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NO. 29584-2-III

COURT OF APPEALS STATE OF WASHINGTON
DIVISION III

JAMES SCHIBEL and PATTI SCHIBEL, husband and wife,

Appellants/Cross-Respondents,

v.

LEROY W. JOHNSON,

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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Chris P. Reilly, WSBA # 25585
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I. INTRODUCTION

The case below was a simple case involving claims for personal injury and breach of a commercial lease. Plaintiffs James and Patricia Schibel claimed injuries and property damage resulting from exposure to a “damp building” during a seven-month period in 2004. From this brief tenancy, the Schibels claimed a host of permanent, chronic conditions, past and future medical expenses, lost property and loss of business. Defendant Leroy Johnson, an elderly man and the Schibels’ landlord, counterclaimed for lost rent when the Schibels broke the lease.

The issues in this appeal are also simple. They involve a trial court appropriately balancing the relevant interests when it granted a motion to withdraw by the Schibels’ counsel and denied a motion to continue the November 1, 2010 trial date, which was the sixth trial date that had been set in the case. The court considered unchallenged evidence that there was a “breakdown in communication, trust, and confidence in the attorney-client relationship” between the Schibels and their counsel (Michael Withey and Richard Eymann). Such a breakdown is good cause for withdrawal, and the trial court correctly allowed Messrs. Withey and Eymann to withdraw.

Plaintiffs’ former counsel initiated their withdrawal three weeks before trial. The trial court was mindful of the difficulties potentially facing plaintiffs, considered the issues surrounding continuing the case, and stated at an October 27, 2010 hearing:

Court: Okay. 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.

...

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.

Mr. Schibel explained in response that despite attempts during the two weeks prior to the hearing, the Schibels had not found substitute counsel because multiple former attorneys had asserted liens on the file. No attorney apparently wanted to take on the case. Moreover, according to Mr. Schibel, he thought his chance of finding an attorney at any time was doubtful. The trial court, in the exercise of its discretion, decided not to continue the case only after the following exchange with Mr. Schibel:

Mr. Schibel: So we're pretty hard-pressed to even get somebody to take us on at this point.

Court: Well, it sounds like, though, even if I continued it, you still would have the same issues and problems of getting counsel.

Mr. Schibel: Correct.

In light of the dim prospect of the Schibels finding trial counsel, Mr. Johnson's objection to setting yet another trial date, and because the matter concerned events that occurred in 2004 (in a lawsuit that that had been pending for almost four years), the trial court

reasonably exercised its discretion and denied the continuance. Having exercised its discretion appropriately, the trial court's decisions on the motion to withdraw and continue the trial date should be affirmed.

The remaining issue is moot. Within a couple days of the October 27, 2010 hearing and before trial, the case settled in a phone call between Mr. Schibel (who was unrepresented due to his counsels' permitted withdrawal) and Mr. Johnson's counsel. Mr. Schibel alerted the trial court that the parties had settled and there was no need for a jury to appear on the November 1, 2010 trial date. Neither party appeared for trial on November 1, 2010.

Subsequently, the Schibels tried to renege and refused to sign a written settlement agreement prepared by Mr. Johnson's counsel. When Mr. Johnson sought to enforce the settlement at a hearing on November 24, 2010, the trial court dismissed the claims of both parties for failure to appear for the November 1, 2010 trial date.¹ Having settled the case and released their claims against Mr. Johnson, the Schibels' appeal of the dismissal is moot and should be denied.

¹ The Schibels appeared *pro se* at the November 24, 2010 hearing. At that point, it had been over six weeks since they were informed of their counsels' withdrawal. Their inability to secure counsel demonstrates that the trial court made not only a reasonable decision, but the correct decision in denying the continuance.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

For the limited purpose of preserving Mr. Johnson's counterclaim in the event that Plaintiffs/Appellants prevail on their appeal and their claims are remanded to the trial court, Johnson assigns error to the trial court's dismissal of Johnson's counterclaim against Plaintiffs.

