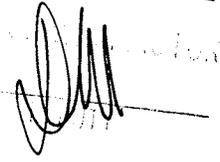


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COURT OF APPEALS

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II



SHARYN MCPHERSON and
RICHARD MCPHERSON,
individually and as a marital
community,

Appellants

v.

CHARLES and LUPITA
SANDOVAL,

Respondents

NO. 34599-4-II

Thurston Co. Superior Court
Cause No. 04-2-01099-1

REPLY BRIEF OF APPELLANTS

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UNDISPUTED FACTS

Respondents' brief reveals these key facts as undisputed:

1. All discovery compliance issues involved GEMS-IT and plaintiffs, not the Sandovals, and were completely resolved on January 6, 2006.

On November 4, the trial court granted GEMS-IT's motion to compel discovery responses, requiring responses and a payment of a monetary sanction within ten business days. Plaintiffs complied, and on December 2 GEMS-IT (not Mr. Sandoval), claiming deficiencies in the responses, moved to dismiss for alleged violation of the November 4 order, with hearing set on December 9, the same day as plaintiffs' motions for consolidation of the new 2005 action with the 2004 one, amendment of the case schedule order, and compulsion of discovery responses from GEMS-IT. On December 9, the court ordered supplemental responses from plaintiffs by December 19, with review on January 6 if GEMS-IT again claimed deficiency. Plaintiffs complied, and of course GEMS-IT claimed deficiency again in a December 29 motion set for hearing on January 6. On January 6, the court denied GEMS-IT's motion.

2. Case Schedule Order compliance issues were resolved by settlement agreement between GEMS-IT and plaintiffs prior to February 6, 2006.

The court on December 9 had ordered continuance of the trial date to May 1 and the issuance of an amended case schedule order by its Judicial Assistant, which came out on December 15. Plaintiffs' disclosure of witnesses was due by January 31. But, after the January 6 hearing, plaintiffs and GEMS-IT, who was still the only active defendant in the case, reached a resolution agreement: the disclosure deadline was extended to February 6, and all pending discovery was cancelled pending a deposition of GEMS-IT to verify that it was not a proper party defendant in the case, following which the 2004 case would be discontinued with the plaintiffs to pursue their claims against General Electric Company and Mr. Sandoval in the 2005 case. That verification occurred to plaintiffs' satisfaction on January 19 with the deposition of Christopher Osbourne for GEMS-IT, and the discontinuance agreement went into effect, which rendered the case schedule order inoperative pending entry of a dismissal order. Pursuant to that agreement, all further substantive activity on the 2004 case ceased.

3. GEMS-IT moved for dismissal based on the discontinuance agreement, falsely claiming noncooperation of plaintiffs and discovery and CSO violations.

On March 10, GEMS-IT moved for dismissal on the discontinuance agreement, claiming that plaintiffs had not cooperated in the drafting and preparation of the dismissal order. But, as plaintiffs showed in their opening brief, and undisputed by respondents in their brief, the “ball was in the court” of GEMS-IT’s counsel Paul Miller regarding the order. He claimed in the brief that he had sent his proposed revision, but the evidence showed that this was not true. And, despite the undisputed facts that there were no discovery compliance issues extant and that the case schedule order had been mooted by the settlement agreement, GEMS-IT also claimed that dismissal was appropriate for discovery and CSO violations. The matter was resolved shortly after the filing of the motion by Mr. Miller’s completion of his revision proposal responsibilities and the entry of a stipulated dismissal order as to GEMS-IT.

3. The Sandovals did not appear in the 2004 action until March 10, 2006.

The Sandovals never appeared in the 2004 action until March 10, 2006, when they joined GEMS-IT in the dismissal motion. The prior discovery motion activity, and the

discontinuance agreement, did not involve them: plaintiffs were proceeding against them in the 2005 case. Respondents admit that RCW 4.28.210 applies, defining an appearance as when a defendant answers, demurs, makes any application for an order or gives the plaintiff written notice of his appearance, and that this never occurred until the March 10, 2006 motion.

Respondents do not claim that the Sandovals “informally” appeared before March 10; they say only that they “may have” informally appeared before then. *Brief of Respondents, p.45.* They then state that this court “could” determine from the record that they had “informally” appeared before then, because they (1) had actual notice of this action, (2) were named as parties in both the 2004 and 2005 actions, (3) Mr. Sandoval was an employee of General Electric Company’s “GE Medical Systems” division (but not GEMS-IT), and (4) had been assisting with and defending the 2004 lawsuit accordingly. *Brief of Respondents, p. 44.* There are three problems with this. First, the issue must be raised and determined by the trial court, so, absent that, it is not appropriate to ask this court to make this factual decision. Second, all these facts cannot be “discerned” from the record. And, third, even if they could, the “facts” stated are not sufficient to establish the existence of an informal appearance.

