FILED
Court of Appeals
Division II
State of Washington
5/28/2020 4:22 PM

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 REPLY 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

201 N.E. Park Plaza Drive, Suite 202
Vancouver, WA 98684

(360) 816-2241

TABLES

Table Of Cases

Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L. Ed.2d 62 (1985).....10

Burlingame v. Consolidated Mines and Smelting Co., 106 Wn.2d 328, 722 P.2d 67 (1986).....5

Fuji Photo Film Co., Ltd. v. International Trade Commission, 474 F.2d 1281 (Fed. Cir. 2007).....9

In re Deming, 108 Wn.2d 82, 736 P.2d 639 (1937) 9, 10, 11

Durand v. HMIC Corp. 151 Wn. App. 818, 835, 214 P. 3d 189 (2009) 11

Gnechi v. State, 54 Wn.2d 467, 470, 364 P.2d 225 (1961).....10, 11

Griffin v. Draper, 32 W. App. 611, 649 P.2d 123, *review denied,* 98 Wn.2d 1004 (1982).....6, 7

In re Hendrickson, 12 Wn.2d 600, 606, 123 P.2d 322 (1942).....10

Hovey v. Elliott, 167 U.S. 409, 415, 18 S. Ct. 841, 42 L. Ed 215 (1897).....4, 5, 8

Jones v. Flowers, 547 U.S. 220, 229, 126 S. Ct. 1708, 164 L. Ed.2d 415 (2006).....6, 7, 8

Matthews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L. Ed.2d 18, (1976).....10

Shaw v. Vannice, 96 Wn.2d 532, 537, 637 P.2d 241 (1981).....10

Schilling v. Radio Holdings, Inc. et al, 136 Wn.2d 152, 159, 961 P.2d 961 (1997) 11

State v. Hatten, 70 Wn.2d 618, 425 P.2d 7 (1967) 4

State v. Nelson, 158 Wn.2d 699, 703, 147 P.3d 553 (2006).....9

Ranier Nat'l Bank v. McCraken, 26 Wn. App. 498, 511, 615 P.2d 469 (1980) 8

In re Rapid Settlements, Ltd., 189 Wn. App. 584, 598, 359 P.3d 823 (2015) 6, 7, 8

Ware v. Phillips, 77 Wn.2d 879, 882, 468 P.2d 44 (1970).....5

Wilson v. United States, 221 U.S. 361, 376, 31 S.Ct. 538, 55 L. Ed. 771 (1911).....8

Young v. Konz, 91 Wn.2d 532, 539, 588 P.2d 1360 (1979).....10

Table Of Statutes

RCW 7.21.030(1).....4, 9

RCW 7.21.050(1).....

R.C.W. 46.65.065 9

SUMMARY OF ARGUMENT

Respondent's argument is premised on a motion for contempt that was mailed to the attorney representing T&L Communications, Inc. ["T&L"]. Since a corporation can only act through its agents, Respondent reasons, the motion mailed to corporate counsel is the bootstrap that gives the court jurisdiction to hold a corporate officer in contempt without providing the party against whom consent is sought notice. Respondent's argument, and the reasons asserted for those arguments, are simply not supported by statute, by the case law that peppers Respondent's brief, by time–honored principals of due process, or by simple logic.

Larry Bushaw ["Bushaw"] has not had an opportunity to defend against Respondent's claim of contempt or any of the relief Respondent sought in its contempt motion. Bushaw was not a party to the lawsuit, had not appeared in the lawsuit, no attorney had appeared in the lawsuit on his behalf, and he was never served with the motion, hearing notices, continued hearing notices, declarations or proposed orders. There is nothing in the record to support a conclusion that Bushaw had actual or constructive notice of the relief Respondent was seeking against him.

Respondent simply did not provide Bushaw with notice and a meaningful opportunity to object to and defend himself and his wife from Respondent's contempt claims.

ARGUMENT

1. R.C.W. 7.21.030 establishes the minimum procedural requirements to provide due process in remedial contempt proceedings.

Remedial contempt requires that a motion, notice and hearing before it may be imposed. RCW 7.21.030(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). Notice is the key to providing an opportunity to be heard. Without notice the party against whom contempt is sought has no opportunity to be heard. *Hovey v. Elliott,* 167 U.S. 409, 415, 18 S. Ct. 841, 42 L. Ed 215 (1897).

Respondent admits that Bushaw was never 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. [RP page 3 lines 4 to 7. *See, also,* Respondent's brief page 7].

2. Notice mailed to an attorney representing a corporation is not notice to an officer, director or shareholder of the corporation

Respondent is arguing that the Superior Court had jurisdiction to enter a contempt order against Bushaw because the motion mailed to T&L's attorney provided Bushaw an meaningful opportunity to defend the motion. Appellant cites several cases, none of which support appellant's

proposition— no law is offered to support Respondent's argument that mailing a notice to a corporation's attorney constitutes notice to an officer, director or shareholder of the corporation.

