

COA No. 29584-2-III

FILED

OCT 03 2011

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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By _____

JAMES SCHIBEL and PATTI SCHIBEL, husband and wife,

Appellants,

v.

LEROY W. JOHNSON,

Respondent.

BRIEF OF APPELLANTS

Kenneth H. Kato, WSBA # 6400
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I. ASSIGNMENTS OF ERROR

A. The court erred by granting the motion of Schibels' counsel to withdraw four days before trial.

B. The court erred by denying the Schibels' motion to continue trial date based on the withdrawal of their counsel four days before trial.

C. The court erred by dismissing the Schibels' case.

Issues Pertaining to Assignments of Error

1. Did the court abuse its discretion by allowing the Schibels' counsel to withdraw just four days before trial and the record reflects no tenable reasons for doing so? (Assignment of Error A).

2. Did the court abuse its discretion by denying the Schibels' motion to continue trial date when they were left without counsel just four days before trial? (Assignment of Error B).

3. Did the court err by dismissing the Schibels' case on its own motion when the parties did not appear for the trial date? (Assignment of Error C).

II. STATEMENT OF THE CASE

James and Patti Schibel filed a complaint against Leroy Johnson on January 9, 2007. (CP 3). Their attorney was then

Calvin Vance. (*Id.*). An agreed motion to continue the trial date was filed on November 11, 2007. (CP 35). Trial was set for August 11, 2008. (CP 50). Trial was then set for April 13, 2009, before a judge pro tem by stipulation. (CP 137-142; 143, 144). In the interim, considerable work was done on the case. (See CP 35-144). On February 27, 2009, Mr. Vance moved to withdraw as counsel for the Schibels, essentially for money reasons. (CP 145). New counsel, Richard Eymann and Michael Withey, along with their respective firms (herein Eymann and Withey), filed a notice of appearance on March 13, 2009. (CP 154-155). Mr. Vance was allowed to withdraw on April 3, 2009. (CP 193).

On April 3, 2009, a new trial date of April 12, 2010, was set. (CP 194). After a defense motion for partial summary judgment was denied on March 25, 2010 (CP 325-327), the parties entered into a stipulation to reset the trial date to August 9, 2010. (CP 328). Although trial had been set for April 12, 2010, the court was unavailable because it was scheduled for a three-week criminal case commencing on April 5, 2010. (CP 328). An amended civil case schedule setting trial for August 9, 2010, was filed on April 30, 2010. (CP 331).

On August 9, 2010, the court had a hearing to discuss a new trial date and to resolve the parties' motions in limine. (RP 33). As for the trial date, the court stated:

You will take higher priority because of the year. This is a 2007 case, and you're killing my stats as far as the older cases should get resolved quicker. (RP 122).

Trial was set for November 1, 2010, with pretrial on October 15, 2010. (RP 124, 125).

On October 12, 2010, Eymann and Withey filed a notice of intent to withdraw pursuant to CR 71. (CP 506-507). They also filed a motion to continue trial date on October 14, 2010, along with Eymann's affidavit in support. (CP 509, 518). On October 15, 2010, counsel filed an amended notice of intent to withdraw, giving notice that the plaintiffs' motion to continue trial date would be heard on October 27, 2010. (CP 521-522).

The court held a hearing on October 15, 2010, on the motion to withdraw and for continuance of the trial date. (RP 125). As for the withdrawal motion, Eymann advised the court:

The pleadings that we filed speak for themselves. I don't have anything really to elaborate on that other than the fact that given the information we provided in the – in the Motion to Withdraw and in the – or the Notice of Withdrawal and in the Motion for Continuance, I can only add that if the Court wants further explanation, I would be – I think I would be happy to do that in camera if it's necessary, but I'm not

real comfortable doing that in open court. (RP 126-127).

In deferring decision on the motions to October 27, 2010, the court stated:

I guess at this point, I'm not ready to rule on the Motion to Withdraw at all, too, until we can hear it together because I think it goes hand in hand considering the trial date is November 1st at this point, and this case being almost three and a half years old. (RP 129).

The defense filed its opposition to plaintiffs' motion to continue the trial date on October 19, 2010. (CP 524).

