

**FILED**

MAY 18 2015

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

No. 326152-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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JAMES T. MORROW and DAWN M. MORROW, husband and wife,

Appellants,

v.

VICKI A. TOMSHA et vir,

Respondent.

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RESPONDENT'S BRIEF

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## I. COUNTERSTATEMENT OF THE ISSUES

Issue 1.: Was Dismissal of the plaintiff's lawsuit within the discretion of the Trial Court when the record clearly establishes a willful violation of the Trial court's Order to Show Cause.

## II. COUNTERSTATEMENT OF THE CASE

On February 18, 2014, Attorney John A. Bardelli filed a Complaint on behalf of Appellants James and Dawn Morrow, alleging his clients suffered personal injury as a result of a motor vehicle accident. The Complaint alleged the injuries were caused by Defendant driver Vicki Tomsha. CP 3 – 5.

In accordance with standard operating procedure in Spokane County Superior Court, at the same time the case was filed, a Case Assignment Notice and Order was issued by the Clerk's Office along with which prominently notes the department and judicial officer the case has been assigned to and the time the status conference is to take place. CP 26. In this instance, the case was assigned to Judge Michael P. Price and a Case Status Conference was scheduled for May 23, 2014 at 9 AM. CP 8.

On May 23, 2014, Appellants failed to appear at the case status conference. CP 9. Respondent also did not appear, but there is no

evidence in the record that Respondent had even been served by May 23, 2014 or if served, that Defendant had been provided with a copy of the Case Assignment Notice and Order scheduling the May 23, 2014 case status conference. A Notice of Appearance by Attorney Alina Polyak on behalf of Respondent was not filed until almost a week later, on May 29, 2014. CP 11 – 13.

On May 23, 2014, as a result of the failure of the Appellants to appear, Judge Price issued an Order to Show Cause, which ordered the Appellant and Respondent to appear in court on June 6, 2014 at 8:30 a.m. and show cause why the case should not be dismissed. CP 9 – 10. The Order explicitly stated in bold and in all capital letters: “FAILURE TO COMPLY WITH THIS ORDER WILL RESULT IN DISMISSAL WITH PREJUDICE”. CP 10. Since there had been no appearance to date by Respondent, the Order to Show Cause was mailed solely to Appellants’ Counsel John Bardelli. CP 10. There is no evidence in the record to show that Appellants ever sent the Order to Show Cause to Respondent’s Counsel once she appeared six days later, which was just a week prior to the June 6, 2014 hearing date.

On June 6, 2014, the Court issued an Order of Dismissal as a result of neither party having appeared at the show cause hearing. CP 14 – 15.

A copy of the Order of Dismissal was mailed to both Appellants' Counsel Bardelli and Respondent's Counsel Ms. Polyak by the Court. CP 15. This is the first indication in the record that Respondent had any notice of the proceedings which had occurred to date.

On June 13, 2014, Attorney Bardelli filed a Motion for Reconsideration to Set Aside Order of Dismissal and to Retain Case as Active. CP 16 – 20. While the Notice of Motion indicates the Motion is directed to the Court and to Respondent's Counsel Polyak, neither the motion nor the Notice of Hearing contain an Affidavit or Declaration of Service to show Respondent ever was sent copies of these pleadings. CP 16 – 22.

Despite the fact that that the issuance of Case Assignment Notices and the concurrent setting of Case Status Conferences occur automatically at the time of filing in every civil case, Mr. Bardelli's affidavit in support of Appellants' motion for reconsideration suggested his office may never have received the Status Conference Notice and further indicated it had not been calendared. CP 18, 24 – 26.

The Affidavit did, however, specifically acknowledge that Attorney Bardelli did receive the Order to Show Cause. It also noted that

Bardelli had two other matters set for hearing on June 6, 2014, a status conference at 9 a.m. and a motion at 9:30. CP 18.

