No. 43004-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Supreme Court, No. 85510-2; Pierce County
Superior Court Cause No. 08-2-04312-1)

ARTHUR WEST,

Appellant,

v.

PORT OF TACOMA, et al.,

Respondent

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

It is certainly true that Appellant Arthur West and Respondent Port of Tacoma do not see eye to eye. This is even true on appeal. Mr. West is appealing the dismissal of his case pursuant to CR 41(b)(1) and CR 41(b)(2) (as well as various interlocutory orders; *see* Assignments of Error and Argument in Opening Brief). The order of dismissal, dated January 25, 2011, lists as its sole bases for dismissal CR 41 (b)(1) and CR 41(b)(2), which bases are non-discretional. CP 626-629. The Port of Tacoma did not respond to any of Mr. West's arguments, but urged this Court to affirm the dismissal pursuant to the Order Denying Motion to Vacate And Or Reconsider Order of Dismissal, dated March 4, 2011. CP 657-661. The Order Denying the Motion to Vacate And Or Reconsider Order of Dismissal included findings of facts and conclusions of law, arguably supporting discretionary dismissal for dilatory conduct, that were absent from the January 25 order of dismissal.

Frankly, it is an interesting question: when a motion for reconsideration is denied on a basis that was not present in the original order for which reconsideration is sought, does that new, additional basis **inure** to the original order, such that an appeal of the original order must also appeal the new, additional basis for the denial of the motion for reconsideration? The Port has not cited any authority for this proposition,

but has argued as though the order denying reconsideration were, in fact, the order of dismissal.

Responding to this question raised by implication in the Port's Response Brief, Mr. West argues to this Court that the answer is "no;" Mr. West need not appeal the new, additional basis in the order denying reconsideration, because an appeal of an order denying reconsideration is in fact an appeal of the original order of dismissal. Alternatively, assuming *arguendo* that the Port is correct and that Mr. West, to prevail, on appeal, must show that this Court should reverse not just the order of dismissal but the order denying reconsideration as well, and responding to the issues raised for the first time in the Port's Response Brief, Mr. West argues to this Court that this Court should also reverse the order denying reconsideration because the Trial Court abused its discretion in doing so.

Alternatively, the Port seeks dismissal of Mr. West's appeal, arguing that Mr. West has been dilatory in prosecuting this appeal, pointing to the multiple revisions of Mr. West's opening brief. Dismissal is not warranted; Mr. West has followed the briefing schedule established in each order entered by this Court; further, each of the Port's motions to strike was directed at a different aspect of the statement of facts in Mr. West's opening brief.

Finally, the Port seeks sanctions in the form of attorney fees and costs for a frivolous appeal. While Mr. West believes firmly that this Court should reverse the Trial Court, even in the event that this Court affirms the Trial Court sanctions would not be warranted. Mr. West has put forth and will continue to put forth argument and authority showing that non-discretionary dismissal under CR 41(b)(1) and (2) was improper and, responding to issues raised by the Port in its Response Brief, that "dismissal" under the Trial Court's inherent authority in denying the motion for reconsideration was an abuse of discretion. This Court should deny the request for sanctions.

II. RESPONSE TO RESTATEMENT OF FACTS

The order of dismissal at issue here is dated January 25, 2011. CP 626-629. The order of dismissal dismissed Mr. West's case on two bases: CR 41(b)(1) and (2). CP 628. The order of dismissal recites that "no element of discretion is involved." CP 629.

Mr. West, after the Trial Court dismissed his case in open court on January 7, but before the order of dismissal was signed and entered, filed a pleading that included an "Objection to CR 41 Dismissal." CP 610. This pleading was filed on January 19, 2011, and was construed as a motion for

reconsideration. The hearing was noted for January 28. The Pierce County Superior Court set over the hearing to March 4. CP 623.

After the order of dismissal was signed and entered on January 25, 2011, Mr. West filed his "Plaintiff's Motion to Vacate Improper Dismissal Issued Without Notice." He noted this hearing for February 25. CP 653. The Pierce County Superior Court set over the hearing to March 18.

Confused, Mr. West did not appear at the hearing on March 4, believing it to have been set over to March 18. CP 672.

