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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 34150-0-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DONNA and JEFF ZINK, et ux.

v.

BENTON COUNTY, et al.

REPLY BRIEF OF APPELLANT DONNA ZINK

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Table of Contents

I.	Response to Introduction	1
II.	Response	5
III.	Conclusion	9
IV.	Certification of Service.....	11

TABLE OF AUTHORITIES

Washington State Supreme Court

Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 881 P.2d 216 (1994) 2, 4

Washington State Appellate Court

Davies v. Holy Family Hosp., 144 Wn. App. 483, 183 P.3d 283 (2008)8

Rules of Appellate Procedure

RAP 10.3.....1

Rules of Civil Procedure

CR 6(d)7

LCR 7(b)(7)(A).....7

LCR 7(b)(7)(f)(iv)8

CR 12(b) passim

I. RESPONSE TO INTRODUCTION

Benton County argues that Zink's sole basis and only argument made for this appeal is that Benton County(BC) allegedly failed to note its motion to dismiss properly. BC claims that Zink did not provide any argument and citation to authority in support of assignments of error as required by RAP 10.3. BC is mistaken. Zink provided no less than four Supreme Court cases stating that a trial court can only dismiss a claim under CR 12(b)(6) if the Defendant, BC, can prove beyond a reasonable doubt that Plaintiff, Zink, can prove no set of facts, consistent with the complaint entitling plaintiff to the requested relief (Opening Brief of Zink, pg. 19, V. Argument). Further, Zink provided legal authority clearly indicating that BC had the burden of proof that no facts supported Zink's claims (*Id.* pg. 24—25). Finally, Zink provided argument in opening briefing clearly showing that to dismiss a complaint under CR 12(b) is not only a question of law reviewed de novo, the Supreme Court has clearly stated that Plaintiff's factual allegations are presumed to be true by the trial court, even if hypothetical, until proven otherwise by the Defendant (*Id.* 19-20).¹

¹ A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court. **Courts should dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. "Under this rule, a plaintiff's allegations are presumed to be true", and "a court may consider hypothetical facts not part of the formal record."** CR 12(b)(6) motions

On October 6, 2015, Zink initiated Benton County Superior Court Cause #15-2-02298-6 by filing a summons and a complaint outlining the facts surrounding the notification of hundreds of convicted sex offenders by Officials employed by Benton County in responding to a request for access to public criminal records (CP 329-339).

In the complaint, Zink provided the Court with a copy of the original complaint submitted to Benton County on August 6, 2015 (CP 13-53). In the complaint submitted to the Benton County Board of Commissioners, in Prosser Washington as required by RCW 4.96.020 (CP 14-18), Zink provided evidence of the facts showing Benton County Officials notified hundreds of convicted sex offenders of her request for access to sex offender registration information through both personal contact and media press release (CP 19-24; 27-29; 34).

Zink provided evidence that Benton County had a history of threatening to notify third party convicted sex offenders prior to release of information to allow them the opportunity to withdraw their request (CP 20, 21). The evidence provided to the court shows that Dr. Tolcacher, Superintendent of the Prosser School District, made a similar request months prior to Zink's request for access to the same sex offender

should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994)(footnotes removed)(emphasis added).

information (CP 20). The evidence shows that Dr. Tolcacher sought an opinion from the State's Attorney General's Office concerning whether sex offender registration information was exempt in early 2013 (CP 25-26). After the opinion of the attorney general was provided, and despite the lack of exemption, BC informed Dr. Tolcacher that the records would be released only after BC notified all convicted sex offenders affected by the request (CP 20). Dr. Tolcacher withdrew his request.

Zink provided e-mails received from sex offenders and others upset about her request showing that the notification and ensuing intimidation and harassment were directly caused by BC (CP 27; 30-31; 35). Zink provided evidence that she notified Mr. Lukson of the e-mails she received due to his notification letter containing her contact information (CP 32-33; 39-) and the press release sent out by BC (CP 34). Which resulted in further harassment, threats of harm and intimidation (CP 36-38; 39-40; 41; 43-51).

Zink provided evidence that BC needlessly caused economic loss and loss of resources when litigation was initiated against her to enjoin the release of non-exempt records maintained by BC responsive to Zink's request (CP 42; 52). Zink provided evidence that BC notified more sex offenders of the July 15, 2013, request, on July 1, 2015; nearly two years after Zink's initial request (CP 53) causing additional litigation and associated costs.