Counsel's Affidavit did not offer any explanation, however, for why he failed to contact Judge Price prior to June 6, 2014 regarding his potential conflict. It offered no explanation for why he didn't stop by Judge Price's courtroom on the day of the hearing to explain that he would also be conducting other hearings. It offered no explanation for why he left the courthouse without stopping by Judge Price's Courtroom to explain his failure to appear. CP 17 – 20, 24 – 27. Counsel didn't contact Judge Price or his assistant until after he left the courthouse and returned to his office. CP 19.

On June 17, 2014, Judge Price issued an Order denying Plaintiff's Motion for Reconsideration. In his Order, he set forth explicit Findings of Fact and Conclusions of Law detailing the events at issue. CP 24 - 27

### III. ARGUMENT

#### **A. Standard of Review**

The question presented on review was whether, under the facts and circumstances of the case, there was an abuse of discretion in the underlying Court's dismissal of Appellants' case. *Jewell v. City of Kirkland*, 50 Wa. App. 813, 818, 750 P.2d 1307 (1988). In *Jewell*, the

Court turned to CR 37 in determining whether dismissal of a petition for failing to timely deposit the cost of preparing record was an abuse of discretion. The Court noted:

**In this state CR 37 vests broad discretion in the trial court as to choice of sanctions. A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Id. Quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wa. App. 223, 548 P.2d 558 (1976).**

The Court went on to later state:

**Abuse of discretion does not exist unless it can be held that no reasonable person would have ruled as the trial court did on the facts before it. *Jewell* at 818.**

**B. The Court properly dismissed the case based on Appellant's willful failure to appear at the Show Cause hearing, Respondent's conduct is not at issue.**

Throughout Appellants' brief, Appellant attempts to make an issue of Defendant's "failure to appear" and the fact that "only one party was sanctioned", apparently in an effort to suggest prejudice on the part of Judge Price or to somehow mitigate Appellants' willful failure to appear for either the May 23, 2014 Status Conference or the June 6, 2014 Show Cause Hearing. This is factually very misleading and inaccurate.

The record clearly indicates that Respondent did not even appear in the case until May 29, 2014, almost a week after the Status Conference had taken place and less than a week before the Show Cause Hearing.

There is nothing in the record to indicate that Appellant had even served Respondent prior to the Status Conference or if service had taken place, that Appellant had provided Respondent with a copy of the Case Assignment Notice and Order which scheduled the May 23, 2014 case status conference. Indeed, if Appellant had provided Respondent with a copy of the Notice of Status Conference, prior to the Status Conference itself, it would totally undercut Appellant's suggestion in their Motion for Reconsideration that they may never have received a copy of it themselves and that is why it was not calendared. The reason Respondent did not appear for the Status Conference is quite clear, unlike Appellant, Respondent had no notice of it.

The same is true with respect to the Show Cause hearing. The record shows the Order to Show Cause was sent by the Court solely to Counsel for Appellants. There is nothing in the record to indicate it was ever sent to Respondent or that Respondent's Counsel was ever notified that the Court had ordered both parties to appear on June 6, 2014. The first time the record reflects Defendant had any notice of court proceedings to date was when the Court issued its' June 6, 2014 Order of Dismissal. In fact, when Appellant moved for reconsideration, there is nothing to indicate he properly served Ms. Polyak with these pleadings.

The Court properly dismissed the case based on Counsel for Appellant's willful failure to appear at the Show Cause hearing. The

dismissal has nothing to do with Respondent's conduct. There is nothing inequitable in how the Court treated the two parties nor was there ever any basis with which to sanction Defendant. Appellant's 'red herring' arguments should be ignored as an intended distraction from the real issue, the dismissal of the case for Appellants' willful failure to appear at the status conference and the show cause hearing.