The Schibels filed their objection to the motion to withdraw on October 20, 2010. (CP 531). The Schibels represented, among other things, that (1) Eymann and Withey had taken on representing them, with such representation being implied to completion of the matter under RPC 1.16, at a time when their case was scheduled for trial; (2) counsel's intent to withdraw three weeks before trial put them in an impossible situation even though counsel did move for a continuance; (3) although Eymann's affidavit in support of plaintiffs' motion to continue trial date stated "[t]he withdrawal was based upon the breakdown in communication, trust, and confidence in the attorney-client relationship," they never suggested that counsel engage in illegal or unethical conduct or perpetrate a crime or fraud, or pursue a course of action morally

repugnant; and (4) although they believed the proposed withdrawal of Eymann and Withey was improper and inconsistent with RPC 1.16, they were willing to try to find new counsel again for trial. (CP 531-533).

On October 25, 2010, the Schibels filed a declaration in support of their objection to motion to withdraw. (CP 539). They declared that Eymann and Withey had taken their case on a contingency basis, incurring unreimbursed expenses preparing the case for trial, and had indicated, following their withdrawal, they intended to file attorney's liens for those expenses as well as an as-yet undetermined amount of fees based on quantum meruit. (CP 539). The Schibels further declared "the looming threat of Counsel's attorney's liens hanging over our case will also hamstring us because substitute counsel will be unwilling to fight with prior counsel for their share of settlement or judgment." (CP 540).

On October 26, 2010, Eymann and Withey filed a response to the Schibels' objection to withdrawal. (CP 542). With respect to their reasons for withdrawing, they stated:

Withdrawing counsel are cognizant of the need to preserve the attorney-client privileged communications and any other confidential matters. It is therefore, not appropriate to describe the full context of our decision to withdraw as plaintiffs' counsel, other than to say that this highly unusual

step was taken very reluctantly and after great thought and soul searching on our part. We are convinced that the breakdown in communications, trust and confidence is so irreparable that it would not be in the best interest of the plaintiffs for us to continue to represent them. (CP 542-543).

Counsel also acknowledged that their withdrawal imposed responsibilities upon them to continue to act in their clients' best interest and to stay involved in the case until the withdrawal was effective:

We are, therefore, sympathetic to the Schibels' request that we stay involved in the case until they are able to retain substitute counsel to represent them. In this regard, the rules require that any motions that were pending at the time the Notice of Intent to Withdraw was filed be handled by withdrawing counsel and we pledge to do so. This involvement would include arguing the pending Motion for Continuance of the Trial Date, *which is essential to the Schibels' ability to find alternate counsel and to have their day in Court.* . . . It is simply impossible for us to proceed to represent the Schibels at the trial now set for November 1, 2010. A continuance of the trial date is therefore an appropriate procedural step in making sure the Schibels' interests are protected. (Italics added; CP 543-544).

On October 27, 2010, the court heard the motions to withdraw and to continue the trial. (RP 130). Eymann advised the court he knew the Schibels were trying to get alternate counsel and understood "under the circumstances why given the status of a trial date of November 1st why that may be a difficult thing to do." (RP 131). In addressing the motion to withdraw, Withey said:

We're, obviously, in a very difficult situation here, Your Honor, and I think we put in the papers the reasons for the withdrawal, and I think there's very substantive reasons.

We do not take this lightly, obviously, and we've done a lot of soul searching, Mr. Eymann and I, about our obligations, and I think the Court may recall that the very tragic and unfortunate death of Mrs. Schibel's father necessitated an earlier trial continuance.

Once we've discovered the reasons why we felt our obligation was to withdraw, we have notified the Court and notified them, but it took some time to do that, you know, without – if the withdrawal motion is granted or at least the intent to withdraw is honored, then we, you know, then, obviously, a trial continuance would be necessary.

I think the reasons that the defendants [sic] have put forth normally would be good ones, but in this situation, they can't try the case without counsel. Yet, counsel cannot continue to represent them. (RP 132, 133).

The court advised the Schibels:

We had continued this out from two weeks ago so you could, one, the Court can't even entertain a continuance until I knew who was going to step in, and, two, to hear from that counsel on how long it would take them to trial prep.

At this point, [the defense is] objecting to me continuing the trial. This is an '07 cause number, and now we're almost going into 2011, and the Court is concerned.

I've continued the trial over defense objection several times, and at this point, the Court is not inclined to continue it any further, and before the Court made some kind of a decision, I wanted to see if you could retain counsel, and they could be here to kind of advise the Court on whether or not they

were going to be able to step up to the plate and how long it would take. (RP 134).

Mr. Schibel was not optimistic about obtaining new counsel. (RP 134-135). The court then asked if they were able to represent themselves at trial. (RP 135). He said no. (*Id.*). The court stated it did not appear anyone was stepping up to take over “[s]o even continuing it to give you time to get new counsel doesn’t sound like that’s even an option.” (*Id.*). Mr. Schibel said it would be difficult to find someone in the “real immediate future.” (RP 136).

