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No. 35788-7-II
THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE
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ROBERT BONNEVILLE aka
WILL ELLWANGER,

Appellant,

AND

KITSAP COUNTY, a municipal
Corporation,

Respondent.

ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT

Kitsap County Cause No. 06-2-00794-0

APPELLANT'S BRIEF

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I. ASSIGNMENT OF ERROR

The Superior Court Abused Its Discretion By Dismissing Appellant's Lupa Petition.

II. ISSUES

- A. Was The Superior Court's Dismissal Manifestly Unreasonable And/or Based Upon Untenable Grounds?**
- B. Was There Substantial Evidence To Support Finding of Fact Number 3 – That Appellant Willfully Disregarded The Scheduling Order?**
- C. Was There Substantial Evidence To Support Finding of Fact Number 2 – That Respondent Was Prejudiced By Appellant's Failure To Comply With the Scheduling Order?**
- D. By Concluding That "The Efficient Administration Of Justice Would Not Be Served By Any Lesser Sanction," Did The Trial Court Erroneously Describe A Finding Of Fact As A Conclusion Of Law?**
- E. Was There Substantial Evidence To Support A Factual Finding That A Lesser Sanction Would Not Suffice To Advance The Purposes Of The Scheduling Order And Yet Compensate Respondent For The Effects Of Appellant's Failings?**

III. Statement of the Case

In approximately 2001, Appellant purchased real property located at 5638 Illahee Road, Bremerton, Wa., known as Assessor Parcel Number 4429-001-001-0002. The property contains a single family residence which is the subject matter of the appeal in Case Number 35025-4-II and a boathouse which is the subject matter of the appeal.

Commencing shortly after purchase and continuing through the spring of 2006, employees of the Kitsap County Department of Community Development and Kitsap County Health District conducted warrantless, non-consensual searches of the property on December 27, 2001, December 12, 2005, December 15, 2005, and January 18, 2006 in response to complaints generated both anonymously and by employees of the departments in order to obtain evidence of violations by Appellant of the provisions of the Kitsap County Building and Health Codes. (CP 24, Declaration of Robert Bonneville and Exhibits attached thereto.)

The result of these unlawful, warrantless, non-consensual searches was the concurrent initiation of two separate nuisance abatement proceedings via two notices containing eight hundred forty one words of boilerplate legalese. From the commencement of the unlawful searches of appellant's property in 2001, through the Administrative proceeding commenced in 2005 through the filing of the LUPA petition from which this appeal ensues in 2006, appellant has been vigorous in his defense, in his participation and in his filings. Ultimately, an adverse administrative decision was rendered and appellant filed a LUPA petition.¹ (CP 2.)

Contemporaneous with the filing of his LUPA petition, appellant commenced a civil action against Respondent under 42 U.S.C 1983 alleging that Respondent had

¹ RCW 36.70C.005 – Land Use Petition Act.

violated Appellant's civil rights during the investigation and prosecution of the underlying building code matter. Respondent removed the 1983 case to Federal Court and engaged in substantial summary judgment litigation over the summer of 2006 pertaining to most of the same issues as were presented in the LUPA proceeding. (CP 24, Declaration of Robert Bonneville and Exhibits attached thereto.)

The underlying building code proceeding was instituted and precipitated by warrantless, non-consensual searches and seizures at Appellant's Illahee property. Appellant received from Respondent executed responses to Requests for Admissions, Interrogatories and Document Production requests that clearly evidence Respondent's willful and intentional pattern and practice of engaging in warrantless, non-consensual searches and seizures in order to locate evidence of violations (civil infractions – not criminal misdemeanor violations) of the Kitsap County Building Code. Appellant was unable to raise the unlawfulness of the searches and seizures before the Hearing Examiner in the administrative proceeding as such is outside the jurisdiction of the Hearing Examiner and must be brought before the Superior Court in the LUPA action.²

As part of the Federal matter, Respondent drafted, executed and filed a Joint Status Report with the Federal Court in which Respondent reported to the Court that Appellant would be out of the country and unavailable for Court proceedings from August 14 through September 6, 2006. Respondent executed and filed the Federal Court Joint Status Report on July 25, 2006. The Joint Status Report was the result of several weeks' oral and written communication between the parties to the Federal Court matter.