Meanwhile, on March 2, the Port had filed a "Reply in Opposition to Petitioner's Motion to Reconsider, & Vacate Court's Dismissal." CP 1316-1333. The Port argued: "The criteria of CR 41 have been met, Court has no discretion, the merits of the case need not be reached, and the Court properly dismissed the Cause pursuant to CR 41(b)(1) or (2). That ruling should not be disturbed." CP 1316-1317. The Port also argued: "After nearly two years of no action by the Petitioner, this Court self-initiated a hearing for show cause, due to lack of activity in this matter. At that hearing, the Court found Mr. West abandoned this litigation and dismissed this matter pursuant to CR 41(b)(1) or (2). Significant to the Court's ruling was the fact that Mr. West has submitted no filings for over 16 months in this case, and failed to note this matter for trial/hearing since receiving the Court's notice. Under court rules, the Court had no

discretion and properly dismissed the matter. That ruling should not be disturbed." CP 1318. The Port argued: " 'A cause **must** be dismissed if it is clearly within the purview of [CR41(b)]; no element of discretion is involved.' *Franks v. Douglas*, 57 Wash. 2d 583, 585, 358 P.2d 969, 971 (1961)." CP 1322 (emphasis as in the Port's reply).

After arguing to the Trial Court that Mr. West's case was clearly within the purview of CR 41(b), the Port then argued to the Trial Court that it had an alternate basis for dismissal of Mr. West's case pursuant to the inherent powers of the Trial Court. CP 1324-1329. The Port argued to the Trial Court that "Dismissal is an appropriate remedy where the record indicates that '(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's action's substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.'" CP 1324. Yet the Port was unable to point to an instance where Mr. West disregarded or disobeyed a court order. CP 1325. The Port argued that Mr. West had failed to comply with case schedules and timelines, but did not cite one such "case schedule" or "timeline" to the Trial Court. CP 1325-26.

The Port also submitted a proposed order to the Trial Court. CP 1335-1339. This proposed "Order Denying Motion to Vacate And Or

Reconsider Order of Dismissal" is the same as the order that the Trial Court signed on March 4, 2011. *Cf.* CP 1335-1339 and CP 657-661.

There is no finding of fact in the Order Denying Motion to Vacate And Or Reconsider Order of Dismissal that Mr. West disobeyed any court order. CP 657-59. Nor is there any such finding of fact in the original Order of Dismissal. CP 626-627. There is one new finding of fact: "Petitioner West's failure to timely prosecute this PRA case was without justification or excuse." CP 659. This is not a finding that Mr. West disobeyed any court order.

The Order Denying Motion to Vacate And Or Reconsider Order of Dismissal concludes, as a matter of law, "Dismissal is also an appropriate remedy where the record indicates that '(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.'" CP 660. There is no finding of fact that Mr. West disobeyed a court order, nor is there any indication in the record that he did so. In fact, the closest that the Order comes is in this conclusion of law: "Petitioner West's failure to timely prosecute this PRA case was without justification or excuse, and was therefore willful." CP 660. The Order itself reads: "The Court denies

Petitioner's Motion to Vacate and Motion to Reconsider the Court's Order of Dismissal." CP 661.

III. ARGUMENT

A. The Order Denying Reconsideration Does Not Inure to the Order Dismissing the Case

The Port's arguments all depend on the Order Denying Reconsideration inuring to the original Order of Dismissal. The Order Denying Reconsideration has additional conclusions of law and one additional finding of fact that are not present in the original Order of Dismissal. The Port argues that the Trial Court dismissed Mr. West's case out of its own inherent powers, rather than pursuant to CR 41, and that a dismissal pursuant to the Trial Court's own inherent powers is reviewed for abuse of discretion, and that Mr. West did not argue in his opening brief that the Trial Court had abused its discretion.

