Williams v. Davies

Court of Appeals of Washington, Division Two

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No. 33366-0-II

Reporter
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BRYON WILLIAMS, an individual, Respondent, v. DAVID D. DAVIES, a married man; and HILL FUNERAL HOME, INC., a Washington corporation, Appellant.

Notice: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Williams v. Davies, 137 Wn. App. 1004, 2007 Wash. App. LEXIS 735 (2007)*

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For Respondent(s): Rodney Bruce Ray of Margullis Luedtke & Ray, Tacoma, WA; Charles Kenneth Wiggins of Wiggins & Masters PLLC, Bainbridge Island, WA; Shelby R. Frost Lemmel of Wiggins & Masters PLLC, Bainbridge Island, WA.

Judges: Houghton, C.J. We concur: Armstrong, J., Hunt, J.

Opinion by: HOUGHTON

Opinion

HOUGHTON, C.J. -- After a bench trial, the court found David Davies liable for negligent infliction of emotional distress. Davies appeals, arguing that the trial court erred in considering both parties' depositions that had not been admitted into evidence and in awarding costs. We affirm.

FACTS

In October 1999, a teenager committed suicide by shooting himself in the head. Bryon Williams, a Baptist youth pastor and a police chaplain, had been a coach and

mentor to the teenager, and the teen's family requested Williams's assistance in arranging the funeral.

On October 11, Williams went to the Hill Funeral Home to discuss the arrangements and to learn whether the body would be appropriate for viewing during funeral services. The mortician, Davies, became upset when Williams said the medical examiner told him that the body probably could be viewed if the gunshot wounds could be masked. Davies believed that whether the body could be viewed was his decision exclusively.

The next day, **[*2]** Davies called Williams and asked him to come to the funeral home right away. Williams's and Davies's testimony differs about what happened next.

According to Williams, he believed Davies had called him to provide counseling to the teenager's family. When he arrived, an employee led him to the prep room. Suspecting that the teenager's body was in the room, Williams told the employee he was squeamish. The employee said nothing and led him into the room.

When Williams entered the prep room, he first saw an open casket containing the body of an elderly woman whose face was partially made up. He then saw the teenager's nude body. The head and chest cavities were open; Williams testified that part of the rib cage had been removed and was leaning on the body, and he could see a pool of blood in the head cavity.

As Williams stood by, Davies removed organs from inside the chest cavity, commenting that the tongue had been removed during the autopsy. Davies also cut up some of the intestines during the discussion. He told Williams that the teenager had suffered for two minutes after shooting himself. According to Williams, Davies said, "And they say this body is viewable." Report of Proceedings **[*3]** (RP) (Oct. 19, 2004) at 644.

Although horrified, Williams asked Davies what part of the body could not be viewed. Davies said that the eyes could not because they had sunk. Williams sarcastically thanked Davies and returned to the church, where he broke down.

According to Davies, when Williams came to the funeral home on October 11, he was visibly angry and acted unprofessionally, ordering Davies to get the body released from the medical examiner. Davies heard Williams say that he was a cop and had seen the body. Davies testified Williams told him that the family wanted a viewing and that Williams told them they could have one.

Davies then invited Williams to the funeral home the next day in order to show that he was not lying about a possible viewing and to help Williams understand why it is the professional mortician's responsibility to discuss this option with the family. Davies denied that he intended to injure Williams emotionally. He also denied that the body was in the condition Williams described. Asked why Williams would fabricate the story, Davies said that he believes Williams hates morticians and saw an opportunity to make money.