All evidence supporting Zink's complaint was available to the trial court on December 4, 2015 for review in deciding whether BC had shown, beyond a reasonable doubt, that there were no facts supporting Zink's allegations of harm.

Furthermore, at the hearing to dismiss for failure to state a claim, the only topic discussed was Zink's failure to appear and whether adequate notice was given (RP (December 4, 2015) 2:13-9:2). The trial court based its decision to dismiss under CR 12(b)(6) without any consideration as to the factual basis for Zink's claims or whether BC met their burden of proving that Zink could not, beyond a reasonable doubt, show any facts justifying recovery (CP 333-334).

Courts are allowed dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. "Under this rule, a plaintiff's allegations are presumed to be true", and "a court may consider hypothetical facts not part of the formal record." CR 12(b)(6) motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief."

Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994)(emphasis added).

The trial court applied an improper standard of review in ordering the dismissal of Zink's complaint. Likewise, the trial courts denial of Zink's motion for reconsideration also fails to meet the legal requirements

for dismissing a complaint for failure to state a claim against Defendants upon which relief can be granted. (CP 338). Rather than determining whether any of Zink's claims were adequate or deficient, the trial courts denial of Zink's claims were based on a lack of attendance at a single hearing wherein lack of notice was an issue and the Defendant was made aware of the lack of notice prior to the hearing.

The trial court's findings, conclusions and order to dismiss for failure to state a claim upon which relief could be granted is based on untenable grounds for untenable reasons Whether the trial court felt Zink was gaming the system and should have been present at the hearing on December 4, 2015, the trial court was required to follow the legal authority for dismissal of claims under a CR 12(b)(6) motion and did not do so. This was error and an abuse of the trial court's discretion and this matter should be remanded back for proper consideration of CR 12(b)(6) in dismissing Zink's claims

II. RESPONSE

BC misunderstand the issues and facts of the case. Whether Zink agreed to e-mail service is not at issue. The issue is whether BC provided adequate notice of the hearing held on December 4, 2015 after the motion to dismiss was removed from the regular civil docket available to litigants.

BC admits that they recused Judge Spanner and Judge Swisher always recused himself. Even though BC recurred Spanner, BC argues

that Zink's recusal of Judge VanderSchoor was solely to game the system. If Zink had wanted to game the system she would have waited until the day prior to the hearing to recuse the judge presiding over the civil docket wherein the motion was to be heard. Further, if Zink wanted to game the system, she would not have contacted Mr. Lukson to determine whether he had made arrangements for a different judge to hear the motion due to BC's motion being removed from the regular civil docket approximately 10 days prior to the scheduled hearing giving Lukson ample time to verify a judge had agreed to hear the motion and provide Zink with that information. It was not Zink's obligation or excusable neglect under that is at issue.

Lukson claims Zink was frustrated when she was not aware that a different judge had been assigned. Not only is that a subjective disparaging statement, even if Zink was frustrated, her frustration stemmed from the total failure of BC to abide by court rules and secure a judge five days prior to the hearing; especially in light of the fact that at the time Zink contacted Lukson on November 25, 2015, a judge had still not been assigned (RP (December 4, 2015) 7:12-13).

BC argues that on November 6, 2015, Lukson contacted the Court Administrator requesting to "special set my motion on December 4th in front of one of the other five judges" or on a different date and that he would coordinate with Zink (CP 140-141). Lukson did not contact Zink concerning the request for a "special set" for his motion (153-154). The

evidence provided by Zink clearly shows that BC had a habit of assigning a judge at the last minute (CP 114-115, 155; RP (December 4, 2015) 7:8-16).

Mr. Lukson claims that the Court Administrator had assured him that the motion would go forward and she would have a judge available at the same time as the regular docket. Regardless of that promise, on November 25, 2015, when Zink contacted Lukson to find out if the hearing was scheduled to go forward, no judge had been assigned to hear the motion (CP 275) and per Judge Ekstrom, no judge was assigned to hear the motion until late in the afternoon the day before the hearing was to occur (**I was assigned this file late yesterday as a matter that simply couldn't be heard on the regular docket.**) (RP (December 4, 2015) 7:12-13).