B. Issues Pertaining to Assignments of Error

Whether the Court should grant Mr. Johnson's appeal made for the limited purpose of preserving his counterclaim in the event that Plaintiffs/Appellants prevail on their appeal and their claims are remanded to the trial court.

III. STATEMENT OF THE CASE

The Schibels filed their Complaint on January 9, 2007. CP 3. In it, they alleged that Mr. Johnson breached a commercial lease with them in 2004 and, through his negligence, injured them by exposing them to mold and dampness in the building he owned and leased to them. CP 8-11. Mr. Johnson filed a counterclaim for back rent the Schibels owed him. CP 23-25.

Mr. Johnson is a retired real estate broker. CP 640 (¶3). He was 79 years old at the time this case was dismissed in November 2010. *Id.* All of the events in the complaint and counterclaim took place in 2004. *Id.*

The Court's initial scheduling Order set a trial date of March 17, 2008. CP 28. The parties jointly sought a continuance of the trial date in order to conduct additional discovery. CP 35. On December 7, 2007, the Court granted the parties' motion and set the second trial date in this case, August 11, 2008. CP 50.

With less than two weeks before the August 8, 2008 trial date, Plaintiffs notified the trial court of an illness in their family. *See* CP 141, 143. The trial court continued the trial and set a new trial date of April 13, 2009, which was the third trial date set in this case. CP 137. Both parties changed counsel, and the Court subsequently set the fourth trial date in this case, April 12, 2010. CP 154, 193, 194, 210. As that date approached, the Court had a scheduling conflict and *sua sponte* set the trial date aside. CP 328. The parties stipulated to a new trial date of August 9, 2010, which was the fifth trial date set in this case. CP 328-331.

In a virtual repeat of the 2008 continuance, with less than two weeks until the August 9, 2010 trial, Plaintiffs notified the trial court of an illness in their family; and, as a result, the trial was continued at the July 30, 2010 pre-trial conference (CP 504). At a hearing on August 9, 2010, the trial court set the trial for November 1, 2010 (VRP 124:11-13), the sixth trial date set in this case.

On October 11, 2010, Plaintiffs' counsel orally informed Mr. Johnson's counsel that they would be withdrawing from the case. CP 640 (¶4). On October 12, 2010, Messrs. Eymann and

Withey filed their Notice of Intent to Withdraw (CP 506) and followed with a Motion to Continue Trial Date on October 14, 2010. CP 518. In a declaration dated October 14, 2010, Mr. Eymann described the basis for withdrawal as “the breakdown in communication, trust, and confidence in the attorney-client relationship” (“the breakdown”). CP 510:13-14. This assertion was repeated several times in the record (cited below), remained unchallenged in the record and has not been challenged on appeal.

In their declaration of October 20, 2010 in opposition to the motion for withdrawal,² the Schibels acknowledged Mr. Eymann’s characterization of the state of their relationship with counsel: “ ‘the breakdown in communication, trust, and confidence in the attorney-client relationship’ and certain other issues ‘protected by the attorney-client privilege.’ ” CP 532. Tellingly, the Schibels did not dispute Mr. Eymann’s characterization but only disputed the application of the RPC 1.16 standards to their conduct. *Id.*

In a subsequent declaration addressing the motion to withdraw filed on October 25, 2010, the Schibels stated that a prior counsel had asserted a \$25,000 lien on the file. CP 539. The Schibels acknowledged that Messrs. Eymann and Withey had incurred expenses on the file that had not been reimbursed, and that they

² According to CR 71(c)(4). “[i]f a timely written objection is served, withdrawal may be obtained only by order of the court.” Here, upon the Schibels’ objection to the withdrawal, the trial court properly treated the issue as a motion. *See* VRP 130-136 (hearing regarding the Motion to Withdraw).

intended to assert a lien on the file as well. *Id.* The Schibels explained to the trial court that the liens on the file were impeding their efforts to find new counsel. CP 540. Further evincing the breakdown in the relationship with their counsel, the Schibels asked the trial court to require that Messrs. Eymann and Withey waive their right to recover fees and expenses as a condition of withdrawal. *Id.*

