

**FILED**

JUN 06 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

31910-5

**COURT OF APPEALS, DIVISION THREE  
STATE OF WASHINGTON**

**WSU and the State of Washington, Respondent  
v.  
Sandra Bernklow, Appellant**

**APPELLANT'S REPLY**

Sandra Bernklow  
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509-758-3385

## **INTRODUCTION**

WSU's Response arrived "incognito", no return name or address on the envelope, no proof of service, served by mail on May 3, 2016. Appellant could not retrieve it promptly but did not want to seek another extension and deliberately keeps this Reply as abbreviated as possible:

## **REPLY TO RESPONDENT'S STANDARD OF REVIEW**

(Response pages 5/6)

Exactly as WSU did in the trial court, WSU quotes "no genuine issue of material fact" law sans that genre of motion being before either the trial court or the appellate court, discussed in depth below and here already.

That is a minor point compared to the fact that WSU does not rebut any of the assertions made in Appellant's Brief, pages 11-13:

1. Labels on pleadings are not controlling....appellate court has extensive authority to put substance over any rule or policy to effectuate justice....laches is an anomaly of law which appears on lists of

affirmative defenses but logically should be mandated argued at the inception of a case, and just as if a case barred as stale was appealed it would not actually be the review of a summary judgment decision regardless of how labelled or what forms of decision were utilized, the same thinking applies when laches is denied and appealed.

No standard of review is offered by WSU specific to laches motions. (Yes, other procedural arguments made were subject to summary judgment/dismissal law but WSU did not separate issues in its discussion.)

2. Appellant cited *ExRel Bond v. State*, 383 P2nd, 288 (1963) as exemplifying a court confusing summary judgment language, probably following the labelling of the parties, and yet distinguishing laches adjudication from typical summary judgment adjudication in concluding that ***“where uncontroverted facts raise a reasonable inference of laches, the party opposing laches must establish that laches does not apply”***. See page 13 of Appellant's Brief.

This is critical to the current posture of the case since WSU did not below, and cannot now, disagree that Appellant at no time changed addresses or in any way played any part in WSU's decision to delay over 4 years even after announcing that without further payment they would

proceed immediately. Judge Acey below had the quintessential case of “uncontroverted facts of reasonable inference of laches” before him, as does this Court now. WSU does not rebut this case.

WSU's assertion that RCW19.16.500 exists to protect the state when it has to turn matters over to collection agencies is a moot point. Appellant disputed the “debt” with WSU and collection agencies do not adjudicate disputes. And as stated in the Motion below, although Appellant invested the huge sum of hours necessary to research/draft on the issue of state immunity as WSU had, at the time of the dispute, stated that it was immune from a laches defense and would simply wait out the malpractice statute then file. But for such unethical state strategy, we would not be here today.

**REPLY TO RESPONDENT'S LACHES ARGUEMENT**

(Response pages 7-10)

WSU made no argument below as to the reasonableness of its huge delay presumably as no argument was available, and as Judge Acey quite noticeably refused to inquire as to why WSU delayed...making it impossible for a valid laches determination to be made at all. This Court cannot add argument not made below either in pleading or in oral hearing especially when it is uncontroverted that

Appellant demanded it below.

Yet it is noteworthy that WSU would now, after multiple prior opportunities declined, argue that it is not correct that “a creditor must sue on an unpaid claim as soon as it becomes due, or risk losing its position”, ***when that is the exact position stated and supported with case law without rebuttal below.*** See pages 15-18 of Appellant's Brief, especially the line of cases cited on page 15 for the exact conclusion that a creditor loses his right to pursue ***“unless he has shown himself ready, desirous, prompt and eager..the parties must come promptly, as soon as the nature of the case will permit..the great weight of authority is against the statute of limitations {protecting the delaying party}”*** *Stewart v. Johnston*, 30 WN 2n 925, 935-36, (1948).

WSU did not, and cannot, rebut that timeliness is a question of promptness when the “debtor” is totally innocent of any delaying tactic and no legal barrier exists. Oddly, WSU then grasps for reasons a creditor might delay which not only do not change Washington's anti-delay case law support of the doctrine of laches, but which have no relevance here as WSU did in fact eventually pursue- and of course one cannot substitute “referred to a collection agency” for filing a cause of action even if said agency did not itself drop pursuit as occurred here

(the very point of appellant having exhaustively researched and presented below Washington's laches law- years of nonpursuit.)

WSU then refers to Appellant having the burden of proof as if no contrary discussion was before the Court and sans having argued against the law presented on that point.

WSU finally argues that a contract for land case not being an account receivable case it is not applicable and notes that in the land case the Court noted that time is not of the essence in every case. This disingenuously ignores the very point of recognizing that unless the nature of the case itself demands delay, delay is presumptively unreasonable. **EVEN MORE ODDLY, WSU THEN ESTABLISHES APPELLANT'S POSITION IN STATING, "IN THE PRESENT CASE, THE VALUE OF THE CLAIMS OF THE PARTIES WAS FIXED AND LIQUIDATED. TIME WAS OF THE ESSENCE."** Indeed, from WSU's point of view, their claim was fixed and neither practical nor legal barrier prevented filing suit, therefor time was of the essence.