Clearly the hearing was not scheduled five days prior to the hearing date as required by Benton County Local Court Rule 7(b)(7)(A) and CR 12 6(d). Furthermore, Zink was not required to argue “excusable neglect under CR 6(d)² or CR (6)(b).³ Once the hearing was removed from

² A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time. CR 6(d).

³ ¶49 In addition, under CR 6(b) the trial court, for cause shown, may at any time in its discretion enlarge a time period set by court rule or court order. Importantly, however,

the regular civil docket, BC was required to make sure a judge was available to hear the motion five days before the hearing was to occur.

If the **matter is stricken and the moving party desires a hearing, a new note for motion docket must be filed with the Clerk** in accordance with section (A), above. Except for matters continued in open court, a new note for docket is required for motions that are continued.

LCR 7(b)(7)(f)(iv). BC's motion to dismiss under CR 12(b) was stricken from the regular docket when Zink filed her affidavit of prejudice and BC was required to reset the motion on a different docket, other than the regular docket, in front of a different judge. Even if the hearing was conducted by a different judge on the same day, it would not be the regular civil docket and required special notice. BC has not shown any good reason why notice could not have been provided to Zink five days prior to the scheduled hearing as required by court rule.

Finally, BC argues, without evidence, that there was no issue with bench copies. Without a special set, any copies submitted to the court would have gone to the judge presiding over the regular civil docket unless a special set hearing had been set up by the Benton County Superior Court. The judge presiding over the regular civil docket could not

once the adverse party misses the original deadline set forth in CR 56(c), a showing of excusable neglect is required under CR 6(b)(2). *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 500, 183 P.3d 283. (2008)

hear BC's motion. When Zink contacted BC to find out about the hearing, since the judge presiding over the regular civil docket could not hear his motion, had BC followed Local Court Rules, a special set could have been established and the Judge hearing the motion to dismiss would have been able to access the bench copies submitted by Zink. Therefore, the Zink's did not have the same access to the court or the judge as BC did.

III. CONCLUSION

Benton County did not provide Zink with adequate notice of the hearing to dismiss once the hearing was stricken from the regular motion docket. Had Zink been trying to "game the system" and sought to delay resolution of the motion by every means available (CP 327) she would not have contacted Lukson on November 25, 2015 to verify the hearing was scheduled and that a judge had been assigned. Rather, she would simply have waited to either recuse Judge VanderSchoor days prior to the hearing or not contacted Lukson at all and just not attended the hearing.

Once the hearing was stricken from the regular civil docket, it was Lukson's obligation to re-note the hearing and provide a special set with an assigned judge at least five days prior to the hearing date pursuant to local court rules as discussed above and in opening briefing.

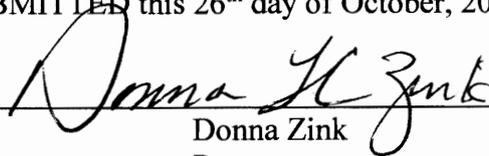
Even if Zink was at fault for not attending a hearing for which she did not receive proper notice, the findings, conclusions and order do not adhere to the mandatory requirements of CR 12(b)(6) for dismissing a

case due to failure to state a claim and the judge abused his discretion in entering the order.

The trial court's decision was based on untenable grounds for untenable reasons and the decision must be reversed and remanded back for proper application of CR 12(b)(6) as mandated by our Supreme Court as specified and discussed above.

RESPECTFULLY SUBMITTED this 26th day of October, 2016.

By

A handwritten signature in cursive script that reads "Donna Zink". The signature is written over a horizontal line.

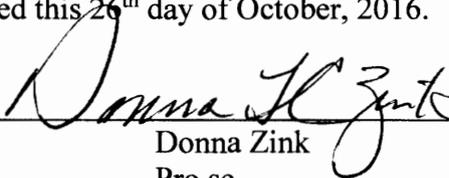
Donna Zink
Pro se

IV. CERTIFICATION OF SERVICE

I declare that on the 26th day of October, 2016, I did send a true and correct copy of appellant's "Reply Brief of Appellant Donna Zink" via e-mail service to the following addresses as agreed upon by all parties to this matter:

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Dated this 26th day of October, 2016.

By 

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