In a declaration dated October 25, 2010, Mr. Eymann stated that he and Mr. Withey were hired with the understanding that Mr. Withey would handle the liability and causation aspects of the case while Mr. Eymann would prepare the damages case. CP 536. Mr. Eymann went on to declare that “plaintiffs claim to have lost all confidence in Mr. Withey and believe he cannot continue to be their lawyer in handling the liability proof at trial.” *Id.* This assertion that the Schibels believed Mr. Withey “cannot continue to be their lawyer” remained unchallenged in the record and has not been challenged on appeal. *See, e.g.*, VRP 130:6-143:9 (proceedings of October 27, 2010). Mr. Eymann concluded by stating that he was not prepared to prosecute the liability and causation aspects of the case. CP 536.

In a subsequent declaration dated October 26, 2010, Messrs. Eymann and Withey reiterated the breakdown (VRP 542:26-543:1) and stated that “it is simply impossible for us to proceed to represent the Schibels at the trial now set for November 1, 2010.” CP 543:26-544:2. At the hearing on October 27, 2010, Mr. Schibel made no

effort to dispute any of the evidence of the breakdown or loss of confidence in Mr. Withey. VRP 134:22-135:11. Given the unchallenged breakdown in communication and trust between the Schibels and their attorneys, the trial court approved the withdrawal. VRP 137:7-11.

Regarding the trial court's consideration of the continuance issue, the trial court stated:

Court: Okay. 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.

...

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.

VRP 134:5-19. Regarding the Schibels' inability to find new counsel, the trial court and Mr. Schibel had the following exchange:

Court: [B]efore 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. From your declaration, it doesn't sound like you're going to be able to get counsel.

Mr. Schibel: Well, Your Honor, we did attempt to. We were informed that we should find new counsel by our attorneys, and we immediately tried to do so, and the problem that we're having is that there is this looming cost for their fees and the cost that they've already put out toward this case hanging in the wings, and the counsel that we have talked to said that they wouldn't come on board knowing that that was out there. That they would have to fight for that given a verdict or a settlement. So we're pretty hard-pressed to even get somebody to take us on at this point.

Court: Well, it sounds like, though, even if I continued it, you still would have the same issues and problems of getting counsel.

Mr. Schibel: Correct.

VRP 134:13-135:11. The trial court denied the continuance request. VRP 138:4-5. The trial court instructed the Schibels of their right to represent themselves if they could not find an attorney before the commencement of trial on November 1, 2010. VRP 138:2-4.

After the trial court denied the continuance, the case settled on October 29, 2010 based on an agreement reached in a telephone call between Mr. Schibel, on behalf of both Mr. and Mrs. Schibel, and Mr. Curt Feig as Mr. Johnson's counsel. CP 678-679 (¶3); CP 694 (¶7); CP 700 (¶1); VRP 144:18-19. Mr. Feig almost immediately e-mailed Mr. Schibel with the terms of the settlement, stating:

Mr. Johnson agrees to release his claims for any recoverable costs or other amounts pursuant to CR 68 (the offer of judgment) and his counterclaims pled in this lawsuit. In return, you and you wife agreed to release any and all claims you have asserted against Mr. Johnson or which you might assert relating to or arising out of your tenancy in the North Wall property. You also agreed to dismiss the lawsuit against Mr. Johnson with prejudice upon execution of a more formal settlement agreement and release document.

CP 683. On behalf of the Schibels, Mr. Schibel admitted the existence, terms, and their agreement to the settlement in open court on November 24, 2010:

Mr. Schibel: We had agreed to and made an oral agreement with Mr. Feig on the 29th as was stated shortly before 4:00, and it was just an oral agreement, which the terms he has stated correctly.

VRP 150:3-6; see also VRP 150:25 (“We agreed to the oral agreement.”). As a result of the settlement, Mr. Schibel telephoned the trial court on October 29, 2010, alerted the trial court that the parties had settled,³ and stated that there was no need for a jury to appear on November 1, 2010. CP 701 (¶4); VRP 145:19-21, 152:3-4.

