Trattler v. Citron – Sanity Restored?

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The Colorado Supreme Court has consistently delivered the message that the purpose of the courts and their rules is "[t]o provide a 'just, speedy, and inexpensive determination' of civil cases,"[1] and that courts should not "deny a party an opportunity to present relevant evidence based on a draconian application of pre-trial rules."[2]

In repeated decisions by the supreme court, this concept has been emphasized and re-emphasized. Examples of this would include *Nagy v Dist Court*,[3] *J. P. v. Dist. Court*[4] and more recently, *Todd v. Bear Valley Village Apartments*.[5] *Todd*, in fact, was thought by many to be a case specifically selected by the supreme court to re-emphasize this point in the face of what was perceived to be erosion of it by judicial interpretation.

In *Todd*, the relevant issue addressed was the discretion of a trial court to preclude testimony of an expert witness because of a party's failure to timely endorse the expert witness. The evidence excluded by the trial court was the testimony of an expert physician endorsed to testify six weeks prior to trial, instead of within the 120 day deadline of Rule 26(a)(2)(B)(I).

On appeal, the Colorado Supreme Court reversed the trial court's determination to exclude the evidence, based upon the court's determination that the nonmoving party should be afforded the opportunity to demonstrate that the failure to timely endorse the expert was either substantially justified **or** harmless. The specific procedure set forth in *Todd* was that the moving party must first show a material violation of a rule or court order. In the event that such is satisfactorily demonstrated, the burden then shifts to

> the non-disclosing party to establish that its failure … was either substantially justified or harmless,

and that

> the party who would suffer [the] sanction **must be given an opportunity to demonstrate that its failure to disclose was substantially justified or harmless**.[6]

In making this determination as to whether the non-moving party's failure was either substantially justified or harmless, the court set forth a "non-exhaustive list to highlight some areas of inquiry that are often relevant." These "areas of inquiry" include the following:

(1) The importance of the witness's testimony;

(2) The explanation of the party for its failure to comply with the required disclosures;

(3) The potential prejudice or surprise for the party to whom the testimony is offered that would arise from allowing the testimony;

(4) The availability of a continuance to cure such prejudice;

(5) The extent to which introducing such testimony would disrupt the trial; and

(6) The non-disclosing party's bad faith or willfulness.[7]

The inclusion of such things as "the availability of a continuance to cure such prejudice," was thought to be a strong message that witness preclusion by the trial court was to be used only as a last resort.

Notwithstanding this, the Colorado Court of Appeals seemingly began blazing trails in a different direction for expert witness preclusion based upon technical disclosure violations. This trend began with *Carlson v. Ferris*,[8] and was solidified by the case of *Svendsen*

v. Robinson.[9] This was, in turn, followed by *Wocnicki v. Musick*.[10]

Both *Carlson* and *Svendsen* addressed the requirements of C.R.C P. 26(a)(2)(B)(I), and the proper scope of discretion for trial courts in terms of witness preclusion sanctions for the violation of such disclosure requirements. C.R.C P. 26(a)(2)(B)(I) requires a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Its requirements, however, are no more specific than that. The federal rules contain a similar requirement, and in two relatively obscure district court cases, *Coleman v. Dydula*[11] and *Nguyen v. IBP, Inc*.,[12] this requirement was further defined to include disclosure of "the name of the court or administrative agency where the testimony occurred, the names of the parties, the case number, and whether the testimony was by deposition or at trial.[13]

The *Carlson* court adopted this interpretation. Moreover, it described this information as information which must "at a minimum" be disclosed, and applied it retroactively. Further, the trial court's order striking the defendant's expert witness because of the defendant's failure to fully supply this newly required information, was upheld as being within the trial court's proper scope of discretion pursuant to C.R.C.P. 37(c)(1), and perhaps most significantly within what the court of appeals determined to be the scope of discretion intended by *Todd*.[14]

