4-6-2012

Hansen v. Roberts Appellant's Reply Brief Dckt. 38904

IN THE SUPREME COURT OF THE STATE OF IDAHO

LARRY HANSEN, Plaintiff/Appellant, vs. MATTHEW ROBERTS, Defendant/Respondent.	**Supreme Court Docket No. 38904-2011** (Bonneville County District Court Case No. CV-2009—3163(2009-585)

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District of Idaho
In and for the County of Bonneville

HONORABLE WILLIAM H. WOODLAND, DISTRICT JUDGE, PRESIDING

Brent Gordon (ISB # 7822) **GORDON LAW FIRM, INC.** 477 Shoup Ave, Suite 203 Idaho Falls, ID 83402 Telephone: (208) 552-0467 Facsimile: (866) 886-3419 Attorney for Plaintiff/Appellant Larry Hansen	Jennifer K. Brizee **POWERS TOLMAN, PLLC** P.O. Box 1276 Twin Falls, ID 83303-1276 Attorney for Defendant/Respondent Matthew Roberts

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Court Rules

ARGUMENT

ISSUE #1: A. Roberts' Disclosures Were Untimely and Insufficient

Hansen argued that Roberts' expert disclosures were untimely and insufficient. In response, Roberts did not dispute that Roberts' rule 26(b)(4) disclosures were not made until after the close of discovery and only weeks before trial. Further, Roberts did not dispute that he failed to disclose the identity of one expert, John Droge, until just two weeks before trial and two and a-half months after expert disclosures were due pursuant to the trial court's scheduling order.

Roberts argues that this Court should find the disclosures timely because Roberts was still conducting discovery after the expert disclosure deadlines and after the close of discovery. However, Roberts' timing issues are due solely to the late start he made to begin discovery in earnest. Roberts failed to explain to this Court that he did not file a notice to depose Hansen until August 18, 2010, nine days after the discovery cutoff deadline. *See* R. Vol. I, p. 86.

Roberts admitted that Hansen responded to written discovery on March 11, 2010, but provides no explanation as to why he waited over five months and until after the discovery cutoff to conduct depositions and follow up on discovery responses he felt were insufficient. Roberts disingenuously states that his decision to wait five months, and until after the discovery cutoff, to start discovery in earnest was Hansen's fault. The

fault for the delay rests squarely on Roberts' shoulders for failing to conduct discovery before the discovery cutoff deadline and before his expert disclosure deadline.

Roberts also incorrectly suggested that he could unilaterally "reserve the right" to file late expert disclosures because his experts were rebuttal experts. Roberts' position is incorrect because his experts were not rebuttal experts and he has no right to unilaterally change the court's scheduling order. Roberts filed a counterclaim seeking damages to his vehicle and, in addition, raised affirmative defenses of comparative fault and pre-existing injuries. Roberts had the burden of proving that Hansen was legally liable to Roberts to recover the damages he sought as well as to prove his affirmative defenses. Accordingly, the expert witnesses he called were not rebuttal witnesses but witnesses who testified in Roberts' case in chief to prove his counterclaim and affirmative defenses. *See Aguilar v. Coonrod*, 262 P.2d 671, 677 (Idaho 2011) (affirming trial court decision to exclude untimely disclosed expert who intended to testify to prove an affirmative defense).

Roberts' response also completely failed to address the standard of review – an abuse of discretion – and show how the trial court's decision was not an abuse of discretion. When determining whether a district court abused its discretion, this Court considers three factors: (1) whether the trial court correctly perceived the issue as one of discretion, (2) whether it acted within the boundaries of its discretion and consistently

with applicable legal principles, and (3) whether it reached its decision through an exercise of reason. *See Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (Idaho 2006).

When the issue of timeliness of expert disclosures was addressed by the court below, Roberts' counsel made the conclusory statement that, "I believe they were disclosed timely." Tr. Vol. I., p. 333, L. 12 The trial court then made the conclusory ruling: "All right. They will be allowed to testify."

The trial court clearly did not meet any of the three required prongs to show that it did not abuse its discretion by allowing expert testimony from witnesses whose disclosures were not timely. Accordingly, judgment should be vacated and the case remanded for a new trial

B. Kimbrough Invaded the Province of the Jury

Hansen argued that the trial court erred in allowing Kimbrough to testify about whether Hansen was negligent because it is inappropriate to allow an expert to provide testimony on subjects that are not beyond the common sense of the average juror. In response, Roberts argues that Hansen failed to object during the trial testimony so he waived the right to challenge the admissibility of the evidence on appeal.

Hansen did object during Kimbrough's trial testimony, just as it began, and sought and received a continuing objection that his testimony invaded the province of the jury:

Q By Ms. Brizee: Dr. Kimbrough, what did you do in this case?