Burlingame v. Consolidated Mines and Smelting Co., 106 Wn.2d 328, 722 P.2d 67 (1986), is cited by Respondent [Respondent's brief, page 10 and again on page 14] for the proposition that "minimal notice has satisfied due process requirements for a valid judgment of contempt". *Id.* at 322. The issue in the before the *Burlingame* court was not whether there was notice, but whether the notice that Hugh Brown, the president of the defendant corporation against whom a contempt judgment was entered, received was sufficient to support the relief that the court granted. *Id.* The court cited *Ware v. Phillips,* 77 Wn.2d 879, 882, 468 P.2d 44 (1970), and *Hovey v. Elliott,* 167 U.S. 409, 414–415, 17 S.Ct. 841, 42 L. Ed. 215 (1897), noting that until adequate notice is given to the alleged contemptor a court has no jurisdiction to proceed to a contempt judgement.

Unlike this case, however, there was no question that Brown received actual notice of the contempt motion— Brown was personally served with a Order To Show Cause why he should not be held in contempt, which the court ultimately found to be sufficient to provide him an opportunity to defend.

Griffin v. Draper, 32 Wn. App. 611, 649 P.2d 123, *review denied,* 98

Wn.2d 1004 (1982) is cited by Respondent [Respondent's brief, page 10] for the proposition that "After notice and a hearing, a Court may 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." *Id.* at 614. *Draper* had nothing to do with the procedural aspects of the contempt proceeding. Walter Draper, the defendant in the case, was found in contempt for his non–compliance with a judgement granting a prescriptive easement across his property. Draper's issue was that he had not seen a written copy of the judgment that had been entered against him so it was impossible for him to commit contempt because he didn't know what he was required by the judgment to do or not do. *Id.*

In re Rapid Settlements, Ltd., 189 Wn. App. 584, 598, 359 P.3d 823 (2015) (misstated by Respondent as "*In re of Rapid Settlements, Ltd's)* is cited by Respondent [Respondent's brief page 11] for the proposition that "The notice requirement of a valid contempt order is important only because it protects an individual's right to be heard." *Id*. Respondent also cites *Jones v. Flowers,* 547 U.S. 220, 229, 126 S. Ct. 1708, 164 L. Ed.2d 415 (2006) [Respondent's brief page 10–11] for the same idea. But what is missing from Respondent's citations is that the most significant aspect of due process is the opportunity to be heard, and there is no opportunity to be heard absent notice. *Hovey v. Elliot* at 415. Factually, *Rapid*

Settlements was a contempt proceeding against a party's attorney, and the *Jones* case involved a property tax sale (not contempt). Unlike this case, the party held in contempt in *Rapid Settlements* was served with a motion for contempt (and he discussed the pending contempt motion in other court proceedings). The party against whom a tax sale was sought in the *Jones* case did not receive tax sale notices because they were not sent to his residence, and the court denied the tax sale because the land owner did not receive notice reasonably calculated to provide an opportunity to defend the proceeding was not given. *Jones* at 229.

Respondent also cites *Wilson v. United States,* 221 U.S. 361, 376, 31 S.Ct. 538, 55 L. Ed. 771 (1911) [Respondents brief pages 11 and 16] and *Ranier Nat'l Bank v. McCraken*, 26 Wn. App. 498, 511, 615 P.2d 469 (1980) [Respondent's brief page 17] for the proposition that a corporate officer can be held in contempt for the acts of his or her corporation [Respondents brief page 11].

Assuming the proposition is correct, *Wilson* has nothing to do with the issue in this case— the *Wilson* court was not considering anything to do with whether the corporate office is question had notice or an opportunity to be heard. The *Wilson* issue was whether a corporate officer could withhold producing documents to a grand jury on the grounds of his constitutional right against self–incrimination. *Id.* In short, even if we assume

a corporate officer can be held in contempt for something his corporation did or did not due, *Wilson* does not address, let alone exempt, an alleged contemptor's right to notice and an opportunity to be heard.

Likewise, *Fuji Photo Film Co., Ltd. v. International Trade Commission,* 474 F.2d 1281 (Fed. Cir. 2007*)* provides no insight to the issue in this case. *Fuji Photo* deals with civil penalties issues by the Federal Trade Commission for the violation of cease and desist orders. The efficacy of notice and an opportunity to be heard is not part of the *Fuji Photo* case. The fact that a corporate officer may be held in contempt for the failure to follow a cease and desist order does not mean that due process can be ignored in proceeding to obtain a judgment of contempt.

