

Court of Appeals No. 68315-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ERIKA HOWE, an individual,

Appellant,

vs.

MCDONALD'S, INC., et al

Respondents.

2012 OCT -4 PM 1:31
 COURT OF APPEALS
 STATE OF WASHINGTON
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OPENING BRIEF OF APPELLANT HOWE

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This is a case where a Plaintiff's lawyer became ill and tried to arrange for another lawyer to take over the case. When those arrangements fell through discovery was not provided to the Defendants and they obtained an order compelling discovery which the original lawyer did not then provide in a timely fashion. The Defendants sought an order to show cause and dismissal of the case. The Plaintiff's lawyer delivered the discovery responses before the trial court ruled but nonetheless the court entered an order simultaneously granting an order to show cause and dismissing the case. Plaintiff seeks review of that order.

ASSIGNMENT OF ERROR

The trial court erred when it dismissed the case when discovery responses were not timely filed.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court properly dismiss the case when the Plaintiff did not timely provide discovery responses after an order to compel had been issued but where the responses were provided prior to the court issuing the order of dismissal?
2. Does the record support dismissal in view of the mandated requirements for such dismissal found at *Burnet v. Spokane*

Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) when the trial court is required to determine that the failure to provide discovery was willful or deliberate and substantially prejudiced the Defendant and to explicitly consider lesser sanctions?

3. Did the trial court and Defendants follow the procedural requirements for a show cause proceeding or for dismissal under the relevant court rules?
4. Did the trial court properly deny the Motion for Reconsideration?

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Howe alleges she was injured at a McDonald's Restaurant when one of its employees got into an altercation with Howe's stepfather and pushed her against a counter. The case was filed on April 15, 2011, on Howe's behalf, by attorney David J. Smith. CP 1.

McDonald's, Inc., a foreign corporation, and McDonald's Restaurants of Washington, Inc., a Washington Corporation, appeared through the Preg O'Donnell & Gillett, PLLC law firm by attorneys Eric P. Gillett and Christine E. Tavares. McDonald's Restaurants of Washington, Inc. answered the Complaint on August 4, 2011. CP 6. Apparently it is

contended that there is no McDonald's, Inc. a foreign corporation. The issue is unresolved at this time. By stipulation of the parties M. David Santillas, Jr., Luanne Santillas, MAG 20, LLC and D. Lark, Inc. were dismissed with prejudice on October 25, 2011, leaving the two McDonald's Corporations as the remaining defendants. CP 87-88.

McDonald's sent out its First Set of Interrogatories and Requests for Production, CP 25-37. and a Request for Statement of Damages to Smith on August 12, 2011. CP 38-39. These were resent to Smith on August 24, 2011, by e-mail. CP 49-51.

Smith had become increasingly ill and was to be treated at the Mayo Clinic in the fall of 2011. He took various steps to close down his practice and had virtually no cases pending by the end of the summer 2011. He made what he thought were arrangements for Howe's case to be taken over by attorney John Peick. CP 107-108. Indeed, Peick contacted the Preg O'Donnell firm on August 31, 2011, and indicated he would be taking over the case. CP 16. Smith had already taken steps to close his practice and with what he thought was the transfer of Howe's case to Peick, he stopped checking on his legal mail and concentrated on addressing his serious health issues. CP 107-108.

On October 13, 2011, McDonald's filed a Motion to Compel Plaintiff's Responses to Discovery and set it for hearing without oral argument on October 24, 2011. CP 11-14. It was served "Via Email, with recipient's approval." CP 55-56. The motion asked for answers to Defendant's First Set of Interrogatories and Request for Statement of Damages based on no responses having been provided and the inability to contact Smith. Although Preg O'Donnell acknowledged that Peick had indicated he would be taking over the case, CP 16, and provided an e-mail from Peick stating that he "was in the process of transferring the case' to himself and that "[o]nce we have the file and get the client transferred we will address your discovery concerns as quickly as possible", CP 53, thereto, the Motion to Compel, according to the declaration of service was not sent to Peick. CP 55-56.

When Smith returned from the Mayo Clinic in mid-October 2011, he learned that Howe's appointment with Peick had been cancelled by Howe's parents and that she and her parents had become estranged. Smith had difficulty getting new contact information for Howe. Smith believed that Peick would probably still take over the case and that it would be a relatively simple matter to get the discovery together. He cooperated with the Defendants in arranging for a stipulation removing the parties other

than McDonald's from the case and an order to that effect was signed by the court on October 25, 2011. CP 87-88.

