

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALEX SALAS, a single person,)
Appellant/Cross Respondent,) No. 58511-8-I
v.) DIVISION ONE
HI-TECH ERECTORS, a Washington) UNPUBLISHED OPINION
corporation,)
Respondent/Cross Appellant.) FILED: July 16, 2012
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Appelwick, J. — In this action for injuries Salas suffered when he fell from a scaffolding ladder on a construction site, we previously affirmed a jury verdict in favor of respondent Hi-Tech Erectors. Salas v. Hi-Tech Erectors, 143 Wn. App. 373, 177 P.3d 769 (2008) (Salas I)¹ Our State Supreme Court subsequently reversed and granted Salas a new trial, but remanded for this court to first resolve the issues raised in Hi-Tech’s previously unaddressed cross-appeal. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 674, 230 P.3d 583 (2010) (Salas II). In its cross appeal, Hi-Tech challenges pretrial rulings imposing discovery sanctions and concluding that Hi-Tech violated regulations governing safety standards for ladders at construction sites. We reverse the discovery

¹ The author of our original decision, the Honorable William W. Baker, died on January 17, 2011.

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sanction, affirm the ruling on the safety standard, and remand for a new trial.

FACTS

Most of the pertinent facts are set forth in the prior decisions of this court and the State Supreme Court and will not be repeated here. A few additional facts are pertinent to our resolution of Hi-Tech's cross appeal.

In a motion for summary judgment below, Salas argued in part that Hi-Tech violated Washington Administrative Code (WAC) provisions governing ladders on construction sites. He also argued that because Hi-Tech had not disclosed any expert witnesses it might call at trial, the court should preclude Hi-Tech's principal, George Canney, from offering expert testimony on scaffolding ladders. Although no court reporter was present for the summary judgment proceedings, the clerk's minute entry states that the court and counsel engaged in a "lengthy discussion" regarding the limitation of Canney's testimony.

In granting Salas partial summary judgment, the court ruled that the scaffold ladders Hi-Tech supplied violated former WAC 296-155-480(1)(e) and (f) (1997), but denied summary judgment as to liability, proximate cause, and damages. The court also ruled that Hi-Tech could call George Canney "as a witness at trial, but he shall not be able to testify as an 'opinion' or 'expert' witness."²

After a new judge took over the case for trial, Salas moved to clarify the original judge's ruling limiting Canney's testimony. In a supporting declaration,

² Although the court later ruled that Salas' counsel opened the door during trial to the precluded testimony, Hi-Tech contends the testimony was admissible whether the door was opened or not.

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Salas' counsel said the original judge had orally considered granting a continuance, ordering another deposition of Canney, and imposing financial terms, but rejected that option because no one had asked for a continuance. Salas' counsel asked the court to memorialize its consideration of lesser sanctions. The record reflects that the original judge heard the motion for clarification, but the record before us contains no findings and no transcript or narrative report of the hearing.

The jury found Hi-Tech negligent but concluded that its negligence was not a proximate cause of Salas' injuries.

Salas appealed, and Hi-Tech cross appealed. We affirmed without reaching the cross appeal. Salas I, 143 Wn. App. 373. The State Supreme Court reversed on an evidentiary issue and remanded for this court to consider Hi-Tech's cross appeal. Salas II, 168 Wn.2d at 674.

DECISION

Hi-Tech contends the trial court abused its discretion in limiting Canney's testimony as a sanction for discovery violations.³ It argues that the sanction was not justified because "there was no willful violation of a court order." We conclude there was an abuse of discretion.

Under local rules, a party must disclose all potential expert witnesses and

³ A trial court's rulings on discovery sanctions, motions in limine, or the admissibility and scope of expert testimony are reviewed for abuse of discretion. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (discovery sanctions); Gammon v. Clark Equip. Co., 38 Wn. App. 274, 286, 686 P.2d 1102 (1984) (motions in limine), aff'd, 104 Wn.2d 613, 707 P.2d 685 (1985); Christensen v. Munsen, 123 Wn.2d 234, 241, 867 P.2d 626 (1994) (admissibility and scope of expert testimony).

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provide a summary of their opinions and qualifications no later than the date designated in the case schedule. KCLR 26(k)(1), (3)(C). Any witness not disclosed in compliance with those rules “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(k)(4). A party must also answer or object to an interrogatory or a request for production. Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 584, 220 P.3d 191 (2009). “[A]n evasive or misleading answer is to be treated as a failure to answer.” CR 37(d); Magaña, 167 Wn.2d at 584. Sanctions may also be imposed for failure to seasonably supplement discovery responses. KCLR 26(e); CR 26(e)(4); In re Marriage of Gillespie, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997).