In *Smith v. Arnold*, 127 Wn. App. 98, 110 P. 3d 257 (2005), this court considered when an "informal" act can be held to constitute an appearance:

'Informal' acts have also been held to constitute an 'appearance.' *Prof'l Marine Co. v. Those Certain Underwriters at Lloyd's*, 118 Wn. App. 694, 708, 77 P.3d 658 (2003); *Gage v. Boeing Co.*, 55 Wn. App. 157, 162, 776 P.2d 991, review denied, 113 Wn.2d 1028 (1989).

Whether a party has 'appeared' informally is generally a 'question of intention, as evidenced by acts or conduct, such as the indication of a purpose to defend or a request for affirmative action from the court, constituting a submission to the court's jurisdiction." *Gage*, 55 Wn. App. at 161 (quoting Annotation, *What Amounts to 'Appearance' Under Statute or Rule Requiring Notice, to Party Who Has 'Appeared,' of Intention To Take Default Judgment*, 73 A.L.R. 3d 1250, 1254 (1976)). A party will not be considered to have appeared informally if the plaintiff could reasonably harbor illusions about whether the party intended to defend the matter. *Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 369 (9th Cir. 1977); *Gage*, 55 Wn. App. at 162.

* * *

Where a party fails to file a notice of appearance or in some way submit to the trial court's jurisdiction, any finding of an appearance must rest on substantial actions that could leave no reasonable doubt about whether the party intended to defend the matter. In contrast, where we are asked to review a finding that an 'informal' appearance has not occurred, there must be substantial evidence to support a finding that the plaintiff reasonably harbored illusions about whether the opposing party intended to defend the matter.

The question of whether a party informally appeared or not is an issue that must have been raised and determined in the trial court. The appellate court's function is of course to review that decision under the appropriate standard; without a trial court decision, it cannot do so. The *Smith* court explicitly so held:

With that said, the standard governing appellate review of a trial court's resolution of an informal-appearance issue is not well settled. Divisions One and Three of this court have stated that a trial court's determination of whether a party has informally appeared is reviewed for an abuse of discretion. See *Prof'l Marine Co.*, 118 Wn. App. at 708; *Ellison v. Process Sys. Inc. Const. Co.*, 112 Wn. App. 636, 643, 50 P.3d 658 (2002), review denied, 148 Wn.2d 1021 (2003); *Batterman v. Red Lion Hotels, Inc.*, 106 Wn. App. 54, 59, 21 P.3d 1174 (2001). But in one case, Division One used language suggesting that an informal appearance ruling is simultaneously reviewed for an abuse of discretion and as a factual finding: We review the trial court's determination of whether a party has informally appeared for an abuse of discretion.

While some actions may be insufficient as a matter of law to constitute an appearance, the question of whether actions are sufficient to constitute an informal appearance will generally be a question of fact to be determined by the trial court. In reviewing such a determination, we will not substitute our judgment for that of the trial court. *Colacurcio v. Burger*, 110 Wn. App. 488, 495, 497, 41 P.3d 506 (2002), review denied, 148 Wn.2d 1003 (2003).

Whether a party has or has not appeared is a question of fact the trial court must resolve based on the evidence presented. A party's formal appearance is generally evidenced by filing and serving a notice of appearance with the court and on all proper parties. The existence of such documentary evidence is conclusive of the party's appearance and entitlement to notice of further proceedings. Likewise, a trial court's finding that a party has appeared informally must also be supported by evidence of actions manifesting an unquestionable intent to appear and defend the matter in court.

Respondents' argument that the record contains facts sufficient for this court to find that they had informally appeared prior to their formal appearance on March 10 cannot be entertained in this court, because it was never raised or determined in the trial court.

Moreover, the stated supporting “facts” are not all discernible from the record, even if this court were to engage in such inquiry. Item (1) is discernible from the record herein only because Mr. Sandoval was served with a third party subpoena for a deposition (which was cancelled due to the discontinuance agreement), and so are Items (2) and (3). However, Item (4) is not. Respondents cite no evidence in the record which can possibly support the statement that Mr. Sandoval “had been assisting with and defending” the 2004 lawsuit.