With respect to the motion to withdraw, Mr. Schibel was unsure whether it would be appropriate to argue in front of defense counsel. (RP 136). The court advised him the defense would be present at all hearings and then granted the withdrawal:

But at this point, it appears that there is a breakdown with you and counsel, and the Court has no choice at this time other than to allow them to withdraw on your behalf. They’ve given the proper notice, they’re here.

I’m kind of at a [loss] because at this point with almost four years later, here we are, and defense counsel objected to the continuance that I did last time. They objected to the continuance before that when the case was first assigned, and we have already done all of the motions, the Motions in Limine, preparing to get to go to trial on the first.

So at this point, I am going to allow Mr. Eymann and Mr. Withey to withdraw. They’ve given the proper notice, and at this point, the Court can’t, on a civil case, order them to stay on board and work the case, especially with their

ethical obligations.

So I am going to sign an order allowing them to withdraw today, and as far as a continuance, though, I understand your dilemma. I, also, understand that the defendants have a right to get this case resolved. It's been pending a long time. Many of the continuances were over their objections.

At this point, the Court is not inclined to continue the case. I know that puts you in a bind with considering trial is Monday, but your option at this point is to represent yourself at trial and move forward because the Court isn't going to grant a continuance at this point and on the declarations of counsel from Mr. Johnson.

They did strenuously object to the continuance into November, and I had said that this case was not going to be continued. We set specific dates, and at this point, you're kind of at a loss. You can appear on Monday and represent yourself or contact counsel, but at this point, the trial date is still set for Monday. So I'm not going to grant any further continuances of the trial. (RP 136-138; CP 546).

When asked by the court if they were ready for trial on Monday, Mr. Schibel responded they were not ready. The court said it needed some guidance and brought up the issue of costs for a jury panel to come in:

I'm not doing it to discourage you from going to trial, but this Court can't afford, either, to bring in a panel and have the costs of paying the jury and the costs of mileage because most of our panels run between three and four hundred dollars.

If you are not intending to continue on Monday, I don't want to bring a panel in on Monday morning and incur any other additional costs. (RP 139).

Mr. Schibel voiced his objections to counsel being allowed to withdraw, but the Court told him it had already allowed withdrawal:

I've already let them withdraw because they do have certain ethical obligations. They believe that the attorney-client privilege or I guess trust is broken at this point. I've already let them withdraw. (RP 139, 140).

The court again brought up jury costs and told the Schibels it was Wednesday and they had until Friday to tell the judicial assistant what they were going to do as a jury panel was going to be brought in on Monday morning. (RP 141). The court said:

If you come in on Monday and say I'm not going to trial and not prepared and they move for dismissal and I grant that dismissal, it would impose costs against you for that jury panel that cost the court for not using that panel.

So you have until Friday. (RP 141).

The court denied the motion for continuance. (RP 143; CP 556).

On November 24, 2010, the court, on its own motion, ordered dismissal of the case. (RP 155-156; CP 631). Finding it had denied any further continuances of the trial set for November 1, 2010, and the parties did not appear for trial, the court dismissed all claims. (*Id.*).

This appeal follows. (CP 32, 636).

III. ARGUMENT

1. The court abused its discretion by allowing the Schibels' counsel to withdraw just four days before trial and the record reflects no tenable reason for doing so.

CR 71 addresses the withdrawal of counsel and differentiates between court-appointed and retained counsel. CR 71(b), (c). Eymann and Withey were retained counsel in a civil case and CR 71(c) governs. After receiving their notice of intent to withdraw, the Schibels timely objected in writing and served counsel. CR 71(c)(4) provides that if a timely written objection is served, withdrawal may be obtained only by order of the court. Nothing in CR 71 "defines the circumstances under which a withdrawal might be denied by the court." CR 71(a).

Withdrawal, however, is a matter left to the trial court's discretion. *Kingdom v. Jackson*, 78 Wn. App. 154, 158, 896 P.2d 101 (1995), *review denied*, 129 Wn.2d 1014 (1996). Its determination is reviewed for abuse of discretion. *Id.* An abuse occurs when the decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In exercising its discretion, the court looks to all pertinent factors. Several are listed in RPC 1.16, which provides in relevant part:

(a) Except as stated in section (c), a lawyer shall not represent a client or, where representation has commenced, shall notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law, . . .