The day after the incident, Williams **[*4]**

wrote a complaint letter to the State Department of Licensing. In the course of the state's investigation, Davies admitted to program manager Dennis McPhee that Williams's account of what had happened in the prep room was accurate. Davies also signed a stipulation of facts consistent with Williams's version. But at trial, Davies testified that the stipulation was inaccurate and that he signed it only because he was advised to. McPhee also testified about his investigation and his concerns about Davies's account. For example, Davies made a number of "denial statements" in his response to Williams's complaint, statements which McPhee understood as an attempt to avoid disclosing what really happened. RP (Oct. 18, 2004) at 489. In particular, McPhee focused on Davies's declarations, "I promise," "I swear,", and "I guarantee," as well as his statement that "none of it happened," as evidence of deception. RP (Oct. 18, 2004) at 490. McPhee observed that when Davies admitted that Williams's version of events was true, he seemed relaxed, like he was glad to get it over with. Last, McPhee believed that Williams described the incident using details that an average person **[*5]** would not know.

After the incident, Williams became withdrawn and suffered from nightmares and anxiety attacks. The experience affected his work as a youth pastor, and he resigned from his position less than a year later.

During a bench trial on the claims, the parties used, but did not admit into evidence, Davies's and Williams's depositions. Following the trial, the trial court found Davies liable for negligent infliction of emotional distress. In its oral ruling, the trial court observed that Williams's story was consistent, while there were several conflicts in Davies's version. The trial court awarded Williams past and future economic damages, the costs of counseling and medication, and past and future non-economic damages, totaling $333,531.00.

Williams submitted a cost bill in which he claimed $371.00 and $1,444.70 for the depositions of Williams and Davies, respectively. Davies opposed the cost bill, arguing that Williams was entitled to a pro rata award for the cost of those portions of the depositions used for impeachment. In awarding Williams the full cost of preparing the depositions, the trial court stated,

> I will tell you that I read both Mr. Davies['s] and **[*6]** Mr. Williams['s] deposition because there were various conflicts in the stories and testimony and I wanted to find out what their stories were closer in time, as close as I could by way of deposition versus what they were saying in trial, and there were some discrepancies with regards to . . . what was told to the investigator and so I did read them for that purpose. So I don't find it -- the Court found it very helpful to read them in their entirety rather than piecemeal so I can get a flavor.

RP (May 13, 2005) at 4. Davies did not object to the cost award. Nor did counsel raise any question about the trial court mentioning that it had to read the full depositions. Davies appeals.

ANALYSIS

USE OF DEPOSITION TESTIMONY

Davies assigns error to the trial court's review of the parties' full depositions. He asserts that the trial court's statement is an admission that it reviewed extrinsic, inadmissible evidence to resolve discrepancies in the parties' trial testimony. Accordingly, Davies requests a new trial before a different judge.

We must first decide whether Williams properly preserved this issue for our review. Under *RAP 2.5(a)*, we may refuse **[*7]** to review any claim of error not raised in the trial court. Where counsel follows *ER 103*, [1] the trial court is given an opportunity to correct any error and the opposing party is given a fair opportunity to respond before the trial court rules. *Smith v. Shannon, 100 Wn.2d 26, 27, 666 P.2d 351 (1983)*.

Davies points to numerous instances during trial when he objected to Williams's improper use of the deposition testimony. Because the trial court sustained those objections, Davies contends that the trial court understood that the transcripts were not being offered as substantive evidence. But this does not explain why Davies did not object in May 2005, when the trial court expressly stated that it had read the entire transcripts. **[*8]** By failing to object or seek reconsideration of the judgment, Davies deprived the trial court of the opportunity to correct any error without resorting to appeal.

Davies further argues that he promptly objected to Williams's use of deposition testimony as substantive evidence. We disagree.

