanction of a continuance conditioned by terms was available. However, the trial court had already denied a motion for the second continuance, and the Porters have not shown that decision to be erroneous. The trial court was not asked to reconsider it, and so a continuance conditioned by terms was no longer an available option when the decision to exclude was made.

The Porters also contend that reversal is called for because the court did not follow *Burnet's* directive to consider a lesser sanction and make a finding of prejudice on the record before imposing the harsh sanction of excluding Dr. Olsen's testimony. *Peluso* is an example of a court's application of *Burnet's* requirement that consideration of a lesser sanction be "apparent from the record." In *Peluso,* the trial court granted a personal injury plaintiff a second continuance because recent surgery had made it impossible for her to attend the trial, but maintained the original discovery cutoff and refused to allow her to present testimony about the surgery from witnesses who had not been previously disclosed. The jury returned a defense verdict. The reviewing court reversed because of the absence of *Burnet* findings. The trial court "made no findings that a lesser sanction was not available, or that the violation here was willful, or that substantial prejudice resulted...." *Peluso,* 138 Wn.App. at 70–71.

Here, the trial court made a record that complies with *Burnet.* The court had already considered and rejected a lesser sanction (Porters' offer to pay terms if given another continuance). The court found the discovery violations to be willful (inability to pay the expert is not a reasonable excuse for delay). And the court identified the prejudice that would result if Dr. Olsen was allowed to present his report ("Two weeks really is not a reasonable amount of time.... There is really no other remedy for this.") We find no abuse of discretion in the exclusion of Dr. Olsen.

The court also did not abuse its discretion in excluding three rebuttal witnesses offered by the defense, another decision to which the Porters assign error. On the last day of trial, the Porters sought to present rebuttal testimony from three witnesses who had not been previously disclosed to Rhyne. The Porters intended to introduce this testimony to contradict Rhyne's testimony that she had been housebound, disabled, and unable to work after the harassment. After hearing from both parties, the court ruled that the witnesses would not be allowed to testify:

> I haven't heard anything that would support a finding by this court that there is good cause here for failure to disclose these witnesses. Local Rule 26 is very clear. Witnesses have to be disclosed. They need to be disclosed at the time designated in the case schedule, but, in any event, before trial. We are in the middle of trial. Actually, the plaintiff has already rested. We are in the defense case. I haven't heard any reason why these witnesses wouldn't have been revealed just by investigation.
>
> ***6** So, for those reasons, the court doesn't find good cause for the failure to comply with Local Rule 26, and I will exclude those witnesses. [4]

The Porters contend they had no obligation to disclose the witnesses earlier. They say the testimony of the witnesses became relevant only after Rhyne testified about how the harassment disabled her from working.

The record does not indicate that the Porters were surprised by Rhyne's testimony about her disabilities. They knew from Dr. Olsen's report that Rhyne was claiming she had difficulty maintaining employment. Their awareness of her claim is shown by their response to Rhyne's motion to exclude Dr. Olsen:

> Dr. Olsen, following an extensive workup, does not think Plaintiff has any mental illness ... and opines she has faked her symptoms to exact money in this case, just as she has feigned mental illness to be on government welfare, housebound and unemployable for over 3 years. [5]

In light of this record, we cannot agree that the rebuttal witnesses became relevant only after Rhyne testified at trial.

Further, the Porters did have an opportunity to present testimony that Rhyne had performed as a musician after she left Dixie's Barbeque. L.J. Porter testified that she had recently seen Rhyne performing at a club in Bellevue. The appellate record does not contain a report of the closing arguments, but L.J.'s testimony would have allowed the Porters to argue in closing that Rhyne was misrepresenting herself as unable to work.

The Porters assign error to the amount of damages and attorney's fees that Rhyne received below, but they do not discuss these claims until their reply brief. This court does not consider issues argued for the first time in the reply brief. *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990). The reply brief is limited to a response to the issues in the responding brief. To address issues argued for the first time in a reply brief is unfair to the respondent and inconsistent with the rules on appeal. RAP 10.3(c); *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994). We decline to review the damages and fees.

Affirmed.

WE CONCUR: AGID and GROSSE, JJ.

Parallel Citations

2007 WL 3054366 (Wash.App. Div. 1)

Footnotes

1 King County Local Rule 40(e)(2) states in part: “If a motion to change the trial date is made after the Final Date to Change Trial Date, as established by the Case Schedule, the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice.”

2 Report of Proceedings, November 9, 2005 at 8, 14–15.

3 Report of Proceedings, November 9, 2005 at 17–19.

4 Report of Proceedings, November 14, 2005 at 71–72.

5 Clerk's Papers at 133 (Defendants' Response to Plaintiff's Motion to Exclude Dr. Olsen, October 31, 2005).