A Tried to reconstruct the accident. So, for example,

Mr. Gordon: Objection, Your Honor. Can I make an objection to all his testimony as to invading the province of the jury?

THE COURT: You have a continuing objection.

See Tr. Vol. I., p. 353 L. 19 through 354 L. 1.

Roberts notes that Kimbrough's opinion testimony was that the crash took place because of a "careless right-hand turn by the plaintiff" and that Kimbrough's opinion was based on Kimbrough's opinion of what Roberts was thinking at the time he passed Hansen on the right. *See* Br. 12 and 13. Such opinion testimony, as discussed in Hansen's initial brief, is inadmissible.

The trial court erred by allowing Kimbrough to testify as to who, in his opinion, was at fault for causing the crash because such testimony invades the province of the jury and is not helpful.

C. The Issue Regarding Droge's Testimony is Moot

Hansen argued that the trial court erred in allowing Droge testify because Roberts failed to provide adequate foundation that Droge's testimony was scientifically reliable. In response, Roberts argues that Droge's testimony is moot since the jury found Hansen negligent and Droge's testimony only went to causation of injuries.

Hansen agrees with Roberts that Droge's testimony only addressed causation of injuries. That said, it is, at the very least, interesting to learn about the unreliable methodology used to support Droge's testimony and the body of case law that supports exclusion of such testimony. Given the unscientific methodology employed by Droge, it is now apparent why Roberts did not disclose the basis and methodology used to support Droge's opinion that a violent crash that caused significant damage to the vehicles involved would translate to extremely minimal forces to the passengers. Obviously, providing the methodology, basis, and facts supporting Droge's opinions, as required by rule 26(b)(4), would bring transparency and light to the unscientific opinions and would allow counsel to effectively cross examine Droge. The information that Hansen elicited from Droge during cross examination – which was not provided in the rule 26(b)(4) disclosures – highlights the problems caused by Roberts' untimely and incomplete disclosures.

ISSUE #2: The trial court erred in ruling that Hansen waived the objections he made during Roberts' video deposition.

Hansen argued that the trial court erred when it ruled that Hansen waived the objections he made during Roberts' video deposition by not addressing those objections during a hearing that was scheduled to review jury instructions. In response, Roberts concedes that a hearing was not set for the sole purpose of addressing the parties'

objections and that at no time did the trial court invite Hansen or order Hansen to raise his objections to the deposition during the hearing set to review jury instructions. Thus, the trial court was clearly wrong when it concluded that Hansen waived the right to raise his objections at trial.

Hansen had the right under rule 32(b) to raise his objections at trial. *See* Idaho R. Civ. P. 32(b) (noting that "objection may be made at the trial . . . to receiving in evidence any deposition . . . for any reason which would require the exclusion of the evidence if the witness were then present and testifying."). Roberts argues that the rule does not apply to video depositions because video depositions need to be edited prior to trial. Roberts provides absolutely no legal authority whatsoever to support his argument and the rules of civil procedure clearly contradict Roberts' position.

If Roberts wanted to edit the video prior to trial then he should have asked the trial court to rule on all of the objections raised during the depositions. Roberts cannot blame Hansen for waiting to trial to raise his objections when the rule clearly allows him to do so.

Roberts then argues that the hearsay documents of Roberts' vehicle damage was admissible; that Roberts' out of court statements were not hearsay; and that he did not violate the court's prior ruling by testifying that he did not receive a citation.

Roberts argues that the documents he submitted regarding the repair estimates for his vehicle are admissible because Hansen testified as to the amount of his vehicle damage and because Roberts made a statement about what he remembered he was told by the mechanic as to how much his repairs would cost. Roberts did not object to Hansen stating the amount of his vehicle repairs but if he did, the trial court, if acting properly, would have sustained the objection. *See Philips v. Erhart*, 254 P.3d 1 (Idaho 2011) (holding that objections to evidence cannot be raised for the first time on appeal and that hearsay evidence admitted without objection is as strong as any other legally competent evidence). Further, Roberts' statement about what the mechanic told him about the amount of repair charges is still hearsay because it is based on the out-of-court statement made by the mechanic.

Roberts argues that his own statements that were made out-of-court and offered during his examination by his own counsel are not hearsay. The rule is clear that a statement is not hearsay only if it was (1) offered against a party and (2) is that party's own statement. *See* Idaho R. Evid. 801(d)(2). Roberts' statements were not offered against Roberts, but for him, so the statements are hearsay. *See State v. Gerrardo*, 147 Idaho 22 (Idaho Ct. App. 2009) (holding that trial court misunderstood the hearsay definition when it allowed a statement by Gonzales, a party to the case, to be used against

Gerardo, who was also a party to the case, because the statement, to not be considered hearsay, could only be offered against the party making the statement).

