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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.

BRIEF OF APPELLANT DONNA and JEFF ZINK

DONNA and JEFF ZINK
Pro Se Appellants
P.O. Box 263
Mesa, WA 99343
(509) 265-4417
dzink@centurytel.net
jeffzink@centurytel.net

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I. INTRODUCTION

The main issue in this case involves the dismissal of Appellant, Zinks' claim for damages against Benton County (BC) under the criteria set out in Civil Rule (CR) 12(b)(6). Our Supreme Court has opined that a CR 12(b)(6) motion should be granted sparingly in the most unusual case in which the allegations show on the face of the complaint that there is some insuperable bar to relief. In this cause of action, the trial court did not find that there was an insuperable bar preventing the relief requested by Zinks. Rather the trial court based its decision to dismiss Zinks' claims on the fact that the Zinks did not attend a hearing due to lack of proper notice from BC. This is error and an abuse of discretion and the trial court's decision must be reversed and remanded back for proper consideration of BC's motion to dismiss after proper notification of said hearing is provided to the Zinks.

The complaint against Respondent, Benton County, concerns their actions in responding to Appellant, Zinks,' request for registration records and information of those convicted of sex offenses registered in Benton County. Using the Public Records Act (PRA),¹ Benton County needlessly

¹ It must be noted that the Zinks are not seeking penalties under the PRA in this cause of action. Rather, Zinks are seeking damages against Benton County for, among other things, using the PRA to intimidate and harass Ms. Zink into withdrawing her request, cause financial damages through needless third party litigation, as well as damages for

notified hundreds of convicted felons,² informed them of Zink's request, provided them with her exempt contact information (RCW 42.56.240(8)) and encouraged third parties to seek injunction knowing the requested records were not exempt. All of these actions against Zink were done under the color of law (specifically RCW 42.56.540).

The record shows Benton County did not want Zink to access sex offender records and information or post these public records on-line on a private website. Rather than release the requested records as required by the strict rules of the PRA, Benton County notified Zink that they would only release the requested records after notifying hundreds of convicted sex offenders and providing them with Zink's contact information.

Benton County has a history of forcing requesters to withdraw their request for sex offender information and records or have convicted sex offenders notified; subjecting the requester to intimidation, harassment and expensive litigation in order to access the records. Just months prior to Zink's request, Benton County had intimidated the Prosser School District into withdrawing a request for sex offender records and information using the same tactic of threatening to notify third parties despite the fact that the requested records were not exempt.

providing Zink's contact information to convicted sex offenders under RCW 42.56.240(8).

² See RCW 42.56.210(2); 520; 540.

The facts show that Zink was initially given approximately two weeks to withdraw her request or notification would be sent. When Zink immediately objected to the needless notification of third parties as the records were clearly not exempt, Benton County did not wait the two weeks. Rather, Benton County immediately notified hundreds of convicted sex offenders of the request; providing Zink's contact information in violation of RCW 42.56.240(8).

When Zink still refused to withdraw her request, Benton County sent out a press release to the media to make sure as many convicted sex offenders were notified of Zink's request as possible. Benton County's behavior is outrageous and has caused Zink great emotional distress as she was unnecessarily contacted and threatened by convicted felons. Further, Benton County's actions caused the Zinks economic loss as they were eventually summoned into five separate causes of action over a two-year period of time for absolutely no reason.

Benton County's actions were intentional and meant to force Zink to withdraw her request or face harassment, intimidation and financial loss through expensive litigation in order to access non-exempt public records. Even after the trial court enjoined the requested records, claiming them to be exempt,³ Benton County continued to notify third parties of the request

³ The trial court's decisions in the Doe v. Benton County cases was overturned by our Supreme Court in *John Doe A v. Washington State Patrol*, 185 Wn.2d 363 (2016).

rather than claim the court provided exemption, initiating a fifth action causing the Zinks further financial and economic loss. Through Benton County's actions, to the date of this briefing the Zinks has not been able to access the requested records or to post them on-line for over three years; a violation of her right to free speech.