³ The Schibels concede in Appellants’ Brief at p. 20 that the matter settled prior to dismissal.

Neither party appeared for trial on November 1, 2010.⁴ VRP 155:18-24. Subsequently, when presented with a written settlement agreement prepared by Mr. Johnson's counsel, the Schibels refused to sign and tried to renege on the settlement. CP 700 (¶2); VRP 144:11-149:17. When Mr. Johnson sought to enforce the settlement at a hearing on November 24, 2010, the trial court dismissed the claims of both parties for failure to appear for the November 1, 2010 trial date. CP 631.⁵

IV. ARGUMENT

A. The Trial Judge Properly Exercised Its Discretion in Granting Withdrawal and Denying the Continuance.

The issues of withdrawal and continuance are intertwined and should be considered together. The trial court took that approach (VRP 129:7-10), and it is appropriate on appeal as well.

1. The Abuse of Discretion Standard Is Deferential.

“Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear

⁴ Mr. Johnson's decision to not appear at trial was in reliance on the existence and terms of the October 29, 2010 settlement with the Schibels and on the Schibels' notice to the court that it was unnecessary to empanel a jury. CP 679-680 (¶6).

⁵ The Schibels appeared *pro se* at the November 24, 2010 hearing. VRP143:21. At that point, it had been over six weeks since they were informed that their counsel were withdrawing. CP 506.

showing of abuse of discretion, that is, discretion 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), citing *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). “Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.” *Junker*, 79 Wn.2d at 26. The abuse of discretion standard recognizes that deference is owed to the judicial actor who is “better positioned than another to decide the issue in question.” *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993), citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990).

2. The Withdrawal Decision Was Reasonable, Supported by Facts, and Well within the Trial Court’s Discretion.

Withdrawal of counsel in a civil case is a matter addressed to the discretion of the trial court. *Kingdom v. Jackson*, 78 Wn. App. 154, 158, 896 P.2d 101, 103 (1995) (citations omitted). An appellate court will reverse only for abuse of discretion. *Id.* (citations omitted).

When withdrawal is sought by a retained attorney in a civil case, it generally should be allowed. *Kingdom*, 78 Wn. App. at 160. “The attorney-client relationship is consensual, and either side’s desire to quit it should be given great weight.” *Id.* Approval of a withdrawal request by the court “should be rarely withheld.” *Id.*, citing *Fisher v. State*, 248 So.2d 479, 486 (Fla. 1971). “In exercising its discretion, a trial court should consider all pertinent factors. Some are listed in Rules of Professional Conduct (“RPC”) [1.16]. Others are found in case law.” 78 Wn. App. at 158.⁶ The RPC related to attorney withdrawal (RPC 1.16), as supplemented by case law, is the appropriate source of standards to consider with respect to an attorney withdrawal.

While RPC 1.16(b) lists several alternative bases justifying withdrawal,⁷ it is apparent that the trial court relied on only one

⁶ Civil Rule (“CR”) 71 addresses withdrawal, but nothing in CR 71 “defines the circumstances under which a withdrawal might be denied by the court.” CR 71(a).

⁷ The text of RPC 1.16(b) presented in Appellants’ Brief at p. 12 differs in material respects from RPC 1.16(b), which is:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

... or

(7) other good cause for withdrawal exists.”

The Schibels’ (mis)citation and reliance on the withdrawal alternative at RPC 1.16(b)(1), which permits a lawyer the option to withdraw “if withdrawal can be accomplished without material adverse effect on the interests of the client” is inapposite here, where the withdrawal was justified. *See* Comment [7], RPC 1.16 (listing circumstances where withdrawal was justified despite fact that withdrawal might “materially prejudice the client”).

basis: “[A] lawyer may withdraw from representing a client if . . . (7) other good cause for withdrawal exists.” RPC 1.16(b)(7). For this Court, the issue on withdrawal is narrowed to whether the trial court’s finding of “good cause” for withdrawal was “manifestly unreasonable” or whether the bases for “good cause” in the record are “untenable grounds” for the trial court’s decision.