Notwithstanding a clear understanding that Appellant would be out of the Country, and notwithstanding the pendency of summary judgment litigation in the federal

² *Exendine v. City of Sammamish*, 127 Wash.App. 574, 586-587 (2005).

matter between the parties concerning the same issues here presented, Respondent chose to take advantage of Appellant's absence to file a motion to dismiss the LUPA Petition pursuant to CR 41 (B) while Appellant was out of the country and noting the motion to be heard two days following his return. (CP 13, 14, and 15.) Respondent belatedly vacated the Order of Dismissal upon being called to task by Appellant. (CP 21 and 22.)

Appellant inadvertently failed to comply with the scheduling requirements contained in the stipulated Scheduling Order. Without excuse, but by way of mitigation, Appellant received numerous invoices from Respondent during the relevant time frames relating to the costs of reproduction of document requests as well as the appeal papers and was confused as to what related to what. Appellant was also under the mistaken belief that the Federal Summary Judgment litigation regarding the same issues superseded the LUPA appeal. In any event, Respondent was in no way prejudiced by Appellant's failure to comply with the scheduling order. Further, the time requirements of the scheduling order are not jurisdictional. Further still, Appellant's failure was inadvertent and not willful. Finally, there were less drastic tools available to the Court to ensure Appellant's timely compliance other than dismissal. (CP 24, Declaration of Robert Bonneville.)

IV. ARGUMENT

THE SUPERIOR COURT ABUSED ITS DISCRETION BY DISMISSING APPELLANT'S LUPA PETITION.

A. Was The Superior Court's Dismissal Manifestly Unreasonable And/or Based Upon Untenable Grounds?

In *Conom v. Snohomish County*, 155 Wash.2d 154, 162-163 (2005), the Washington Supreme Court refused to permit dismissal of a LUPA petition for failure to

follow the time requirements regarding scheduling the initial hearing. The Supreme Court at pp. 160-161, based its decision largely on the analysis of this Court in *Will v. Frontier Contractors, Inc.*, 121 Wash.App. 119, 128-129 (2004). In *Will*, this Division determined the appellate standard of review for the review of involuntary dismissals pursuant to CR 41 (b) as well as the analysis required of the trial court as follows:

We review an order of dismissal under CR 41(b) for an abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wash.2d 674, 684-85, 41 P.3d 1175 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *Hizey v. Carpenter*, 119 Wash.2d 251, 268, 830 P.2d 646 (1992).

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 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.” See also *Rivers*, 145 Wash.2d at 686, 41 P.3d 1175 (citing *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036 (1997)). But Washington courts do not resort to dismissal lightly. *Rivers*, 145 Wash.2d at 686, 41 P.3d 1175 (quoting *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wash.App. 125, 129-130, 896 P.2d 66 (1995)). (Footnote omitted.)

In the present case, the Court did not engage in the “on the record” analysis and findings required before concluding that the drastic sanction of dismissal was the only means of obtaining compliance and, therefore, the matter should be reversed. The entirety of the Court’s “analysis and findings” is as follows³:

I’m dismissing the case. The bottom line is that – I had forgotten originally, but I have had the opportunity to read Plaintiff’s material. The thing that tripped it for me is Plaintiff is very intelligent, very knowledgeable of the LUPA laws and the procedure.

In that respect, if he had been 30 days, maybe 40 days, maybe even 60 days late on this, there wouldn’t be much of a question for me that I’m going to give him his day in court on this, but he has let too much time go by before correcting the errors that I’m sure he was aware of.

³ (RP 12/8/06; 16:17-20.)

And I also came in to this feeling that the County was having a very difficult time with prejudice, and I think that's because I took my focus off what LUPA is for and the necessary issues of how land decisions are made and the timeliness of getting the process to the court of appeals, if it's going to end up going there.

As noted by the Supreme Court in *Burnet v. Spokane Ambulance*

131 Wash.2d 484, 494 (1997):

Those reasons should, typically, be clearly stated on the record so that meaningful review can be had on appeal.⁴

Here, the trial Court failed to engage in the appropriate analysis and fact finding process and therefore, the matter should be reversed.

B. Was There Substantial Evidence⁵ To Support Finding of Fact Number 3 – That Appellant Willfully Disregarded The Scheduling Order?