The record in *Carlson* showed that the defendant had shown that he had listed the attorneys' names who had been involved in the previous cases the medical expert had testified in, that the expert had always provided the type of information that he had provided in this case in past cases, and that he did not have access to all the information set forth by the appellate court's opinion concerning the minimal amount of information and type of information required.[15] Notwithstanding such, the court of appeals upheld the trial court's order striking the expert as an endorsed expert, because of defendant's failure to comply with what became known as "the *Carlson* criteria," in terms of the information that must be included in expert witness endorsements regarding the expert's testimonial history. Moreover, the precedent was established that the trial court's determinations under C.R.C.P. 37(c)(1) of expert witness preclusion would be upheld in the absence of an abuse of discretion by the trial court. Further, the *Carlson* court was quite liberal in terms of what would satisfy the two prongs of *Todd* for witness preclusion. First, the court readily determined that the trial court was well within its discretion in determining the lack of disclosures to not have been "substantially justified." With regard to the second prong of *Todd*, i.e., whether the defendant's failure to comply was harmless, it stated that "[t]he purposes of providing lists of prior cases are to enable opposing counsel to obtain prior testimony of the expert that may be relevant to the proposed testimony in the pending case and to enable a party to prepare for cross-examination at a deposition or a trial. **Failure to disclose the information is not harmless as contemplated by the rules**."[16] Further, the court of appeals rejected the defendant's argument that the information could have been obtained by taking the expert's deposition – stating instead that "Rule 26 does not contemplate shifting the burden of obtaining information to the discovering party."[17]

Svendsen v. Robinson[18] was the next case to address the issue. In *Svendsen*, the tables were turned where it was the defendant who was challenging the lack of proper disclosure by the plaintiff. The record showed that the plaintiff had made significant efforts to obtain this information from their expert, but ultimately fell short. As in *Carlson*, the expert's endorsement included attorneys' names. The list also included the date of the testimony, the amount charged by the expert, and in some cases, the case name. It contained, as well, a numerical code, which the expert later explained during his deposition, identified whether is was arbitration or trial testimony. The list did not contain, however, case numbers, the name of the court, or agency, or the venue or state where the attorneys were located. Furthermore, the list only included testimony taken at trials and arbitrations, and not at depositions. The plaintiff, as well, supplemented the information given on the day the expert's deposition was taken in California. Again, however, the supplemented list contained no case number, case name, court, or party name.

In upholding the trial court's order striking this expert based upon the party failing to comply with the minimum requirements of C.R.C P. 26(a)(2)(B)(I) as interpreted in *Carlson*, the court of appeals made certain significant and profound statements. These included its statement that: "[f]ailure to disclose the information is not harmless as contemplated by the rules."[19] It stated as well that there is no requirement for the court to first order compliance with the disclosure requirements before it strikes the party's expert, but instead, that "[a] C.R.C.P. 37 sanction is automatic and self-executing;" and thus there is no "one warning" exception and "a motion for sanctions filed by the opposing is not a pre-requisite for the imposition of the sanction."[20]

Svendsen was followed by the case of *Wocnicki v. Musick*,[21] which ratcheted up the grip of *Carlson* and *Svendsen* even further. In upholding the trial court's order blocking the defendant's expert witness for lack of disclosure pursuant to C.R.C P. 26(a)(2)(B)(I), the court made the bold statement that: "[i]f the party offering the testimony fails to provide sufficient information about the proposed expert's qualifications or opinions, the trial court has broad discretion to determine sanctions, including disallowing the expert's testimony,"[22] and the court will only "review the trial court's decision to preclude an expert witness from testifying for abuse of discretion."[23]

At that point, the intent of the supreme court in *Todd* to allow expert witness preclusion only in the most extreme of circumstances seemed to have been entirely lost. To the contrary, the courts in *Carlson, Svendsen*, and *Wocnicki* were using out of context quotes from *Todd* to support an entirely different rule.

At least in the field of malpractice litigation, this introduced an era where expert witness preclusion based upon technical flaws in the other party's C.R.C P. 26(a)(2)(B)(I) disclosures, was becoming rampant, and the results were anything but consistent with the intent of *Todd.* One of the resultant standard practices in professional malpractice litigation in depositions was for opposing counsel to repeatedly search for proof that the expert failed to disclose all necessary information pursuant to C.R.C P. 26(a)(2)(B)(I), based upon information which the opposing counsel actually had about such other undisclosed testimony by access to an expert witness database.[24] Thus, the hypocrisy that was developing was that opposing counsel were contending that they had been prejudiced by the non-disclosure of information concerning the expert's previous testimony, where they were able to prove the non-disclosure only by access to a data base which gave them the information anyway.