When confronted with the issue, courts have found good cause for withdrawal where the attorney and client suffer a “breakdown” in communication. *Ryan v. State*, 112 Wn. App. 896, 51 P.3d 175 (2002). An attorney-client relationship necessarily requires a high degree of trust, and so can deteriorate to the point where the attorney’s withdrawal would be justified. *Ausler v. Ramsey*, 73 Wn. App. 231, 239, n. 9, 868 P.2d 877 (1994) (citations omitted).

The facts in the record supporting withdrawal are substantial and unchallenged. On October 14, 2010, which was almost two weeks before the October 27, 2010 hearing, Mr. Eymann described the basis for withdrawal as “the breakdown in communication, trust, and confidence in the attorney-client relationship.” CP 510:13-14. This assertion was repeated several times in the record. *See, e.g.*, CP 537:1-2, CP 542:26. The Schibels submitted multiple declarations between October 14, 2010 and the hearing. CP 531-533, 539-540. In his declaration of October 20, 2010, Mr. Schibel specifically acknowledged Mr. Eymann’s characterization of the

breakdown. CP 532 (¶3). Mr. Schibel also addressed the trial court at the October 27, 2010 hearing and had ample opportunity to challenge Mr. Eymann's characterization of the breakdown. VRP 130:6-143:9 (proceedings of October 27, 2010). Nevertheless, Mr. Eymann's description of the breakdown remained unchallenged in the record.

As further evidence of the breakdown in communications, Withey also described the difficulty in working with Mrs. Schibel in preparation for the trial:

Mr. Withey: There was a lot of matters that Mrs. Schibel had to attend to over the last couple months and that, you know, obviously, for personal reasons took her away from being able to think about this trial and for good reasons was unable to participate in what was going on, and I think that was a factor in terms of why this motion came on so late.

VRP 132:22-133:3. This was apparently significant for Mr. Withey because the more serious allegations of personal injury⁸ involved Mrs. Schibel and her cooperation in trial preparation was important to any chance of the Schibel's success at trial on the liability issues. See CP 289:15-23 (comparing Ms. Schibel's claimed illness with

⁸ Mr. Johnson does not concede that Mrs. Schibel's complaints of personal injury were meritorious or related to her tenancy in Johnson's building and has argued persuasively they are not. CP 283-311 (dispositive motion on medical causation). However, for the purpose of this appeal and the consideration of the trial court's decisions, the lack of merit is not a proper consideration, and there is no indication in the record that the lack of merit to the Schibels' claims informed the trial court's decisions.

that of Mr. Schibel). As was the case with Mr. Eymann's characterization of the attorney-client relationship, the Schibels never challenge Mr. Withey's characterization of Mrs. Schibel's inability to participate in trial preparations. *See, e.g.*, VRP 130:6-143:9 (proceedings of October 27, 2010).

As evidence of the loss of confidence and trust vital to the attorney-client relationship, Mr. Eymann stated in his declaration of October 25, 2010 that "plaintiffs claim to have lost all confidence in Mr. Withey and believe he cannot continue to be their lawyer in handling the liability proof at trial." CP 536 (¶6). This assertion remained unchallenged in the record and has not been challenged on appeal. *See, e.g.*, VRP 130:6-143:9 (proceedings of October 27, 2010). This is significant because Messrs. Withey and Eymann had distinct responsibilities on the file – Mr. Withey was the lead for the liability and medical causation issues while Mr. Eymann was the lead for preparing the damages case -- and Mr. Eymann was unprepared to present the case on liability and medical causation. CP 536-537 (¶7).

As the final evidence of the breakdown, the trial court considered the attempt by the Schibels to renege on their fee agreement with Messrs. Withey and Eymann. CP 539-540. The trial court specifically found there was a breakdown between the Schibels and their counsel that justified withdrawal:

Court: 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.

VRP: 136:20-23. The existence and significance of the breakdown is well-supported in the records. A breakdown in communications, confidence and trust, such as the one presented in the record and considered by the trial court in this case, is a recognized justification and is undoubtedly good cause for a withdrawal.