Finally, Roberts argues that his statement that he did not receive a citation was not objectionable even though the trial court had ordered the parties not to present testimony about citations. Roberts' argument that the court order concerning the citation was extremely narrow and that Hansen should have expanded the motion in limine to include testimony about whether Roberts received a citation is disingenuous because Roberts specifically asked the trial court for guidance on the scope of its ruling and indicated that she would like to ask Roberts whether he received a citation along with the police officer and Kimbrough.

> Roberts' Counsel: "With Matt Roberts, my plan was to ask him: Did you receive a citation as a result of this accident? And he'll say, no, because he didn't. Mr. Hansen got the citation. Can I ask him that question? It's not – that's not dealing with Mr. Hansen, whether or not he received or didn't receive a citation, but it's kind of linked, so I thought I better bring it up with the Court while we're talking about this."

See Tr. Vol. I., p. 47 L. 24 through 49 L. 5.

The trial court ruled: "I'm going to grant the motion to the extent that it deals with testimony and/or admission of the citation." *See* Tr. Vol. I., p. 51 L. 18. The trial court

then went on to clarify that his ruling extended to all witnesses mentioning the citation but that he would allow the police officer and accident reconstructionist to testify about factual circumstances: "I would bar any comment concerning the citation itself by either the officer or the reconstruction expert." *See* Tr. Vol. I., p. 53 L. 8.

Thus, Roberts' suggestion that the trial court's ruling was only narrowly limited to testimony of Hansen is wrong and Roberts sought and obtained clarification from the trial court as to the scope of the ruling and the trial court clearly extended the prohibition of testimony regarding the citation to all witnesses.

Roberts's argument that Hansen's objection was not proper fails because Hansen was prohibited from objecting to the testimony at trial. Rule 32(b) allows Hansen to object to deposition testimony at trial but Hansen was precluded from doing so under the trial court's erroneous ruling. Thus, Roberts' arguments that Hansen had to object based on the violation of the court's order is wrong since Hansen was precluded from objecting in the first instance.

Finally, Roberts' arguments that the error was harmless is wrong because no evidence whatsoever was presented to support Roberts' damages so the outcome of the case would certainly have been different if Roberts was precluded from introducing hearsay statements to prove his damages. Further, the allocation of fault would probably be significantly different if Roberts was prohibited from making self-serving hearsay

statements and if he was prohibited from violating the court's order prohibiting testimony regarding citations. As noted in Hansen's initial brief, the jury was considering allocating fault 51/49 but asked if it could award Roberts 90 percent of his damages. When the court said, "no," the jury then found Hansen 90 percent at fault so it could give Roberts, who it knew just underwent a liver transplant, money to repair his car. Since the case involves a claim and a counterclaim, any difference in the allocation of fault will make a difference in the amount Hansen has to pay to Roberts or may result in an award to Hansen if he is given a fair trial.

ISSUE #3: Limitations on Voir Dire

Hansen argued that the trial court abused its discretion by prohibiting Hansen from inquiring whether a prospective juror or one of his family members were or had ever been employed by an insurance carrier. In response, Roberts argued that Hansen did not raise the issue of whether he could inquire about potential juror's past employment with an insurance company until the day of trial and that by waiting until the day of trial, Hansen did not preserve the issue for appeal. However, the only case law cited in support of Roberts' argument state that an issue must be raised at trial to preserved on appeal and Hansen clearly sought permission to inquire about a potential juror's past employment before jury selection commenced so the issue was preserved.

A blanket rule prohibiting the mention of insurance at all prevents a plaintiff from discovering whether potential jurors is biased due to juror or the juror's family's employment with insurance companies.

Issue #4: Roberts is not entitled to attorney fees.

Roberts seeks fees, arguing that Hansen's appeal was frivolous. The request for fees is unsupported by any discussion as to what arguments it believes are frivolous. An unsupported and conclusory statement is not sufficient to provide this Court or Hansen with proper notice of the basis or reasoning supporting such a request and should be denied. See Idaho R. App. P. 35(5).

CONCLUSION

For the foregoing reasons, Hansen requests that this Court vacate the judgment in favor of Roberts and remand to the trial court for a new trial.

DATED this 6th day of April, 2012.

Brent Gordon

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2012, I faxed and caused two (2) true and correct copies of the foregoing instrument to be delivered to the following via U.S. Mail, postage prepaid:

Jennifer K. Brizee
POWERS TOLMAN, PLLC
P.O. Box 1276
Twin Falls, ID 83303-1276

Fax: (208) 733-5444

Brent Gordon