**C. The Trial Court had the authority to dismiss this action for noncompliance with its' Order to Show Cause.**

Under CR 41(b), a trial court has the authority to dismiss an action for noncompliance with a court order or court rules. *Woodhead v. Discount Waterbeds, Inc.* 78 Wash.App. 125, 896 P.2d 66, (1995), citing *Snohomish Cy. v. Thorp Meats*, 110 Wash.2d 163, 166, 169, 750 P.2d 1251 (1988); *Walker v. Bonney-Watson Co.*, 64 Wash.App. 27, 37, 823 P.2d 518 (1992) (under the first sentence of CR 41(b), a trial court may exercise its discretion to dismiss an action based on a party's willful noncompliance with a reasonable court order); *Jewell v. Kirkland*, 50 Wash.App. 813, 817, 750 P.2d 1307 (1988) (the trial court is vested with the authority to impose reasonable sanctions for the breach of reasonable rules).

A trial court also has the discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases.

*Wagner v. McDonald*, 10 Wash.App. 213, 217, 516 P.2d 1051 (1973). It may impose such sanctions as it deems appropriate for violation of its scheduling orders to effectively manage its caseload, minimize backlog, and conserve scarce judicial resources. *Id.*

Given the Court' broad discretion, and its' public mandate, to properly manage its docket and resources, dismissal here for Appellants' willful failure to appear for the show cause hearing was appropriate. The basis for dismissal is set forth in great detail in the Trial court's response to Appellants' Motion for Reconsideration. CP 24 – 27. Appellant places incorrect emphasis on the use by the Court of the word "inactive."

**D. Dismissal of Appellants' case is proper given Appellants' willful failure to appear for the Case Status Conference and the Show Cause hearing.**

All civil cases filed in Spokane County Superior Court are provided a case scheduling order which prominently notes the department and judicial officer that case has been assigned to and the time the status conference is to take place. CP 26. A Case Assignment Notice assigning the case to Judge Michael Price and setting a Case Status Conference for May 23, 2104 was issued the same day Appellant filed their case on February 18, 2014 in accordance with this very routine procedure. CP 8. This fact is conveniently ignored by Appellants. Counsel for Appellant's Affidavit in support of Appellants' Motion for Reconsideration dances

around this point, but it is important to note, it never does actually state they never got it, just that it wasn't placed in the file. CP 18 & 26. There is no explanation offered as to whether Counsel for Appellant filed the Summons and Complaint himself or had someone do it on his behalf or why, if in fact the Case Assignment Notice was not received on February 18, 2014, efforts were not made to obtain a copy over the course of next three months in order to ensure the assigned Judge was properly noted in Appellants' file and the Case Status Conference properly calendared.

Even if Appellants' ignoring such routine procedure in newly filed cases fails to rise to the level of willful behavior, the same cannot be said of Appellants' failure to appear at the Show Cause hearing. Appellants' Counsel readily admitted his office received the Order to Show Cause, which set a hearing on June 6, 2014 at 8:30 a.m. CP 18. Appellants' Affidavit notes two other matters set for the same day, a "Trial Setting Scheduling Conference," which was likely a routine Case Status Conference, at 8:30 a.m. and a motion hearing, which Counsel acknowledges did not start until 9:20 a.m. C.P. 18.

What is completely lacking in Counsel's Affidavit is any explanation whatsoever as to why Appellants could not appear for the Show Cause Hearing. CP 17 – 20, 25 – 27. The Affidavit does not explicitly state that the 8:30 a.m. "Trial Setting Scheduling Conference," prevented him from appearing for the Show Cause hearing. It offers no

specifics as to how long he was present for the 8:30 trial setting, a routine matter which typically lasts a matter of minutes if they are handled in open court and even less so if they are handled by the Judge's Judicial Assistant. Like the statements made as to whether a Status Conference Notice was ever received, the Affidavit dances around, but do not directly address the core question, why didn't Appellant appear at the Show Cause during the 40 minutes between the 8:30 start time and the beginning of Counsel's 9:40 a.m. hearing? CP 18 – 19.

It is not unusual at all for attorneys to have more than one matter scheduled, in different courtrooms on Friday motion day in Superior Court. The remedy is quite easy, if the attorney plans to attend them all, he or she need only put the applicable Judges on notice that they are indeed present at the courthouse, that they plan to attend the hearing, but that they are required to be in another courtroom first. This can be done simply by stopping by the two courtrooms in question prior to the start of either hearing.