WSU further ignores the fact that the land case (*Hogan v. Kyle*) was decided in 1894 and was actually cited by the 1948 Court as supporting their conclusion that ***the parties must come promptly as***

*soon as the nature of the case will permit....Stewart v. Johnston, supra.*

WSU not only failing to establish timely filing but actually using Appellant's own cited case and their own quote from the case, no true argument of timeliness is before the Court now and without timeliness is matters not whether WSU's argument on damages is logical or not....but it is not:

**REPLY TO RESPONDENT'S DAMAGES ARGUEMENT**

(Response pages 9-10)

This Court has already been directed to the many pages of both legal analysis of the damages element in laches law and factual analysis in Appellant's pleading below...repeated multiple times in other pleadings both below and in this Court and will not repeat the law and the list of damages, both personal and against the citizens of the state of Washington in general, ad finitum. As for WSU's proffered case, Appellant herself raised *Crodle v. Dodge* both in the trial court and again here as it is a 1917 case unequivocally rejected in the 1980 case of *Hayden v. Port Townsend*, 93 Wash. 2D, 870, 874-75: **“DAMAGE IS NOT A QUESTION OF WHETHER OR NOT THE HARM FROM THE DELAY IS MATERIALLY PREJUDICIAL BUT A**

**QUESTION OF WHETHER OR NOT THE ABILITY TO DEFEND IS TRAMPLED UPON...** As repeatedly pointed out previously below and here, *Hayden* specifically refused to budge from the strict requirement that actions be filed as soon as the nature of the case permits in accepting the original justification of the doctrine of laches that defensive ability is always trampled upon with delay. Put another way, *Hayden* finds the inevitable loss of defensive ability that delay causes to itself be so prejudicial that the state cannot create an additional level by adding the word “material” and requiring damage unique to the moving party be demonstrated.

WSU offers no subsequent case law obliterating the Supreme Court's *Hayden* decision that delay itself generally establishes damage—a clear warning that one who unilaterally delays cannot then avoid the consequences of delay by arguing damages, at least not in any but the rarest of cases where none of the traditional concerns of delay (memory/witnesses/records/the inherent unfairness of disappearing and then pouncing years later) can be shown. Certainly a state facility veterinarian versus a private party pet owner is not such a case— and yet Appellant lodged specific damage points below as the trial court's bias was blatant and caution dictated “covering all the bases”.

**REPLY TO RESPONDENT'S FINAL COMMENTS**

(Response pages 10/11)

As always, WSU misrepresents the record. WSU states that Appellant's Recusal motion "simply asserts that Judge Acey was somehow biased against her because he denied her motion" and that it cited no standards and no legal principals requiring recusal. The Recusal Motion was in fact involved properly researched and drafted citing relevant recusal principals and a list evidencing predetermination bias. WSU did not understand the difference between a no-genuine-issue-of-material-fact summary judgment motion and a question-of-law summary judgment motion below; does WSU now confuse predetermination bias with conflict-of-interest bias?

Similarly WSU states that "somehow a defect in the pleading is asserted with no specific citation of authority..." Again, Appellant's motion below speaks for itself. WSU offered absolutely no rebuttal to the fully supported argument that supporting attachments are in fact part of a Complaint and must be served with the pleading, or any of the other procedural arguments. WSU did not deny failing to serve the attachments. Judge Acey refused to inquire on the subject, just as he refused to elicit any explanation for the delay in filing. With no rebuttal

to the procedural arguments the trial court was left no choice, in theory, but to grant the motion on those procedural arguments which could have resulted in the case settling before refiling; and procedural arguments by definition render WSU's "bench trial" a nonsequitor.

### **CONCLUSION**

The unfairness to the citizens of the state of Washington in allowing the state itself to grossly delay an action is self-evident. In an ideal world this case would not only result in reversal of the decision below and in any compensation to Appellant possible, but it would also result in Washington attorney's affiliated with collection agencies being ordered to attach all supporting documentation to complaints with the penalty for noncompliance being dismissal with prejudice, and in all state agencies being ordered to cease intentionally delaying filing under any theory at all when the party alleged to owe a debt is in effect, or literally, begging the "creditor" to let a court determine the merits and doing nothing to delay that determination.

Obviously Appellant, living in the northwest only due to a critical health crash 10 years ago, unemployed, unmarried, and indigent, invested many thousands of dollars worth of time in fighting the injustice of the original delayed claim and then fighting Judge Acey's

injustice first in the case itself and then in his refusal to forward the indigency application to the Supreme Court knowing that would force Appellant to either quit the fight or invest another huge number of hours in trips to the University of Idaho law library to research indigency and appealing an abusive refusal to refer the matter to the Supreme Court.

Appellant respectfully asks this Court to exercise the vast power cited in the discretionary review motion requested by the Court although appeal as-of-right applied to undo the travesty below, refund the filing fee/copy forwarding fees, etc.

Dated: June 4, 2016

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

Washington State Court of Appeals Case number 319105

I, Sandra Bernklow, do hereby swear under penalty of perjury of the laws of the state of Washington that on this date of June 4, 2016, I deposited in the United States mail in Lewiston Idaho, with proper postage affixed, the attached document entitled:

Appellant's Reply

addressed to Respondent's attorney of record Jason Woehler at his address of record:

Jason Woehler, ESQ.  
705 2<sup>nd</sup> Avenue, Suite 605  
Seattle, WA. 98104

June 4, 2016

S Bernklow