But the Order Denying Reconsideration does not inure to the original order of dismissal. First, there is the text of the Order Denying Reconsideration itself (as opposed to the findings of fact and conclusions of law supporting that order): "The Court denies Petitioner's Motion to Vacate and Motion to Reconsider the Court's Order of Dismissal." CP 661. In other words, the original order stands. It is not modified by the

Order Denying Reconsideration, nor do the findings of fact and conclusions of law inure to it. Second, even when an appellant appeals from an order on a motion for reconsideration, that appeal "allows review of the propriety of the final judgment itself." Davies v. Holy Family Hosp., 144 Wn. App. 483, 492, 183 P.3d 283 (2008). To conclude otherwise would be inequitable; there are many instances where a judgment is entered that is reviewable *de novo* and then a motion for reconsideration is made. On appeal, generally, the grant or denial for a motion for reconsideration would be reviewable for abuse of discretion. It would place an excessive burden upon the appellant to be forced to prevail upon appeal first of the denial of a motion for reconsideration before being allowed to seek review of the underlying judgment.

And as to the underlying judgment – the original Order of Dismissal – the record shows that the Trial Court dismissed Mr. West's case pursuant to CR 41(b)(1) and (2). "The dismissal of an action for want of prosecution is in the discretion of the courts in the absence of a guiding statute or rule of court. Snohomish County v. Thorp Meats, 110 Wn.2d 163, 167, 750 P.2d 1251 (1988)....However, dismissal is mandatory if CR 41(b)(1) applies." Business Services of America II, Inc. v. Wafertech LLC, 174 Wn.2d 304, 308, 274 P.3d 1025 (2012).

Mr. West showed that the Trial Court should not have dismissed his case pursuant to CR 41(b)(1) (upon motion of a party and 10 days' notice before hearing; the Port moved for dismissal under CR 41(b)(1) on the same day that the Trial Court dismissed the case) or CR 41(b)(2) (upon motion by the Court and notice as prescribed by rule; the notice sent by the Court only gave Mr. West of a status conference, and only gave him warning that the case would be dismissed if he did not appear at the status conference).

Mr. West was inactive in the case. Since Mr. West's inaction, however, fits within the conduct remediable by CR 41(b)(1) and (2), then CR 41(b)(1) and (2) apply and the Trial Court *lacked* discretion to dismiss the case under any other basis. "There is only one exception to the mandatory application of the italicized portion ["*If the case is noted for trial before the hearing on the motion, the action shall not be dismissed*"] of the rule: 'Where dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action for want of prosecution remains.'" Business Services, 174 Wn.2d at 308, *quoting* Thorp Meats, 110 Wn.2d at 169. "Such dilatoriness 'refers to unacceptable litigation practices other than mere inaction.'" Business Services, 174 Wn.2d at 308, *quoting* Wallace v. Evans, 131 Wn.2d 572, 577, 934 P.2d 662 (1997). The examples given include "failures to appear, filing late

briefs, and similarly egregious sorts of behavior," like failing to appear at trial or a pretrial conference. Business Services, 174 Wn.2d at 310-11.

The Port has argued that Mr. West engaged in dilatory conduct that consisted of unacceptable litigation practices other than mere inaction. Response Brief at 33. But the actions that the Port complains of do not fall within the realm of "dilatory", which Black's defines as "tending to cause delay." During the part of the case where Mr. West was actively prosecuting his claims, the Port was complaining, indeed, that he was rushing things and seeking relief prematurely. *See, e.g.*, Response Brief at 1. The actions that the Port complains of that took place during this period did not tend to cause delay. CP 793; CP 801-03, CP 57-60 [as to Mr. West's scheduling a show cause hearing without reviewing available records, that was because the Port had failed to produce the exemption and withholding logs; *see* CP 778; CP 59]. And as to the bar complaint or Mr. West's email requesting investigations, those were outside of the case and did not cause nor tend to cause delay within the case. Response Brief at 33. The actions the Port complains of were, admittedly, objectionable and troublesome, but they did not cause delay.

Because Mr. West's inaction called for the application of CR 41(b)(1) and (2), the Trial Court lacked discretion to dismiss the case for

dilatory behavior. And because Mr. West cured his inaction, the Trial Court had no discretion to dismiss the case under CR 41(b)(1) or (2).

The Port did not respond to any of Mr. West's arguments concerning the dismissal pursuant to CR 41(b)(1) and (2), nor to his arguments concerning the interlocutory orders. This Court should conclude that the Order Denying Reconsideration does not inure to the original Order of Dismissal, that Mr. West has shown that dismissal pursuant to CR 41(b)(1) and (2) was improper, that the other interlocutory orders to which Mr. West assigned error were improper, and should reverse and remand to the Trial Court for Mr. West to proceed with his case.