Finally, even if all these items can be found in the record and this court could choose to engage in the inquiry, they clearly do not establish the requisite facts: that they could leave no reasonable doubt about whether the Sandovals intended to defend the 2004 action, or that the plaintiffs reasonably harbored illusions about whether they intended to do so. The evidence is undisputed that (1) plaintiffs intended, and always expressed this intent unequivocally to the court and opposing counsel, to proceed against the Sandovals in the 2005 action in conjunction with Mr. Sandoval’s true employer General Electric Company, and (2) that Mr. Sandoval expressed intent to defend only the 2005 action by appearing and defending therein, and by appearing in the 2004 case for the sole purpose of obtaining its dismissal so as to clear it from the calendar.

ARGUMENT

The question on this appeal is whether the trial court properly granted the Sandovals' motion for dismissal with prejudice, instead of without.

These undisputed facts establish that the trial court had no basis under governing law to enter the dismissal order with prejudice. As seen in *Rivers v. Washington State Conference etc.*, 145 Wn. 2d 674, 686-87, 41 P. 3d 1175 (2002), cited in the opening brief at p. 27, it must be apparent from the record that (1) a court order was in fact violated, (2) the refusal to obey the order was wilful or deliberate, (3) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (4) lesser sanctions as sufficient were explicitly considered by the trial court.

No court order was violated. As seen, all discovery compliance issues had been resolved and the case schedule order mooted by the settlement agreement long before the Sandovals ever entered the case.

Noncompliance with the February 6 witness disclosure deadline was not "wilful or deliberate," because, as seen, plaintiffs unquestionably had a reasonable basis not to do so: the settlement agreement regarding the 2004 action and the understanding that the case would proceed in the 2005 action.

The Sandovals could not possibly have been prejudiced in

their ability to prepare for trial, because it was absolutely clear and understood that there would be no trial in the 2004 action. This is made plain by the stated basis for the Sandovals' dismissal motion: to clear the 2004 case from the court's calendar in light of the pendency of the 2005 action.

And, it is undisputed that the trial court did not consider whether a lesser "sanction" could have sufficed (even if a "sanction" was appropriate). Both sides were asking for the same thing: that the 2004 case be dismissed for case administration purposes. Dismissal of the case without prejudice would have fully served that purpose.

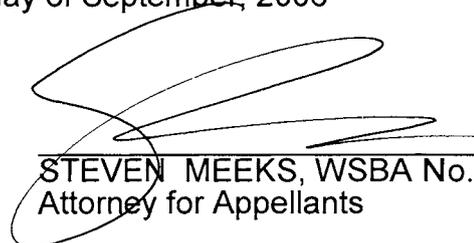
Without the *Rivers* factors present in the record – particularly the predicate factor of the plaintiffs being in violation of a court order – the trial court had no power to impose any "sanction" whatsoever, and clearly no power to impose the sanction of a dismissal with prejudice of a claim already pending in another action. The trial court stated, however, that notwithstanding the absence of the *Rivers* factors, that it would not dismiss the matter with prejudice only if plaintiffs took a unilateral voluntary dismissal under CR 41(a)(1)(B).

The court had no power whatsoever to do this, and so did not have the “discretion” to do so. The choice to dismiss under 41(a)(1)(B) is that of the party, and in this case, for reasons irrelevant to the court’s decision but stated for information purposes on the record, plaintiffs chose not to do so. In effect, the trial court – without any factual basis for a *Rivers*-type sanction in the record – punished the plaintiffs for refusing to elect a course of action that they had every legal right not to elect. This is not, as respondents suggest, an explicit consideration of a “lesser sanction” as contemplated in *Rivers*; it is a judicial decision undertaken with no factual or legal support whatsoever, and thus a decision that is arbitrary, capricious and without any tenable basis under law.

APPEAL NOT FRIVOLOUS

This appeal clearly is not frivolous, under the very standards cited by respondents. In fact, the claim of frivolousness is itself frivolous under those standards.

Dated this 20TH day of September, 2006



STEVEN MEEKS, WSBA No. 13295
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PROOF OF SERVICE

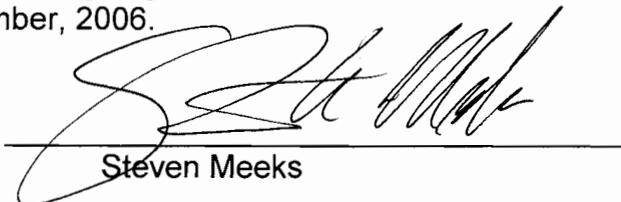
As a competent adult nonparty person, on November 20, 2006 I served a complete and true copy of the original of this document to:

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Via:

- Deposit in United States Mail, first class, postage prepaid to the address shown, at Olympia, Washington
- Certified Mail, Return Receipt requested to the address shown
- Personal delivery to the office address shown via agent ABC Legal Services

I declare under penalty of perjury under Washington law that the foregoing is true and correct. Executed this 20th day of November, 2006.



Steven Meeks

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