On October 21, 2011, McDonald's filed a "Reply Regarding Motion to Compel Discovery." CP 57-58. It was served "Via Email, with recipient's approval." CP 59-60.

Smith did not oppose the motion to compel, CP 108, and it was granted on October 26, 2011. CP 61-63. The order compelled answers to the Interrogatories and Requests for Production and Request for Statement of Damages within 40 days of the date of the order. CP 63. Accordingly, the responses were due December 5, 2011. Smith continued to have trouble reaching his client who was not aware of the urgency of attending to the discovery so the responses were not filed by the deadline. CP 108.

On December 13, 2011, McDonald's filed a Motion to Show Cause and to Dismiss Case for Lack of Prosecution, CP 67, citing CR 37(b), KCLR 4(g), CP 69-70, and the "interests of justice." CP 68. It was served "Via Email, with recipient's approval." CP 79-81.

The motion was filed in part under KCLR 4(g) which provides for the court to order an attorney to show cause why sanctions should not be imposed for the failure to comply with the Case Schedule. The process for Motions for Orders to Show Cause is established by KCLR 7(b)(9). That

process was not followed, no Order to Show Cause was issued and no return date to respond to an order to show cause was issued by any court.

The motion was also filed under CR 37(b) and sought dismissal of the entire case. As a dispositive motion, under KCLR 7(b)(3) and (4)(B), it should have been set for oral argument but that did not happen, instead the motion was set by McDonald's for December 21, 2011, without oral argument. CP 65-66.

McDonald's filed a "Reply Regarding Motion to Dismiss Case" on December 20, 2011. CP 93-106. It was served "Via Email, with recipient's approval." CP 84-86.

Smith was finally able to reach his client and they proceeded to begin to prepare the responses to the discovery. On December 20, 2011, Smith e-mailed the court's bailiff and asked for an emergency phone conference to seek an extension of time to provide responses on the discovery. CP 109 and 111. He received a "bounce back" e-mail message advising that she was out of the office and would return the message on December 23, 2011. CP 112. Smith also understood that Judge Benton was not available. He made repeated attempts to find an alternative judge to rule on his request but was unable to find one. CP 109.

On December 22, 2011, before the court had ruled on the pending motion regarding show cause and dismissal, Smith e-mailed the discovery responses to Preg O'Donnell consistent with the service practices of the parties. He did so twice - first at 3:13 p.m., without Howe's signature advising that he would obtain it when she was off work (this e-mail is not in the record since it appears the attachment may not have gone through) and the second at 3:32 p.m. when he was able to obtain her signature earlier than he thought he would be able to. CP 109 and 113. In both e-mails he asked that McDonald's strike the motion. He sent a copy of the e-mails to the court's bailiff. He again received a "bounce back" e-mail from the bailiff advising that she was out of the office and would return the e-mail upon her return. CP 109 and 114. Preg O'Donnell acknowledged receipt of the e-mails when it replied to Smith complaining about his having sent the e-mails to the court. CP 109 and 115.

On December 23, 2011, at 7:19 a.m. the bailiff sent Smith an e-mail indicating that it was difficult for her to receive e-mails asking for action and asking Smith to file a motion. CP 109 and 117-118.

At 10:26 a.m., that same day, December 23, 2011, the bailiff e-mailed Smith a copy of the order signed by the court. CP 110 and 119. The order acknowledges receipt of a response from Howe stating it was "sent

to chambers' email "With no indicia of being served upon the Defendants." CP 87-88. The December 23, 2011, order entered by the court was captioned "Order Granting Defendant McDonald's Restaurants of Washington's Motion to Dismiss Case" but the body of the order provides:

ORDERED that the Defendant's Motion to Show Cause is GRANTED, and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the Complaint of Plaintiff Erica [sic] Howe be, and the same is hereby, dismissed with prejudice within 5 days of this Order.

Applying the standard counting provisions of CR 6(a), the 5th day after entry of the order was January 3, 2012. (The time in the order is less than 7 days so intervening weekends and holidays are not counted and January 2, 2012, was a court holiday.) CP 87-88.

On December 30, 2011, Smith served on McDonald's the Response to McDonald's Request for Statement of Damages so by December 30, 2011, McDonald's had received replies to all of its discovery requests in full compliance with the court's discovery order. CP 110. Certificates of Service show that both the Answers to Interrogatories and Response to McDonald's Request for Statement of Damages had been served on McDonald's. CP 122-123 and 124-125.