State v. Nelson, 158 Wn.2d 699, 703, 147 P.3d 553 (2006) is cited by Respondent for the proposition that "Notice is that which is reasonably calculated under the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections" [Respondent's brief, 10, 11, 12 and 13]. At issue in *Nelson* was whether the statutory requirements required to revoke a drivers license, R.C.W. 46.65.065, provided the defendant, Nelson, with the revocation of a drivers license.

Unlike the present case, there was no question that the State provided the notice that was required by R.C.W. 46.65.065— the State sent a

written notice of the license revocation by certified mail to Nelson's address of record with the Washington Department of Licensing. Absent actuals knowledge by the State that such a notice would not reach Nelson, R.C.W. 46.65.065 met due process requirements. *Id.* at 699.

In this case the statutory notice requirement was not met. R.C.W. 7.21.030(1) was not followed. The issue is not whether R.C.W. 7.21.030(1) provides due process, it is whether Respondent provided the notice required by R.C.W. 7.21.030(1). And, it is undisputed, that Respondent did not do so.

In re Deming, 108 Wn.2d 82, 736 P.2d 639 (1937) involved a judicial disciplinary proceeding. Respondent asserts *Deming* stands for the proposition that due process is a flexible concept that can be tailored based on the circumstances of a case [Respondent's brief page 14]. The specific question before the court has no bearing on the issue in this case—whether due process required that Judge Deming be provided an opportunity to argue his case at a public hearing before the Commission On Judicial Fitness, or whether a de novo review of the proceedings were sufficient to meet due process standards. *Id*.

Respondent also glosses over the numerous cases cited by the Deming court that hold "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner".

E.g., Matthews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L. Ed.2d 18, (1976), *citing Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L. Ed.2d 62 (1985), *Young v. Konz,* 91 Wn.2d 532, 539, 588 P.2d 1360 (1979), *In re Hendrickson,* 12 Wn.2d 600, 606, 123 P.2d 322 (1942), *Shaw v. Vannice,* 96 Wn.2d 532, 537, 637 P.2d 241 (1981), and *Gnechi v. State,* 54 Wn.2d 467, 470, 364 P.2d 225 (1961).

"Flexibility" in the context of due process means that a procedural rule that may satisfy due process in one case may not do so in another case. *Demming* at . Flexibility does not mean one can simply ignore the procedural rule.

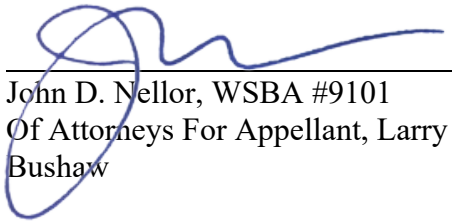
Finally, Respondent seems to assert that there is some special standard that excuses compliance with due process because the underlying case against T&L involved a wage claim. Respondent cites *Durand v. HMIC Corp.* 151 Wn. App. 818, 835, 214 P. 3d 189 (2009) and *Schilling v. Radio Holdings, Inc. et al,* 136 Wn.2d 152, 159, 961 P.2d 961 (1997) [Respondent's brief page 17] in support. There is nothing in either decision that would permit due process be waived to facilitate collection of a wage claim.

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) or by basic due process. 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: May 28, 2020



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

PROOF OF SERVICE

THE UNDERSIGNED hereby declares:

On May 27, 2020, 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:

Timothy J. Dack
Law Office of Timothy J. Dack
1014 Franklin Street, Suite 102
P.O. Box 61645
Vancouver, WA 98666
(360) 694-4227

Lucie R. Bernheim
Lucie R. Bernheim, Attorney At Law
512 Bell Street
Edmonds, WA 98020
(425) 712-8318

Stephen Alexander Bernheim
Lucie R. Bernheim, Attorney At Law
512 Bell Street
Edmonds, WA 98020
(425) 712-8318

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

Dated: May 28, 2020

John D, Nellor, WSBA #9101

J. D. NELLOR, PC

May 28, 2020 - 4:22 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53392-8
Appellate Court Case Title:	George Christensen, Appellant v T&L Communications, Inc, Etal, Respondent
Superior Court Case Number:	13-2-03759-2

The following documents have been uploaded:

- 533928_Briefs_20200528162036D2053997_5056.pdf
  This File Contains:
  Briefs - Petitioners Reply
  The Original File Name was Bushaw reply brief.pdf

A copy of the uploaded files will be sent to:

- lrbernheim@gmail.com
- lucie@luciebernheimlaw.com
- steve@luciebernheimlaw.com
- timdack@dackoffice.com

Comments:

Sender Name: John Nellor - Email: jd@nellorlaw.com
Address:
201 NE PARK PLAZA DR STE 202
VANCOUVER, WA, 98684-5871
Phone: 360-816-2241

Note: The Filing Id is 20200528162036D2053997