If in fact, the attorney concludes this is not going to be possible, it is incumbent on the attorney to contact the Court prior to the hearing date to explain the conflict and request a continuance. Simply not showing up is not an option. In this instance, Counsel failed to do any of this, he simply failed to appear and actually left the courthouse and returned to his office before attempting to contact the Court.

Appellant argues the Court did not make a finding of willfulness.

This is ridiculous. The Court explicitly stated:

**Here, counsel offers no viable excuse or basis to explain or otherwise make clear why counsel could not have notified this department in advance of two separate hearings that counsel would either be unable to appear or had schedule conflicts. Instead Counsel simply failed to appear at both hearings... . CP 27.**

Any violation of an explicit court order without reasonable excuse or justification must be considered a willful act. *Anderson v. Munundro*, 24 Wash. App. 569, 574, 604 P.2d. 181 (1979). Here, Counsel offers no explanation for why he did nothing at all, either in advance of the hearing or the day of the hearing.

**E. Dismissal of this action was the proper remedy.**

The State Supreme Court in an analogous situation, after pointing out that default judgments are not favored under the law, stated:

**Balanced against that principle is the necessity of having a responsive and responsible system which mandates compliance with judicial summons, that is, a structured, orderly system not dependent upon the whims of those who participate therein, whether by choice or by the coercion of a summons and complaint.**

Id. citing *Griggs v. Averbek Realty, Inc.*, 92 Wash.2d 576, 581, 599 P.2d 1289, 1292 (1979).

As discussed earlier, under the first sentence of CR 41(b), a trial court has the authority to dismiss an action for noncompliance with a court order or court rules. This authority is the direct result of the need for **“a structured, orderly system not dependent upon the whims of those who participate therein.”** All those who seek redress in the courts are negatively affected or prejudiced by those who waste judicial resources or willfully ignore court rules and valid orders of the court. Again, it is willful conduct, such as has been shown here, that merits dismissal, because willful conduct is what harms the system most.

Had Appellant submitted an affidavit that set forth facts which supported a finding of excusable neglect, it is unlikely this appeal would be taking place. But that is not the case. Appellants’ Counsel offered no specific explanation at all for his failure to contact the Court prior to the hearing if there was a problem, the day of the hearing to explain his need to be at the end of the docket in one Courtroom so he could be at the beginning of the docket in another, or why he didn’t immediately go see Judge Price after his motion ended.

If this Court imposes a requirement of actual prejudice in preparing for trial on the part of the Respondent, measured solely by how much time remains prior to the trial date, before dismissal is merited, and instead

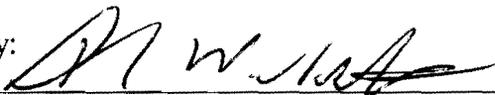
imposing a nominal monetary fine, it is tantamount to ruling that dismissal is never an option at the outset or early stages of any case. This is Appellant is suggesting regarding a \$250 sanction being appropriate. This is bad policy and precedent. It will allow Attorneys to pick and choose between which orders they follow and which they will ignore and simply pay a nominal monetary sanction. Why is a court order at the outset of the case any less important than in the middle or at the end of a case. The appropriate sanction should be drive by the conduct of the attorney. Dismissal is clearly warranted in the case of a willful failure to meet a court order, particularity when the order in question explicitly states: "FAILURE TO COMPLY WITH THIS ORDER WILL RESULT IN DISMISSAL WITH PREJUDICE". CP 10.

#### IV. CONCLUSION

For the reasons stated above, the court is respectfully requested to uphold the lower court's dismissal of this case.

Respectfully submitted this 15<sup>th</sup> day of May, 2015.

LAW OFFICES OF RAYMOND W. SCHUTTS

By:   
Raymond W. Schutts, WSBA No. 19061  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 15<sup>th</sup> day of May, 2015, I sent for delivery a true and correct copy of **RESPONDENT'S BRIEF** by the method indicated below, and addressed to the following:

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<input checked="" type="checkbox"/>	U.S. MAIL
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Debi R. Vocca