A Reply on Order to Show Cause and a Motion to Show Cause combined with a Motion for Reconsideration was filed on behalf of Howe on January 3, 2012. CP 53-106. At that time three dates had passed under the case schedule; the last date for filing the Statement of Arbitrability and the Deadline for Confirmation of Joinder on September 23, 2011, and the Deadline for Hearing Motions to Change Case Assignment Area on October 7, 2011. The next case scheduled date was for Disclosure of Possible Primary Witnesses on April 4, 2012. The discovery cutoff was not until August 13, 2012, and the trial date was October 1, 2012. CP 95.

Opposing pleadings were filed by McDonald's on January 10, 2012. The motion was denied January 26, 2012, by the court without comment except to say that that the Motion for Reconsideration was denied. CP 140-141.

Timely Notice of Appeal was filed, CP 142, and this is Appellant's Opening Brief.

ARGUMENT

In this case the Defendants wanted discovery and properly sought to have it provided by an order to compel. When, due to Smith being ill, it was not forthcoming, they sought an order to show cause why the case

should not be dismissed. Smith provided the substantial discovery by December 22, 2011, (the statement of damages was filed by December 30, 2011 but is pro forma and not of significance in this matter) and notified the court that he had done so, yet the court still issued an order which simultaneously granted the motion for the order to show cause but also apparently dismissed the case. The process of doing so is procedurally flawed and there was a complete failure of any evidence in the record and by the court to follow mandated requirements for imposing the harsh remedy of dismissal.

The orders entered by the court are confusing at best. The order signed by the court on December 23, 2011, appears to grant a “Motion to Show Cause” while simultaneously ordering the case dismissed “within 5 days of this Order.” The initial motion by McDonald’s was an attempt to trigger the show cause provisions of KCLR 4(g) which provides for the court to order an attorney to show cause why sanctions should not be imposed for the failure to comply with the case schedule. Apparently the motion also simultaneously sought to trigger the provisions of CR 37(b) for sanctions for discovery violations. The order entered by the court does not provide Smith the opportunity to appear and show cause and

apparently grants the sanction of dismissal to take effect without further hearing or proceedings by operation of the order itself.

The Order Denying Motion for Reconsideration does not correct any of this. It does not acknowledge or address the part of the original order which granted McDonald's request that Smith be required to appear and show cause why the case should not be dismissed, does not correct any of the procedural flaws and does not show that the court made the determinations it is required to make when entering an order of dismissal prior to a party having the opportunity to have their case heard on the merits.

1. Dismissal Is Unnecessarily Harsh Remedy - Rarely To Be Imposed

By the time the court entered its first order the Defendant had its discovery. Whether the trial court's dismissal was the remedy under KCLR 4(g) or CR 37(b) it is extreme, harsh and unnecessary. Dismissal is a remedy rarely to be imposed. A lead case in this area is *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) which requires that it be clear from the record and the findings that of the court that:

- (1) the party's refusal to obey the discovery order was willful or deliberate,
- (2) the party's actions 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.

These requirements are further discussed in *Marina Condominium Homeowner's Ass'n v. Stratford at Marina, LLC*, 161 Wn.App. 249, at Paragraph 20, 254 P.3d 827 (Wash.App. Div. 1 2011), citing *Burnet*:

¶20 Court rules provide that a court may impose sanctions for a party's failure to abide by discovery orders. CR 37(b), (d). Sanctions may range from the exclusion of certain evidence to granting a default judgment when a party fails to respond to interrogatories and requests for production. *Magaña*, 167 Wash.2d at 583-84, 220 P.3d 191. However, default is an extremely harsh remedy, since it precludes hearing the merits of the case at trial. *Id.* at 599, 220 P.3d 191. It is the general policy of Washington courts not to resort to dismissal or default lightly. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wash.2d 674, 686, 41 P.3d 1175 (2002). [Emphasis added.]

The *Marina* court goes on to reaffirm that when dismissal is ordered strict rules must be followed and specific considerations must be made:

When a trial court imposes default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions 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. *Id.* at 686, 41 P.3d 1175; *Burnet*, 131 Wash.2d at 494, 933 P.2d 1036.

The dismissal order and the denial of reconsideration in this case fail on all three prongs of the *Burnet* test.

There was no evidence in this matter that the failure to provide the discovery was willful or deliberate and the court entered no such findings. The failure to have provided the responses sooner is unfortunate but is the product of Smith being ill, the interference by Howe's parents so that Peick did not formally come on board, and the difficulty Smith had in locating his client after she and her parents became estranged. CP 107-108. He did not ignore the discovery requests and he was not an intransigent or obstreperous opposing lawyer. He did not oppose the motion to compel and he cooperated in entering into a stipulation dismissing several parties from the case. He sought to get an extension so he could get the responses done but was frustrated in the process due to the court being out.

