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Court of Appeals
Division II
State of Washington
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GEORGE CHRISTENSEN, an individual, Respondent, vs. **T & L COMMUNICATIONS, INC.,** a Washington corporation; **PACIFIC TECH CONSTRUCTION, INC.,** a Washington corporation; **KENNETH FORTENBERRY,** an individual; **and, OLD REPUBLIC SURETY COMPANY,** a foreign corporation, Appellants.	Case Number: 53392-8-II BRIEF OF APPELLANT LARRY BUSHAW

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON

FOR CLARK COUNTY

The Honorable John Fairgrieve, Judge

John D. Nellor, Attorney At Law
Attorney for Appellant, Larry Bushaw

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TABLES

Table Of Cases

Bering v. Share, 106 Wn.2d 212, 721 P.2d 918 (1986).....8

Griffin v. Draper, 32 W. App. 611, 649 P.2d 123, *review denied,* 98 Wn.2d 1004 (1982).....7

Lind v. Lind, 63 Wn.2d 482, 387 P.2d 752 (1963) 6

State v. Hatten, 70 Wn.2d 618, 425 P.2d 7 (1967).....6, 8

Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959) 8

Table Of Statutes

RCW 7.21.030(1).....6, 7

RCW 7.21.050(1).....6

Other Authorities

ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering the "Order 1) Imposing Sanctions For Contempt Against T & L Communications, Inc., And Larry E. Bushaw; Requiring Remedial Payment To Plaintiff By Larry E. Bushaw" [CP 263] on Plaintiff's Motion To Hold Debtor In Contempt And To Disregard Corporate Entity [CP 250] without Larry E. Bushaw having been served with the motion.
2. The Superior Court erred in entering "Findings of Fact and Conclusions of Law" [CP 262] on Plaintiff's Motion To Hold Debtor In Contempt And To Disregard Corporate Entity [CP 250].
3. The Superior Court erred in entering a Finding of Fact that "On October 12, 2018, Mr. Bushaw appeared as ordered with his attorney, Timothy Dack…" at a supplemental examination [¶ IV.B., CP 263].

STATEMENT OF THE CASE

Larry E. Bushaw ("Bushaw") is a shareholder in a Washington corporation known as T & L Communications, Inc. ("T&L").[1] Bushaw was serving as T&L's president during the time relevant to this appeal, March and April, 2019.[2]

This case commenced by George Christensen ("Christensen") in Clark County Superior Court on October 29, 2013, captioned as *George Christensen, an individual, vs. T & L Communications, Inc., a Washington corporation; Pacific Tech Construction, Inc., a Washington corporation; Kenneth Fortenberry, an individual, and; Old Republic Surety Company, a foreign corporation* [CP 2] (the "T&L lawsuit"].

Bushaw is not a party to the T&L lawsuit [*See*, CP 2], was not named in the complaint or amended complaint [CP 3], and has never been served with a summons or a complaint [*See*, CP 4, 6, 8 and 9] in the T&L lawsuit. There is also nothing of record that Bushaw has appeared, or that an attorney has appeared on his behalf, in the cause.

On March 9, 2018, the Superior Court entered a judgment in the amount of $76,581.92 against T&L [CP 173] following a jury trial and

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[1] Although there appears to be nothing of record, Bushaw does not dispute he was a T&L shareholder.

[2] Although there appears to be nothing of record, Bushaw does not dispute that he served as T&L's president in March and April, 2019.

verdict [CP 150]. The Superior Court then entered a Supplemental Judgment against T&L on June 1, 2018 for attorney fees and costs in the amount of $90,958.40 [CP 195].

On April 19, 2019, the Superior Court of Clark County, the Honorable John Fairgrieve, entered an order in the T&L lawsuit holding Bushaw (and T&L) in contempt and imposing personal liability on Bushaw for "the full amount of judgment" [CP 263] (the "Contempt order"). The order further provides that Bushaw's contempt of court can be purged once the judgments against T&L are paid. *Id*.

The court also entered what are dubbed "Findings of Fact and Conclusions of Law" with the order [CP 262].

The Contempt order was entered on Plaintiff's March 7, 2019, "Motion To Hold Debtor In Contempt And To Disregard Corporate Entity" [CP 250]. The motion was originally noted for hearing on March 15, 2019 [CP 247] and re–noted on March 22, 2019 for hearing on April 19, 2019 [CP 253].

Bushaw was not served with the "Motion To Hold Debtor In Contempt And To Disregard Corporate Entity", a proposed order, proposed findings of fact and conclusions of law, the hearing notice or the re–noted hearing notice [*See, e.g.,* CP 248, 255].