A review of the record shows that Davies's objections did not relate to using the depositions as substantive evidence. To preserve the issue for appellate review, the objection must specify the particular ground on which it is based. *Sweek v. Municipality of Metro. Seattle, 45 Wn. App. 479, 485, 726 P.2d 37 (1986)*. Although Davies objected to Williams's use of deposition testimony at trial, his objections were based on relevance, the form of Williams's questions, speculation, and improper impeachment. At no point in the proceedings did Davies object to the use of the depositions as substantive evidence, even after the trial court stated that it had reviewed the deposition transcripts. Davies therefore may not assign error to the trial court considering the depositions as substantive evidence when he did not object on those grounds below. *Sweek, 45 Wn. App. at 485*. **[*9]**

Davies asserts that he "had no opportunity to object because the error had already been committed" and that the error "was such that neither Williams nor the trial court could have cured it." Appellants' Supp. Reply Br. at 6. The assertion overlooks the presumption that trial courts disregard inadmissible evidence in a bench trial. *Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn. App. 836, 841, 14 P.3d 877 (2000)*. Had Davies alerted the trial court that the

[1] ***ER 103(a)(1)*** provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike is made."

depositions were not admitted into evidence, we presume that the trial court could reconsider its findings without relying on the deposition testimony.

Moreover, even if the trial court erred in considering the depositions when they were not expressly offered or admitted into evidence, Davies is unable to point to any portion of the record to substantiate his claim that the trial court "based its determination of the credibility of the parties" on the deposition testimony. Appellants' Br. at 8. To the contrary, the trial court points to McPhee's testimony about Davies's inconsistent positions taken during the investigation as helpful in making its credibility determinations.

Additionally, in the findings of **[*10]** fact and conclusions of law, the trial court stated that it had considered the admitted evidence and testimony, the argument of counsel, and the briefing. The sole reference in the findings to deposition testimony is to portions of Williams's deposition testimony that Davies used in cross-examination. Davies does not assert that the record does not support any of the trial court's findings or conclusions. Instead, Davies points to the trial court's remark as an admission that the trial court compared the deposition testimony with trial testimony to resolve credibility questions. But this is not what the trial court said; it merely stated that, due to conflicts in the parties' accounts, it found it helpful to review the entire depositions to harmonize the trial testimony.

By failing to object at the May 2005 hearing, Davies did not give the trial court an opportunity to cure any error. The objections to the form of Williams's questions at trial were insufficient to preserve the issue for review. Having never objected to the trial court's review of the depositions despite having several opportunities to do so, Davies failed to preserve his claim of error for review. [2] *RAP 2.5(a)* **[*11]** .

COST BILL

Davies further contends that the trial court's award of the full cost of Davies's and Williams's depositions contravenes *RCW 4.84.010(7)*, which allows a pro rata award for portions of the depositions introduced **[*12]** into evidence or used for impeachment.

> *RCW 4.84.010(7)* allows as costs:
>
> To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

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[2] Even if he had preserved the claimed error, his argument would nonetheless fail. First, the deposition of a party may be used by the adverse party for any purpose. ***CR 32(a)(2)***; ***Young v. Liddington, 50 Wn.2d 78, 80, 309 P.2d 761 (1957)***. This includes using the opposing party's deposition testimony as substantive evidence. *See Blankenship v. Myers, 97 Idaho 356, 362, 544 P.2d 314 (1975)*; *see also* ***Young, 50 Wn.2d at 80*** (upholding trial court's order to read relevant portions of a deposition to the jury). Further, when part of a deposition is introduced, an adverse party may require introduction of any other part that ought, in fairness, to be considered with it. ***CR 32(a)(4)***.

Courts have interpreted this provision to allow an award of the full costs incurred in taking depositions when the depositions are used for trial purposes. *Kiewit-Grice v. State, 77 Wn. App. 867, 874, 895 P.2d 6 (1995)*. This includes the trial court's review of deposition testimony as substantive evidence. *Chan v. Smider, 31 Wn. App. 730, 737-38, 644 P.2d 727 (1982)*.

Here, the trial court reviewed the depositions without objection from either party and found them "very helpful." RP (May 13, 2005) at 4. Both parties understood that the trial court reviewed the deposition testimony. Under these circumstances, the trial court did **[*13]** not err in awarding Williams the full cost of both depositions.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to *RCW 2.06.040*, it is so ordered.

Houghton, C.J.

We concur:

Armstrong, J.

Hunt, J.

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