(b) Except as stated in section (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client used the lawyer's services to perpetrate a crime or fraud;

(3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client, or

(6) Other good cause exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) A lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

Other factors include whether withdrawal will delay trial or otherwise interfere with the functioning of the court, whether the client has had or will have an opportunity to secure substitute counsel, whether the client has sufficient prior notice of the lawyer's intent to withdraw, whether the client lacks the ability to prove a prima facie case, whether the client has failed to pay the lawyer's fees, whether the client has failed to cooperate with the lawyer, whether a denial of withdrawal will cast an unfair financial burden on the attorney, whether the lawyer is unable to find or communicate with the client, and whether there is any other prejudice to the client or lawyer. *Kingdom*, 78 Wn. App. at 158-160.

Although withdrawal of retained counsel in a civil case should generally be allowed, "it can be denied if specific articulable circumstances warrant that result." *Kingdom*, 78 Wn. App. at 160. In *Atlantic Petroleum Corp. v. Jackson Oil Co.*, 572 A.2d 469 (App.

D.C. 1990), the court determined that granting withdrawal on the date of trial was an abuse of discretion when counsel was ready to try the case and the client had no other lawyer. Here, Eymann and Withey were prepared to try the case, yet sought to withdraw three weeks before trial. They were allowed to withdraw just four days before the trial date after the Schibels timely objected. The Schibels had no other lawyer, but the trial court forced them to go to trial pro se, knowing they had tried to obtain other counsel and had been unsuccessful. The circumstances in *Atlantic Petroleum* are very similar to those faced by the Schibels and point to an abuse of discretion by the court.

Other than the recitation in Eymann's affidavit that "[t]he withdrawal was based upon the breakdown in communication, trust and confidence in the attorney-client relationship," there is no indication in the record of any facts supporting this mere assertion. (CP 510). None of the considerations in RPC 1.16(b) permitting withdrawal are implicated in Eymann's statement. Moreover, the record reflects references from the Schibels' counsel that they could not represent themselves without counsel and from the court itself that it was waiting for substitute counsel to come on. (RP 132-134). The court was also urged by counsel and the Schibels to

hold an in camera proceeding where the reasons for withdrawal could be fleshed out, but it refused. (RP 136). When there are no facts in the record supporting the reasons given by Eymann and Withey to withdraw on the eve of trial, the court's decision allowing withdrawal is an abuse of discretion as it was for untenable reasons. *Junker*, 79 Wn.2d at 26.

RPC 1.16(b) provides that a lawyer may withdraw "if withdrawal can be accomplished without material adverse effect on the interests of the client." The Schibels were blind-sided by the proposed withdrawal of counsel some three weeks before trial. The court granted withdrawal four days before the November 1, 2010 trial date. They could not represent themselves on such short notice and no lawyers would take a case like this with trial to start in four days. As a result of the withdrawal of counsel, the Schibels' certainly suffered prejudice as their case was dismissed through no actions of their own. (CP 31). Just as a jury does not leave common sense behind in its deliberations, this Court should not either. The withdrawal simply could not be accomplished without material adverse effect on the Schibels. The court abused its discretion because it did not consider the caveat in RPC 1.15(b) in making its decision.

In its order granting withdrawal, the court found “the attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of plaintiffs’ counsel.” (CP 546). The record does not support this finding. No facts articulate the current state of the attorney-client relationship or the nature of the ethical obligations of counsel allegedly damaged by that relationship. In these circumstances, counsel should not have been allowed to withdraw as no good cause existed. The court abused its discretion since its decision was based on untenable grounds and for untenable reasons. *Junker*, 79 Wn.2d at 26. The order granting withdrawal cannot stand.

2. The court abused its discretion by denying the Schibels’ motion to continue trial date when they were left without counsel just four days before trial.

The withdrawal of an attorney in a civil case does not give the party an absolute right to a continuance. *Jankelson v. Cisel*, 3 Wn. App. 139, 141, 473 P.2d 202 (1970), *review denied*, 78 Wn.2d 996 (1971). “The rationale for this rule is that if a contrary rule should prevail, all a party desiring a continuance, under such circumstances, would have to do would be to discharge his counsel or induce him to file a notice of withdrawal.” *Id.* (citing *Peterson v.*

Crockett, 158 Wash. 631, 291 P. 721 (1930)). The court's decision on whether to grant a continuance is reviewed for an abuse of discretion. 3 Wn. App. at 141.

Here, the court told the parties they were killing her stats as this was a 2007 case. (RP 122). At the hearing on the motions for withdrawal and continuance, the court told the Schibels it could not even entertain a continuance until it knew who was going to be new counsel. (RP 134). But the Schibels pro se had the right to ask for a continuance. There is no requirement that a trial continuance must be sought only by counsel. The court was mistaken on the law. It nonetheless gave the Schibels what it called an option: represent themselves and move forward because there would be no more continuances. (RP 138).