Unchallenged findings are verities for purposes of appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). On appeal, the Schibels challenge the adequacy of the evidence in support of Mr. Eymann's description of breakdown as the justification for withdrawal. Appellants' Brief at pp. 14-16. However, there was no need to further develop the evidence of the breakdown because no one disputed the existence of such a breakdown over the two-week period in which it was discussed in multiple pleadings and at two hearings. Having not challenged the existence of a breakdown before the trial court's reliance on the breakdown as justification for the withdrawal, the Schibels cannot challenge the existence or significance of the breakdown on appeal.

In contexts other than civil litigation, a breakdown in communications between attorney and client is also grounds for withdrawal. Even under criminal procedural rules, where defendants are *entitled* to an attorney, a criminal defendant or appointed counsel

can justify withdrawal and appointment of new counsel upon a showing of “a complete breakdown in communication between the attorney and the defendant.” *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139, 150 (2004) (citations omitted). *United States v. Mullen*, 32 F.3d 891, 896 (4th Cir. 1994) (holding “[t]hat because of the breakdown in communication and the lack of confidence expressed by [the] defendant, counsel can no longer effectively represent the defendant”). It logically follows that if a breakdown in communication is sufficient to require that a criminal defendant be provided new counsel, a similar breakdown is sufficient to justify withdrawal of a counsel in a civil case, where there is no absolute right to counsel.

The Schibels cite *Atlantic Petroleum Corp. v. Jackson Oil Co.*, 572 A.2d 469 (D.C. App. Ct. 1990) as support for their argument that the trial court erred in allowing withdrawal. To the extent the court might consider *Atlantic Petroleum* even persuasive precedent,⁹ it is distinguishable for numerous reasons. First, this case did not involve a day-of-trial request for and granting of withdrawal like *Atlantic Petroleum*. The record demonstrates the Schibels had several weeks to locate counsel to allow that counsel to participate in the decision regarding the continuance and that lack of time was not the reason the Schibels could not find counsel. Second, the party in

⁹ D.C. Bar Rule 1.16(b) includes a good cause provision, though it is worded differently than Washington RPC 1.16(b).

Atlantic Petroleum was a corporation that was required to have counsel to represent it at trial. 572 A.2d at 471. Allowing withdrawal in that context amounted to dismissal of the case, whereas here dismissal did not automatically follow the withdrawal; here, even after the withdrawal, the trial court considered the continuance request and the Schibels also had the option of representing themselves. Third, the appellate court in *Atlantic Petroleum* reversed the trial court in part because, in that case, the plaintiff had obtained new counsel and sought a continuance, but the trial court still dismissed the case. In contrast, here, the Schibels told the trial court they could not find a counsel due to existing liens on the file, an impediment that would not be cured with time. And finally, the appellate court in *Atlantic Petroleum* determined that the trial judge's finding of a breakdown in the attorney-client relationship was unsupported by the record and clearly erroneous. Here, the evidence is unchallenged that the breakdown between the Schibels and their counsel was substantial and existed.

Given the breakdown, the court simply could find no basis to impose an attorney-client relationship where none existed. The Schibels' argument against withdrawal asks the court to ignore the breakdown and force the attorney-client relationship. To do so would violate not only RPC 1.16, but might also put Messrs. Withey and Eymann in jeopardy of violating other RPCs, such as 1.4 (communication). The Schibels cite no authority for the proposition

that a non-corporate party in a civil case is entitled to be represented by counsel after there has been a breakdown in communication and no such authority exists. Here, the trial court made the only responsible choice in granting Messrs. Withey's and Eymann's withdrawal request. The Plaintiffs' actions left the trial court no other choice.

3. The Continuance Decision Was Reasonable, Supported by Facts, and Well within the Trial Court's Discretion.

“When a case is set and called for trial, it shall be tried or dismissed unless good cause is shown for a continuance.” Spokane County LCR 40(d); CR 40(d). Good cause is not defined in the rules.¹⁰ The burden was on the Schibels to demonstrate good cause for a continuance.