This all led to the case of *Trattler v. Citron*.[25] In *Trattler,* the plaintiff's expert witnesses were stricken shortly before the trial date by the trial court which concluded that "Rule 37(c)(1) **requires** that the trial court sanction all failures to disclose under rules 26(a) and (b) with witness preclusion unless the failure to disclose is either substantially justified or harmless."[26] Remarkably, the trial court noted that it did "not fault plaintiff's counsel who seems to have made repeated efforts to persuade [the expert] to make the required disclosure,"[27] but nonetheless refused to find that the non-disclosure was "substantially justified." With regard to the second prong of *Todd*, i.e., whether the non-disclosure was "harmless," the trial court refused to consider plaintiff's counsel's suggestion that the court inquire with defense counsel as to how much of the information concerning the expert's prior testimony the defense counsel actually had from its own database. As set forth in the supreme court's decision, the following information is revealed by a review of the transcript regarding the pivotal hearing:

> Trattler' s Attorney: Judge, I'll represent to you that if you ask these lawyers as officers of the court whether they had access to all of the information which was supplemented related to Dr. Schapira, [including] cases, case names, case numbers, lawyers, et cetera, they will have to admit they did. They will have to admit this is all available. Every single one of those cases was available to them and all of that information was available to them. And, if you ask them, and I request that the court [ask] this, "how much of it did you have prior to Dr. Schapira's deposition?" I suspect that they will have to admit that they had all of it, or they had access to all of it, because they have access to defendants' deposition bank, which contains all of this information. . . .
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> Trattler's Attorney: Judge, just one other thing. . . . There is a harmless part to this argument. I am not asking you to change your ruling, but I would ask the court to inquire of [defense counsel] . . . how much of the disclosure he had at the time of Dr. Schapira's deposition, because it goes directly to the harmless portion of the test. And, while [defense counsel] is correct that the rule requires that the witness disclose this information, it also goes on to say that before the witness is stricken, there is a determination of whether it's harmless. If he had everything, then this becomes a legal game, which it shouldn't be.

In spite of this, the trial court's response was: "[w]ell, I'm not going to require [defense counsel] to answer that question."[28]

In a nearly unanimous decision (with Justice Eid dissenting), the court took the opportunity to make its intent in *Todd* clear, and overruled to the extent inconsistent, the court of appeals' determinations in *Carlson, Svendsen*, and *Wocnicki*.[29] The focus of emphasis used by the court was not only a review of the intent of *Todd,* but a particular emphasis and determination of what alternative sanctions were available to trial courts under C.R.C.P. 37(1). Based upon such, it ultimately concluded that the trial court had abused its discretion in not imposing an alternative sanction that was more "commensurate with the nature of the violation."[30]

In reaching this decision, the court noted:

> While an expert's past testimony may be useful when the opposing party seeks to impeach that expert during cross-examination, the expert's testimonial history is not central to the case. Here, the defendants knew the identity of the experts, received all relevant information about the experts except for a portion of their testimonial history, had ready access to the experts' testimonial history by use of a defense attorney's database, and had already undertaken lengthy depositions of each of *Trattler's* experts, including extensive questioning of the doctors' expertise, their previous testimony in other cases, and their opinions on the present case. In addition, defendants had the opportunity to depose each doctor a second time prior to trial. Thus, much of the experts' forensic testimony was thoroughly probed prior to the defendants' Rule 37(c)(1) claim and could have been explored further….
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> The record also indicates that the trial court believed *Trattler* acted in good faith and was not to blame for her experts' failure to fully disclose their testimonial history….