As noted above, the trial court first “found” that appellant was allegedly intelligent and knowledgeable about LUPA procedures. The Court then found that appellant had let more than 60 days pass by before correcting his error. The Court then found that Appellant’s intelligence coupled with the amount of delay meant that his failure to comply with the scheduling order regarding transcripts and briefs could only have been willful or deliberate.

Inasmuch as lawyers themselves frequently seek and obtain forgiveness for their failings in circumstances far more egregious than this both in terms of their awareness of

⁴ See also, *Will* at 133 and *Woodhead* at 132.

⁵ The appropriate standard for appellate review of findings of fact is whether such finding is supported by substantial evidence. *McDonald v. Parker*, 70 Wash.2d 987, 988 (1967). “The test, referred to as the substantial evidence test, is whether there exists therein any competent, relevant and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings.” *Ballinger v. Department of Social and Health Services*, 104 Wash.2d 323, 328 (1985), citing *Gogerty v. Department of Institutions*, 71 Wash.2d 1, 8-9 (1967). See also, *State Ex Rel. Beam v. Fulwiler*, 6 Wash.App. 369, 372-373 (1972).

the rules of procedure and the amount of the passage of time before correction,⁶ the combination of these factors as the trial court did under these circumstances should not be construed as substantial evidence of either willfulness or deliberation.

It is true that individuals purporting to represent themselves must be held to the same standards governing all who appear before a court. *State v. Smith*, 104 Wash.2d 497, 508, 707 P.2d 1306 (1985) (pro se defendant must comply with procedural rules) *State v. Bebb*, 44 Wash.App. 803, 806, 813, 723 P.2d 512 (self-representation is not a license to avoid compliance with court rules), *aff'd*, 108 Wash.2d 515, 740 P.2d 829 (1987). It is one thing to be held to the same standards as an attorney, it is quite another to be held to a far higher standard than attorneys licensed to practice before this court especially on the basis that one is supposedly too smart to have made an inadvertent error. Here, the parties were engaged in a multi-front battle in both state and federal court and appellant was out of the country. This was just one thing that fell in between the cracks and did not get accomplished in a timely fashion.

In sum, there was no evidence, let alone substantial evidence, that appellant's failure to comply with the scheduling order was either willful or deliberate and the matter should be reversed.

⁶ In *Will*, at pages 129-131, this Division reviewed the underlying facts in Rule 41 dismissal cases revealing a starkly different record. In those case supporting dismissal, counsel had repeatedly mislead both the court and counsel and the court had warned that further disobedience would result in dismissal. The only case cited involving delay alone as cause for dismissal was a 17 month delay – far from the facts of this case.

C. Was There Substantial Evidence To Support Finding of Fact Number 2 – That Respondent Was Prejudiced By Appellant’s Failure To Comply With the Scheduling Order?

No evidence was presented that Respondent was in any way prejudiced in its ability to prepare for trial in this matter. Respondent essentially asserts that any impediment to the fast food justice offered by the LUPA procedure automatically inures to Respondent’s detriment and prejudice. Such is not the case. It is Appellant who is prejudiced by any delay in resolving the litigation as it is appellant’s property that is being hijacked. Respondent lost nothing by the passage of time. As noted by the Court in *Sleasman v. City of Lacey*, 128 Wash.App. 617, 624 (2005), “...the time requirement for noting and setting an initial hearing prevented only LUPA petitioners, such as the Sleasmans, from delaying swift review of their *own* complaints.” (emphasis in original.) Here, Appellant’s delay only hurt Appellant as he prevented himself from having an expedited resolution of his complaints. No prejudice inured to the detriment of Respondent, nor was such alleged by motion, declaration or memorandum and the matter should be reversed.

D. By Concluding That “The Efficient Administration Of Justice Would Not Be Served By Any Lesser Sanction,” Did The Trial Court Erroneously Describe A Finding Of Fact As A Conclusion Of Law?

Although the Court made no analysis, discussion or finding of the sufficiency of a lesser sanction, the Respondent inserted the following language in the Court’s handwritten order.⁷

Conclusion of Law: The petitioner’s willful failure to comply with the scheduling or to perfect the appeal was willful & prejudices the county.

⁷ (CP 26.)

The efficient administration of justice would not be served by any lesser sanction.