McDonald's was not substantially prejudiced. There is no evidence of any such substantial prejudice and the court did not enter any findings to that effect. McDonald's had their discovery before the court even entered the dismissal order on December 23, 2011. The order itself provided that the dismissal was not effective for five days which implies some sort of additional window of time to comply but Smith had already provided the discovery. He did so seven months before the discovery

cutoff and nine months before the trial date. There was no prejudice to McDonald's by the slow discovery reply.

Burnet mandates that before the court can enter the extreme remedy of dismissal it must have "explicitly considered whether a lesser sanction would probably have sufficed." It did not do so. This is part of the problem of having a dispositive motion heard without oral argument. *See* procedural discussion below. The only remedy proposed by McDonald's was dismissal which is too harsh, is against public policy and is unnecessary. Howe should be allowed to have her case heard on the merits.

Smith had provided the discovery so no remedy was needed to get the discovery. Perhaps some of the Defendant's attorney fees and costs could have been ordered for the time spent on their motions but that was not requested and was not considered. There is a complete failure by the court to engage in the explicit consideration required; it simply dismissed in its confusing order and then refused to reconsider that order when requested.

A failure of even one of the *Burnet* prongs would require reversal and remand for trial in order to avoid the unnecessarily harsh remedy of

dismissal. Here all three prongs are missing; reversal and remand are mandated.

2. Procedural Irregularities Requires Reversal of the December 23, 2011 Order

The court's order of December 23, 2011, was procedurally flawed and, therefore, any attempt to rely upon it for dismissal is improper and requires reversal. Any dismissal under KCLR 4(g) requires a show cause proceeding to be set and heard pursuant to the provisions of KCLR 7(b)(9). That did not happen here; the court simply issued an order saying that the Order to Show Cause was granted and when Smith provided responsive information the court did not address it but rather rejected it as being a Motion for Reconsideration.

McDonald's also sought a dispositive result, dismissal, under CR 37(b) but did not note the motion for oral argument as required under KCLR 7(b)(3) and (4)(B).

The procedural requirements for a KCLR 4(g) motion and for dismissal under CR 37(b) were not followed and the order premised on those rules cannot have been properly entered and cannot be either a dismissal or serve as the basis for dismissal.

3. Motion for Reconsideration

The Court should have granted the Motion for Reconsideration, granted the request that its December 23, 2011, order be vacated and dismissed the Defendant's motions.

CR 59 is, of course, the rule on motions for reconsideration and provides:

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved . . . any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial

....

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

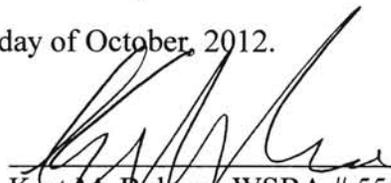
As discussed above there were procedural irregularities, errors of law under *Burnet*, the result is contrary to the law and substantial justice has not been done. The requirements for a Motion for Reconsideration were met, any one of which would be sufficient for granting the motion. The

failure of the court to grant the motion for reconsideration and to grant the relief requested by the Plaintiff was an abuse of discretion which this court should reverse.

CONCLUSION

In a procedurally flawed process the trial court improperly dismissed the case with a confusing and conflicting order and improperly imposed an unnecessarily harsh remedy denying the Plaintiff her day in court. Smith did not act willfully, McDonald's did not suffer substantial prejudice and the court did not consider imposing any lesser sanctions – all mandated by law. This court should remedy the error of dismissal by reversing and remanding for trial.

Dated this 3rd day of October, 2012.


Kurt M. Bulmer, WSBA # 5559
Attorney for Appellant Howe

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OF THE STATE OF WASHINGTON

ERIKA HOWE, an individual,)	Court of Appeals No. 68315-2-1
)	
Appellant,)	CERTIFICATE OF SERVICE
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)	
Respondents)	
_____)	

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on October 3, 2012 he caused to be served by U.S. Mail, first-class, postage paid:

1. OPENING BRIEF OF APPELLANT HOWE

on

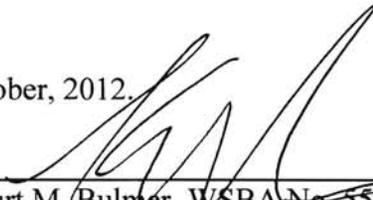
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Dated this 3rd day of October, 2012.



Kurt M. Bulmer, WSBA No. 5559

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