ARGUMENT

1. The Superior Court May Not Sanction Or Hold A Third Party In Contempt Of Court For Allegedly Failing To Comply With A Court Order Who Has Not Been Served With A Motion Or Provided A Hearing On The Motion For Contempt

A Washington Superior Court court "[M]ay initiate a proceeding to impose a remedial sanction on… the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related." RCW 7.21.030(1). Remedial contempt requires a motion, notice and hearing before it may be imposed. *Id.* The only exception is if the contempt appears in open court and the judge certifies that he or she saw or heard it. RCW 7.21.050(1). A person charged with contempt has a right to be heard, a right to reasonable time to prepare his or her defense, and a right to produce witnesses or other evidence. *E.g., State v. Hatten,* 70 Wn.2d 618, 425 P.2d 7 (1967). Even conduct that is clearly contemptuous of the court does not warrant an adjudication of contempt without a hearing. *Lind v. Lind,* 63 Wn.2d 482, 387 P.2d 752 (1963).

The Contempt order in this case was entered without Bushaw being served with notice of the motion for contempt or an opportunity to be heard. There is no record that Bushaw was ever served with the "Motion To Hold Debtor In Contempt And To Disregard Corporate Entity", the proposed order on that motion, plaintiff's proposed findings of fact and

conclusions of law, the hearing notice or the re–noted hearing notice [*See, e.g.,* CP 248, 255]. Nor is there even any record that Bushaw was served with a motion, hearing notice or order for the supplemental exam upon which the motion for contempt was based

Notice and hearing are not only statutory requirements of remedial contempt, RCW 7.21.030(1), but fundamental to due process.

2. The Standard Of Review Of An Order Of Contempt Is Whether The Order Was Properly Entered

The scope of review on appeal of a contempt order is whether the order itself was properly entered. *Griffin v. Draper,* 32 W. App. 611, 649 P.2d 123, *review denied,* 98 Wn.2d 1004 (1982).

It is fundamental that the entry of an order of remedial contempt without a motion, notice or hearing having been served on the party against whom contempt is sought is itself improperly entered. RCW 7.21.030(1) requires notice and a motion for remedial contempt. Bushaw was denied such motion, notice, and opportunity to be heard.

3. It Is Error For A Superior Court To Enter Findings Of Fact And Conclusions Of Law On A Motion For Contempt That Was Never Served On The Party Against Whom Contempt Of Court Was Sought

The Superior Court entered Findings of Fact and Conclusions of Law [CP 262] on plaintiff's Motion To Hold Debtor In Contempt And To Disregard Corporate Entity [CP 250]. It was inappropriate for the court to

enter findings of fact and conclusions of law affecting Bushaw when the court had no jurisdiction over him. Bushaw was not a party to the case, had not been served with the motion upon which the findings of fact and conclusions of law were entered and was not afforded his right to be heard, a right to reasonable time to prepare his or her defense, and a right to produce witnesses or other evidence. *E.g., State v. Hatten,* 70 Wn.2d 618, 425 P.2d 7 (1967).

4. The Court's Finding Of Fact That Bushaw Was Represented By Timothy Dack Is Not Supported By Any Evidence

Within the Findings of Fact and Conclusions of Law [CP 262] is Finding of Fact IV.B.— that "Mr. Bushaw appeared as ordered with his attorney, Timothy Dack" at a supplemental examination. Findings of Fact must be supported by substantial evidence. *E.g., Thorndike v. Hesperian Orchards, Inc.,* 54 Wn.2d 570, 343 P.2d 183 (1959). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair–minded, rational person of the truth of the declared premise. *See, Bering v. Share,* 106 Wn.2d 212, 721 P.2d 918 (1986).

There is no evidence of record that Timothy Dack appeared for or represented Bushaw in any proceedings in this cause. Bushaw is not a party to the T&L lawsuit, has not appeared in the case, and there is no appearance of record for any attorney on behalf of Bushaw.

Conclusion

For the reasons set forth above, the "Order 1) Imposing Sanctions For Contempt Against T & L Communications, Inc., And Larry E. Bushaw; Requiring Remedial Payment To Plaintiff By Larry E. Bushaw" [CP 263] on Plaintiff's Motion To Hold Debtor In Contempt And To Disregard Corporate Entity [CP 250], and the "Findings of Fact and Conclusions of Law" [CP 262] were entered without the Appellant, Larry E. Bushaw having been served with the motion or a notice to appear in court as required by RCW 7.21.030(1). Bushaw requests that this court enter an order reversing and vacating the "Order 1) Imposing Sanctions For Contempt Against T & L Communications, Inc., And Larry E. Bushaw; Requiring Remedial Payment To Plaintiff By Larry E. Bushaw" and the supporting Findings of Fact and Conclusions of Law, and for such other relief as the court deems appropriate.

Dated: December 2, 2019

John D. Nellor, WSBA #9101
Of Attorneys For Appellant, Larry E. Bushaw

PROOF OF SERVICE

THE UNDERSIGNED hereby declares:

On September 23, 2019, I deposited true and correct copies of this Statement of Arrangements with the United States Postal Service, at 401 N.E. 136th Avenue, Vancouver, Washington, First Class Mail postage prepaid, to the following persons at the following addresses:

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I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: December 2, 2019

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J. D. NELLOR, PC

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Transmittal Information

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