The importance of *Trattler* is not only that it put an end to the "game of expert witness preclusion" that was

becoming commonplace after *Carlson* and *Svendsen*, but that it again re-emphasized and expanded upon the supreme court's frequently cited rule that "the trial court must strive to afford all parties their day in court and an opportunity to present all relevant evidence at trials" and that "it is unreasonable to deny a party an opportunity to present relevant evidence based upon a draconian application of pre-trial rules."[31] It emphasized and defined, as well, the numerous alternative sanctions that were available under C.R.C.P. 37(c)(1), other than witness preclusion. The following language used by the court is excellent, and deserves more than paraphrase:

> Where preclusion of the undisclosed evidence is not a proper sanction, the appropriate alternative sanction should be in keeping with the significance of the violation. We reaffirm the principle that sanctions should be directly commensurate with the prejudice caused to the opposing party. *See Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672, 677 (Colo. 1987). Consequently, we have previously held that "it is unreasonable to deny a party an opportunity to present relevant evidence based on a draconian application of pretrial rules." *J.P.*, 873 P.2d at 750 (citing *Nagy v. Dist. Court*, 762 P.2d 158 (Colo. 1988)). Further, Colorado courts have held that when a party violates the discovery rules, trial courts are permitted "to choose an appropriate sanction, which may include evidence preclusion. However, that sanction is not mandatory." *Genova v. Longs Peak Emergency Physicians*, 72 P.3d 454, 466 (Colo. App. 2003). In so doing, "the trial court must strive to afford all parties their day in court and an opportunity to present all relevant evidence at trial." *Todd*, 980 P.2d at 979. We reaffirm, as we did in *Todd,* our long-standing principle that the objective of the discovery rules is "to provide a 'just, speedy, and inexpensive determination' of civil cases." *See id.* (quoting C.R.C.P. 1(a)). Accordingly, we hold that preclusion of expert witnesses for failure to provide testimonial history is a disproportionate sanction.
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> When considering an appropriate sanction for nondisclosure or late disclosure of testimonial history, the trial court should be guided by the alternatives specified in Rule 37(c)(1), including the alternatives cross referenced in sections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of the rule. Thus, the court may consider rescheduling depositions or trial, payment of attorney fees and costs, contempt proceedings against the experts, admitting evidence of the noncompliance, instructing the jury that noncompliance may reflect on the credibility of the witness, or any other sanction directly commensurate with the prejudice caused.[32]

The retroactive application of the principles of *Trattler* has now also been approved in the recent court of appeals decision of *Erskin v. Beim*.[33]

Thus, to answer the question posed in the title: some sanity has indeed been restored. Hopefully it (and the justice it carries with it) will last.

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Endnotes

1 *Todd v. Bear Valley Vlg. Apts*., 980 P. 2d 973, 979 (Colo. 1999) (*quoting* C.R.C.P. 1(a)).

2 *J.P. v. Dist. Ct.*, 873 P. 2d 745, 750 (Colo. 1994) (*citing Nagy v. Dist. Ct.*, 762 P. 2d 158 (Colo. 1988)).

3 *Id*.

4 *J.P*., 873 P. 2d 745.

5 *Todd*, 980 P. 2d 973.

6 *Id*. at 978 (emphasis added).

7 *Id.*

8 *Carlson v. Ferris*, 58 P.3d 1055 (Colo App. 2002).

9 *Svendsen v. Robinson*, 94 P.3d 1204 (Colo. App. 2004).

10 *Wocnicki v. Musick*,119 P.3d 567 (Colo. App. 2005).

11 *Coleman v. Dydula*, 190 F.R.D. 316 (W.D.N.Y. 1999).

12 *Nguyen v. IBP, Inc*., 162 F.R.D. 675 (D. Kan. 1995).

13 *Carlson*, 58 P.3d at 1058.

14 *Todd*, 980 P. 2d 973.

15 *Carlson*, s*upra* at 1058-59

16 *Id*. at 1060.

17 *Id*.

18 *Todd*, 980 P. 2d 973.

19 *Svendsen*, 94 P.3d at 1207.

20 *Id*. at 1207-1208.

21 *Wocnicki v. Musick*, 119 P.3d 567 (Colo. App. 2005).

22 *Id*. at 575.

23 *Id*.

24 *See, e.g*., www.idex.com/.

25 *Trattler v. Citron*, 182 P.3d 674 (Colo. 2008).

26 *Id*. at 678.

27 *Id*.

28 *Id*. at 679.

29 *Id*. at 681.

30 *Id*. at 683, n. 2.

31 *Id*. at 682-683.

32 *Id*.

33 *Erskin v. Beim*,___ P.3d ___, 2008 WL4330271 (Colo. App. 2008) (Not released for permanent publication and subject to modification upon rehearing).