The decision to “grant or deny a motion for a continuance rests within the sound discretion of the trial court.” *State v.*

¹⁰ The term “good cause” is defined in several unrelated regulations and case law. For example, in considering a habeas petition, the Washington Supreme Court looked favorably on a U.S. Supreme Court definition of “good cause” as requiring “something external to the petitioner, something that cannot fairly be attributed to him.” *State v. Dearbone*, 125 Wn.2d 173, 883 P.2d 303 (1994), citing *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). The Washington Administrative Code for the Department of Social and Health Services defines “good cause” in the context of requesting a continuance of a trial date as “a substantial reason or legal justification for failing to appear, to act, or respond to an action” and by reference to CR 60. WAC 388-02-0020(1). In the context of employment law, “good cause” has been defined by the Washington Court of Appeals as “(s)ubstantial reason, one that affords a legal excuse.” *Comfort & Fleming Ins. Brokers, Inc. v. Hoxsey*, 26 Wn. App. 172, 177, 613 P.2d 138 (1980), citing *Black's Law Dictionary* (4th ed. 1968).

Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Trial courts may consider (1) the necessity of reasonably prompt disposition of litigation; (2) the needs of the moving party; (3) the possible prejudice to the adverse party; (4) the prior history of the litigation, including prior continuances granted the moving party; (5) any conditions imposed in the continuances previously granted; and (6) any other matters that have a material bearing on the court's exercise of discretion. *Balandzich v. Demeroto*, 10 Wn. App. 718, 720, 519 P.2d 994, *rev. denied*, 84 Wn.2d 1001 (1974); *accord Downing*, 151 Wn.2d at 273 (finding that courts may consider surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure).

The Schibels argue, in part, that their attorneys' withdrawal entitled them to a continuance. In *Jankelson v. Cisel*, 3 Wn. App. 139, 141-42, 473 P.2d 202 (1970), the court cautioned that a continuance is not an absolute right afforded to parties whose attorneys withdraw:

The withdrawal of an attorney in a civil case or his discharge does not give the party an absolute right of continuance. *Grunewald v. Missouri Pac. R.R.*, 331 F.2d 983 (8th Cir. 1964); *Annot.*, 48 A.L.R.2d 1155 (1956). 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. *Peterson v. Crockett*, 158 Wn. 631, 291 P. 721 (1930).

A trial court may reasonably exercise its discretion to authorize an attorney to withdraw and yet not grant a continuance. *See Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 786, 727 P.2d 687 (1986) (the court noted that the matter had been continued once before with the specification that no further continuances would be granted, the prejudicial impact of a continuance on a party who is prepared and ready for trial, and the advantages of avoiding delay in litigation whenever possible); *Martonik v. Durkan*, 23 Wn. App. 47, 51, 596 P.2d 1054 (1979) (finding a long delay in prosecution of cause, prior continuances, and the interests of the defendant support denial of continuance). The Schibels inability to find counsel, which by their own admission, was not temporary and was open-ended, was only one *Balandzich* factor and was not dispositive in a request for a continuance as the *Jankelson*, *Willapa Trading Co.* and *Martonik* cases demonstrate – the Court has tremendous discretion to control its docket and avoid the prejudice to a party, including a defendant, like Mr. Johnson.

Mr. Johnson persuasively argued to the trial court that further delay would prejudice him because of the lapse of time since the events at issue in the complaint:

Memories don't improve with time. *See Tyson v. Tyson*, 107 Wn.2d 72, 75-76, 727 P.2d 226 (1986) (evidence becomes less trustworthy as time passes and witnesses' memories fade or are colored by intervening events and experiences). Trial courts

should consider possible prejudice to the non-moving party. *Balandzich*, 10 Wn. App. at 720 (third factor). Here, the allegations on which Plaintiffs' causes of action rest involve activity in one of Mr. Johnson's commercial rentals that occurred over six years ago. To the extent that the jury's decision on this case will rely on the testimony of witnesses concerning the events of 2004, it is prejudicial to Mr. Johnson to delay the trial any more because his memory and the memory of all the other witnesses will only worsen between now and some future trial date.