The court then reiterated its concern that the case was from 2007 and it was almost 2011. (RP 134). The court's main concern was its "stats" and running the trial docket to resolve older cases. That concern led to a Draconian result that summarily denied the rights of the Schibels to have their case heard. Rather, the court's concern should have been justice and how to accomplish it in a difficult situation.

The court kept reminding the Schibels about their being responsible for the costs of a jury panel “[i]f you come in on Monday and say I’m not going to trial and not prepared “and they move for dismissal and I grant that dismissal.” (RP 141). It gave them until Friday to advise the judicial assistant if they were going to trial. (*Id.*). The court allowed two days for the Schibels to decide whether to go to trial pro se when even it contemplated the appearance of new counsel. The denial of a continuance and the court’s actions were an abuse of discretion because they were manifestly unreasonable and based on untenable grounds or for untenable reasons. *Junker*, 79 Wn.2d at 26.

In deciding a motion for continuance, the court may consider many factors, including the prompt resolution of litigation, the needs of the moving party, prejudice to the other party, the prior history of the litigation, and any other matters having a material bearing on the issue. *Balandzich v. Demoroto*, 10 Wn. App. 718, 720, 519 P.2d 994, *review denied*, 84 Wn.2d 1001 (1974). Here, the necessity for a continuance was caused by the withdrawal of the Schibels’ counsel for unsupported reasons that were never established on the record. Withdrawing counsel advised the court a continuance of the trial date was necessary as the Schibels could

not try the case without counsel. (RP 133). Nearly four years old at the time of dismissal, much work and effort had been put into the prosecution and defense of the case. The Schibels could not possibly represent themselves at a trial set to begin four days after their counsel's withdrawal. Fairness and equity demanded a continuance, but it was denied. The Schibels acted immediately on the notice of intent to withdraw and tried to secure substitute counsel. The court abused its discretion by denying a continuance as the decision was based on untenable grounds and for untenable reasons, none of which trumped the prejudice to the Schibels caused by withdrawal of their counsel on the eve of trial. *Junker*, 79 Wn.2d at 26.

3. The court erred by dismissing the Schibels' case on its own motion when the parties failed to appear for trial on November 1, 2010.

Because the parties did not appear for trial set for November 1, 2010, the court dismissed all claims with prejudice on its own motion. (CP 631). Although the court had advised the parties to be present on that date for trial (RP 154, 155), the parties were clearly under the impression there was no need to appear on November 1,

2010, and the trial date had been stricken. (CP 622). Indeed, the court attempted to contact defense counsel to confirm. (*Id.*).

The Schibels and the defense thought the case was settled and the court was so advised on October 29, 2010. (RP 145). Mr. Johnson filed a motion to enforce the settlement agreement and dismiss plaintiffs' claims with prejudice. (CP 620). But the court, simply dismissed all claims about three weeks later. (CP 631).

The court erred by dismissing the Schibels' claims with prejudice for failure of the parties to appear because they thought the trial date had been stricken and there was no need to attend court on November 1, 2010. What the court said on October 27, 2010, about being present on the trial date was this:

So, Mr. and Mrs. Schibel, my judicial assistant, Rita, she'll bring you a card. If you decide that you don't want to proceed pro se, then please let her know before Friday at 4:00 so we can notify the court administrator's office. Otherwise, we will see you on Monday morning at 9:00, okay? (RP 143).

The Schibels did let the judicial assistant know by the deadline that there was no need to proceed pro se as they thought the case was settled. In that circumstance, they did not have to be in court on Monday morning. (RP 143). The court abused its discretion by dismissing the case on its motion as it did so on untenable grounds

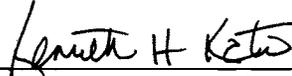
and for untenable reasons. *Junker*, 79 Wn.2d at 26. It should not have dismissed all claims sua sponte as the case was then still ongoing.

IV. CONCLUSION

Based on the foregoing facts and authorities, appellants Schibel respectfully urge this Court to reverse the order granting withdrawal, the order denying continuance of trial date, and the order of dismissal, and remand the case for further proceedings.

DATED this 3rd day of October, 2011.

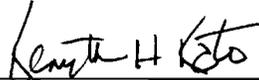
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 3, 2011, I caused a true and correct copy of the Brief of Appellants to be served by first class mail, postage prepaid, on Curt H. Feig and Chris P. Reilly, Attorneys at Law, 1325 Fourth Ave., Ste 150, Seattle, WA 98101.



Kenneth H. Kato