Here, Hi-Tech did not disclose Canney as *an expert* by the deadlines in the case schedule order. While it disclosed Canney as a witness and stated that he had expertise, it never answered an entire series of interrogatories requiring the disclosure of any expert’s opinion and anticipated testimony.⁴ Violations of the discovery rules and the case schedule order may justify sanctions. KCLR 26(k)(4); Dempere v. Nelson, 76 Wn. App. 403, 405-06, 886 P.2d 219 (1994) (witness excluded for failure to disclose witness until 13 days before trial); Allied Fin. Servs. v. Mangum, 72 Wn. App. 164, 168-69, 864 P.2d 1, 871 P.2d 1075 (1993) (witnesses excluded due to failure to submit a witness list as required by pretrial order); Hampson v. Ramer, 47 Wn. App. 806, 737 P.2d 298 (1987)(upholding exclusion of evidence as sanction for discovery violation);

⁴ Hi-Tech responded, “N/A” to virtually all of Salas’ interrogatories regarding potential expert witness testimony.

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Carlson v. Lake Chelan Comty. Hosp., 116 Wn. App. 718, 737, 75 P.3d 533 (2003) (upholding exclusion of testimony where interrogatory responses were incomplete and never updated).

The Supreme Court has concluded that excluding a witness as a discovery sanction without setting forth the reason for the sanction on the record, as required by Burnett v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) is an abuse of discretion. Blair v. TA-Seattle No. 176, 171 Wn.2d 342, 344, 254 P.3d 797 (2011). The trial court made no record setting forth the reasons for its sanction. Accordingly, we reverse the sanction without prejudice to revisit the issue on remand.

Hi-Tech next contends the trial court erred in ruling on partial summary judgment that the scaffold ladder at issue violated the requirements of former WAC 296-155-480 as a matter of law. We disagree.

The accident in this case involved a metal ladder attached to metal scaffolding. Salas argued below that the ladder was regulated by both former WAC 296-155-480,⁵ which appears in Part J “Stairways and Ladders” and sets forth requirements for construction site ladders, and former WAC 296-155-483 (2000), which appears in Part J-1 “Scaffolds” and sets forth requirements for scaffold access ladders. Hi-Tech responded that only Part J-1 applied, because while it expressly cross-references Part J’s requirements for portable ladders, it

⁵ Former WAC 296-155-480(1)(e) provided, “The rungs of individual-rung/step ladders shall be shaped such that employees’ feet cannot slide off the end of the rungs.” Former WAC 296-155-480(1)(f)(i),(ii) required the rungs of all metal ladders, whether fixed or portable, to be “corrugated, knurled, dimpled, coated with skid-resistant material, or otherwise treated to minimize slipping.”

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makes no such cross-reference for attachable ladders like the one in this case.

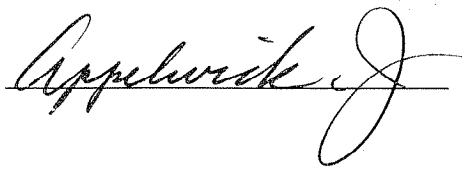
In his reply, Salas pointed to the following preamble language in Part J:

This part applies to *all stairways and ladders* used in construction, alteration, repair . . . , and demolition workplaces covered under chapter 296-155 WAC *Additional requirements for ladders used on or with scaffolds are contained in chapter 296-155 WAC, Part J-1.*

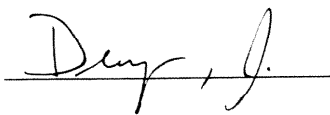
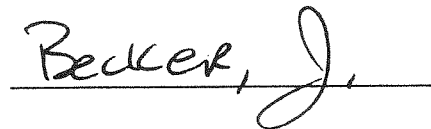
Former WAC 296-155-475 (1991) (emphasis added).

This provision appears to be dispositive. The italicized language indicates that the requirements of Part J apply to all construction site ladders, including scaffold ladders, and are *in addition to* the requirements of Part J-1. Hi-Tech, however, does not address this provision or explain how its interpretation of Part J-1 alters the provision's meaning or scope. Absent such argument, we cannot say the trial court erred in concluding that Hi-Tech violated former WAC 296-155-480 as a matter of law.

We reverse the discovery sanction, affirm the ruling on the safety standard, and remand for a new trial.

A handwritten signature in cursive script, reading "Appelwick, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Dwyer, J.", written over a horizontal line.A handwritten signature in cursive script, reading "Becker, J.", written over a horizontal line.