B. Alternatively, Even if the Order Denying Reconsideration Did Inure to the Order of Dismissal, This Court Should Still Reverse the Trial Court

Alternatively, even if the Order Denying Reconsideration did inure to the Order of Dismissal, this Court should still reverse the Trial Court.

1. Mr. West May Make these Arguments In Reply

Mr. West may make these arguments in reply. An issue not addressed in the opening brief can be raised in reply if it is in response to an argument in the respondent's brief. *E.g.*, In re Disciplinary Proceeding Against Eugster, 166 Wn.2d 293, 324, 209 P.3d 435 (2000).

2. Mr. West Did Not Disobey a Court Order

The Order Denying the Motion for Reconsideration contains a conclusion of law reciting that disobeying a court order is one of the three necessary grounds for dismissal pursuant to the inherent powers of the court. *Accord*, McDaniel v. Pressler, 3 Wash. 636, 636, 29 P. 209 (1892); Jackson v. Standard Oil Co. of California, 8 Wn. App. 83, 103, 505 P.2d 139 (1972); State ex rel. Clark v. Hogan, 49 Wn.2d 457, 464, 303 P.2d 290 (1956). But the Port is unable to point to a court order that Mr. West disobeyed. There is no such order. Even if CR 41(b)(1) and (2) did not apply to Mr. West's inaction, and assuming that Mr. West's burden here on appeal is to surmount the Order Denying Reconsideration before this Court may review the Order of Dismissal, the Trial Court abused its discretion in Denying Reconsideration when a necessary finding of fact – disobedience of a court order – is absent.

"The trial court has a wide discretion in the matter of granting or denying a new trial, except where its order is predicated upon an erroneous ruling." Sargent v. Safeway Stores, Inc., 67 Wn.2d 941, 942, 410 P.2d 918 (1966). Here, it was erroneous to deny reconsideration where disobedience to a court order was a necessary precondition therefor, when there was no showing and no finding of disobedience to a court order.

Likewise, assuming *arguendo* that the standard is abuse of discretion, as in the case of dismissal pursuant to the court's inherent authority, "an abuse of discretion occurs when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take." Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Here, there is no indication in the record or in the Trial Court's findings of fact that Mr. West disobeyed a court order. The decision was an abuse of discretion.

C. **This Court Should Deny the Request to Dismiss the Appeal**

The Port requests that this Court dismiss the appeal, arguing that Mr. West's multiple re-revised briefs constitute disobedience of this Court's orders and dilatoriness justifying dismissal. This is not supportable. With each of these Court's orders, Mr. West revised his briefs accordingly. If Mr. West got it wrong and had to be corrected, the error was not intentional or deliberate, and does not support the harsh

sanction of dismissal. Mr. West's counsel apologizes for her errors.[1] Further, Mr. West complied with the Court's orders regarding the timing of the filings, even though did find it necessary to seek extensions (as has the Port).

D. This Court Should Deny the Request for Sanctions

An appeal is frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of success." In re Recall of Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). Here, the parties cannot even agree on which order is at issue! This is not frivolous, and it is certainly debatable. This Court should deny the request for sanctions.

E. Request for Fees

Should Mr. West prevail, he requests an award of fees pursuant to RAP 18.1 and RCW 42.56.550(4).

[1] Further, the pot should not call the kettle black. Despite attaching the order dated October 19, 2012, as an appendix to the brief, where this Court ordered: "While West filed [the March 30, 2009] Motion for Reconsideration with the clerk, he never brought before the trial court, so those materials were not considered by the trial court and cannot be considered by this court", the Port cited to Mr. West's March 30, 2009 Motion for Reconsideration in its Response Brief at page 14.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse and remand the case to the Trial Court.

Respectfully Submitted this 13th day of February, 2013.

CUSHMAN LAW OFFICES, P.S.

Stephanie M. R. Bird, WSBA #36859

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On February 13, 2013, I caused a copy of the foregoing document to be filed with the Court of Appeals, Division II and to be sent electronically and hard copy delivered to the party as listed below:

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Comments:

Attached is Appellant's Reply Brief

Sender Name: Jennifer Harkins - Email: jenniferharkins@cushmanlaw.com

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