The sufficiency of a lesser sanction conclusion by the trial court is really a finding of fact required by *Conom* and *Will*, not a conclusion of law. In *Willener v. Sweeting*, 107 Wash.2d 388, 394 (1986) the Court held:

...a finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact. Under these circumstances, we will review the conclusion of law as a finding of fact and look for evidence in the record to support the finding. *Golberg v. Sanglier*, 96 Wash.2d 874, 639 P.2d 1347, 647 P.2d 489 (1982).

Therefore, the matter should be reviewed under the finding of fact standard.

E. Was There Substantial Evidence To Support A Factual Finding That A Lesser Sanction Would Not Suffice To Advance The Purposes Of The Scheduling Order And Yet Compensate Respondent For The Effects Of Appellant's Failings?

No evidence was presented and the Court made no finding on the record that a lesser sanction would not have sufficed to insure compliance with the scheduling order. In the first place, the Respondent and trial court applied the wrong legal standard. The issue is not whether “the efficient administration of justice would not be served by a lesser sanction” as proffered by the respondent and approved by the trial court. Rather, the issue is whether or not the trial court could have obtained compliance using a lesser sanction without offending the purposes of the Scheduling Order or failing to compensate the respondent for the effect of appellant’s failure to timely comply with the order.

In *Burnett v. Spokane Ambulance*, 131 Wash.2d 484, 497 (1997) the Supreme Court held:

In any case, we are satisfied that it was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony on the credentialing issue without first having at least considered, on the record, a less severe sanction that could have

advanced the purposes of discovery and yet compensated Sacred Heart for the effects of the Burnets' discovery failings.

Thus, respondent and the trial court applied the wrong legal standard and the matter should be reversed on that basis alone. But there is more.

Unlike the facts in *Woodhead* – as noted by the Court in *Will* – the moving party in this case sought only dismissal and did not offer a lesser sanction alternative. (CP 13 at 4:12-20.) As noted, the intent of finding a lesser sanction is that the Court should look at what level of carrot or stick is necessary to move the offending party into compliance – compliance being the desired result, not dismissal. Here, Respondent acknowledged that Appellant had taken substantial steps to comply upon being put on notice of his failures. (RP 12/8/06; 16:17-20.)

The Court need only have entered an order requiring Appellant to comply with the scheduling order within 30 days or then, suffer dismissal. The court might have coupled such an order with a monetary sanction to ensure that respondent was made whole for having had to bring the motion. But no – No lesser sanction was even considered, much less rejected as insufficient⁸. Therefore, the matter should be reversed.

V. CONCLUSION

Appellant only asks that this Court grant him the same courtesies extended to practicing attorneys. The trial court did not engage in the analysis and fact finding required of it prior to imposing the drastic sanction of dismissal. Appellant could not raise his constitutional arguments against the warrantless searches and seizures in the

⁸ The Supreme Court has approved such an approach in cases where appellant failed to file a transcript and statement of facts noting that timely filing of the same is not a jurisdictional prerequisite to review. *Neal v. Green*, 68 Wash.2d 415, 416 (1966) citing *Beagle v. Beagle*, 55 Wash.2d 908 (1960).

administrative hearings. The Trial Court's drastic action deprived appellant of the only opportunity he had to raise the unlawfulness of respondent's conduct. Yet again, respondent seeks to skirt its responsibilities and the consequences of its actions through technicalities. Such is not justice. As noted by the Supreme Court, "Washington courts do not resort to dismissal lightly." The Order of Dismissal should be reversed and the matter remanded.

Dated this 19th Day of April, 2007.



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CERTIFICATE OF SERVICE

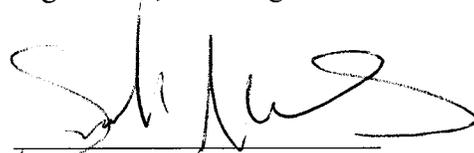
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

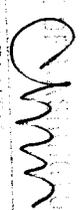
On April 19, 2007 I caused to be served in the manner noted a copy of the following upon designated counsel:

- 1. Appellant's Opening Brief

Philip A. Bacus Kitsap County Prosecuting Attorney 614 Division Street, MS-35A Port Orchard, Wa. 98366-4676	<input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Fax: 360.337.7083 <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Email pbacus@co.kitsap.wa.us

DATED this 19th Day of February, 2007, at Gig Harbor, Washington.


Sara Nichols

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STATE OF WASHINGTON
BY  DEPUTY