CP 527:18-528:1. Mr. Johnson supported his objection with an explanation about his age (then, 79) and the possibility that continuing delays in the trial might hamper his ability to remember events and defend himself:

Justice delayed is justice denied. *See Lane v. City of Seattle*, 164 Wn.2d 875, 888, 194 P.3d 977 (2008). Trial courts should consider the prior history of the litigation, including prior continuances granted the moving party. *Balandzich*, 10 Wn. App. at 720. As of today, the allegations in the Plaintiffs' Complaint have been hanging over Mr. Johnson's head for almost four years. He has prepared for trial and been within a month of a trial date four times (July 2008, March 2010, July 2010, and October 2010). The last continuance requested by Mr. Johnson (as part of a stipulated motion) was in November 2007. Preparing for trial is stressful and interrupts Mr. Johnson's retirement. Mr. Johnson deserves to be able to finally face a jury of his peers and put the Plaintiffs' allegations behind him.

CP 528:2-11 (internal citations omitted). Mr. Johnson was able to show that at the time of the October 27, 2010 hearing he had already

come within a month of trial on four separate occasions. In July 2008 and in July 2010, continuances were unexpectedly granted with less than two weeks before trial. At the time of the request for a continuance in October 2010, the Schibels had no timeline for the continuance and no reasonable prospect of being able to find representation for a subsequent trial date. VRP 134:13-135:11.

The record reflects that the trial court properly weighed a variety of factors, which included (1) Mr. Johnson's justified objection to further continuances and the setting of a seventh trial date; (2) the demonstrated prejudice of the requested open-ended continuance on Mr. Johnson's ability to defend himself in the against the Schibels' claims; and, (3) the dim prospect that the Schibels would be able to retain an attorney to take the case given the lien issue. Under the circumstances, the trial court's decision to deny the continuance request was reasonable, fully supported by the record, and well within the trial court's zone of discretion.

B. The Schibels' Appeal of the Dismissal Is Moot Because the Trial Court's Dismissal of a Settled Case Is Not Prejudicial.

A case is moot if a court can no longer provide effective relief. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). "It is a general rule that, where only moot questions or abstract propositions are involved, ... the appeal ... should be dismissed." *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d

512 (1972). Here, the parties reached an agreement to release their respective claims. CP 694 (¶7). They agreed to a dismissal of the case “upon execution of a more formal settlement agreement and release document.” CP 684. Mr. Schibel admitted the existence, terms, and their agreement to the settlement in open court on November 24, 2010. VRP 150:3-6; *see also* VRP 150:25 (“We agreed to the oral agreement.”). The settlement was the reason no party appeared for trial on November 1, 2010. *See* CP 679 (¶6); VRP 145:19-21, 152:3-4. Given the fact that the parties released their respective claims and took actions in reliance on those releases, the appeal of the dismissal is moot.

C. If the Case Is Remanded, Defendant’s Counterclaim Should Survive and Retain Vitality in Any Further Litigation at Trial Court.

The Schibels are not entitled to the relief they seek in their appeal. In the event, however, the Court remands any of the Schibels’ claims to the trial court, Mr. Johnson asks the Court to also preserve his counterclaim for further disposition at the trial court.

V. CONCLUSION

The trial court's decisions granting the withdrawal of Messrs. Eymann and Withey as well as the denial of the Schibels' request for a continuance were justified and an appropriate exercise of the trial court's discretion. The Schibels' appeal of the dismissal is moot because the Schibels reached an agreement to release their claims against Mr. Johnson. With no remaining claims against Mr. Johnson, there is no meaningful relief this Court can grant the Schibels.

Respectfully submitted this 6th day of December, 2011.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of December, 2011, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Kenneth H. Kato, WSBA # 6400	<input type="checkbox"/>	VIA HAND DELIVERY
Attorney for Appellants	<input type="checkbox"/>	VIA FACSIMILE
1020 N. Washington St.	<input checked="" type="checkbox"/>	VIA U.S. MAIL
Spokane, WA 99201		
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DATED this 6th day of December, 2011.

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