The Zinks not only has a right to file a complaint against Benton County for their egregious actions concerning a request for public records, the Zinks have right to proper notification of a hearing to dismiss those claims and to know which judge is to hear a CR 12(b)(6) motion to dismiss prior to attending the hearing. The trial court's decision that a motion to dismiss pursuant to CR 12(b)(6) can be heard and determined without proper notice to the opposing party is error (LCR 7(b)(7)(E) and an abuse of discretion and must be reversed and remanded back for proper notification under LCR 7 and proper application of CR 12(b)(6) to the facts of this case.

II. ASSIGNMENTS OF ERROR

- 1) The trial court erred and abused its discretion in continuing and deciding a hearing to dismiss a claim of action based solely on the fact that Zink did not respond to the motion nor attend the hearing due to improper notification from Benton County. (CP 106-107; Report of Proceedings (RP) December 4, 2015).

- 2) The trial court erred and abused its discretion in dismissing Zink's claims against Benton County based on untenable reasons and unsustainable grounds (CP 107).
- 3) The trial court erred and abused its discretion in finding that Benton County had provided adequate notice of the motion to dismiss under LCR 7(b)(7)(A) (CP 327).
- 4) The trial court erred and abused its discretion in finding Plaintiffs have sufficient experience with court process that their non-appearance on December 4, 2015 was not excusable since they had notice of a hearing even though a recused judge was presiding over the hearing (CP 327).
- 5) The trial court erred and abused its discretion in concluding Plaintiffs, having failed to respond to the substantive motion, sought to delay the resolution of the motion by every means available; including voluntarily failure to appear in an attempt to further this goal (CP 327).
- 6) The trial court erred and abused its discretion by shifting the burden of notification of a hearing onto Zink stating "[t]he maintenance of an action imposes obligations upon the Plaintiff which were not met in this case (CP 327).
- 7) The trial court erred and abused its discretion in concluding that Zink improperly refuse to attend a hearing for which no judge had been assigned and no notice had been provided (CP 327).
- 8) The trial court erred and abused it's discretion in ordering the dismissal of Zink's claims (CP 106-107).

III. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err in dismissing Zinks' claims due to a mistaken belief that the Zinks "failed to respond to the substantive motion, sought to delay the resolution of the motion by every means available (other than those that would have been proper), and voluntarily failed to appear in an attempt to further this goal" (CP 327)?
2. Did Benton County have a responsibility to arrange a proper hearing for their CR 12(b)(6) motion and provide the Zinks with proper notification to include the presiding judge?
3. Did the trial court err and abuse its discretion in determining Benton County had provided proper notice?
4. Did the trial court err and abuse its discretion in determining the Zinks had an obligation to attend a hearing for which proper notice was not provided?
5. Did the trial court err and abuse its discretion in dismissing Zinks' claims based solely on the fact that he Zinks did not meet their obligations to attend a hearing for which proper notice was not provided?
6. Did Benton County meet its burden of proof that Zinks' tort claims for damages failed to state any grounds for relief pursuant to CR 12(b)(6)?

IV. STATEMENT OF THE FACTS

On October 6, 2015, Appellants, Zinks, filed this cause of action in the Benton County Superior Court. (CP 1-55). The Benton County Superior

Court established a civil case schedule by order (CP 56). The date of trial was set for October 10, 2016.

On October 7, 2015, the summons and complaint were served on Benton County Auditor, Brenda Chilton, per the requirements of Civil Rule (CR) 4(a)(1)(2) (CP 57-58). Following the general rules for pleadings Zink's' complaint contained short, plain statements of the claims of injuries caused by Benton County and the relief requested to compensate for those injuries. (CR 1-53). The Summons served on Benton County including the required statement that Benton County had twenty days to respond to Zinks' complaint (CP 54-55).

On October 13, 2015, Benton Count requested email service (CP 125). Zink agreed to e-mail service the following day (CP 105). On October 14, 2015, Benton County submitted a "Notice of Appearance" via e-mail (CP 59-61).

Benton County's answer to Zinks' complaint was required to be filed by October 27, 2015 CR 7(a)1; 8(b); 12(a)(1). Benton County did not file an answer to Zinks' complaint, have never filed an answer to Zink's complaint and are in default (CP 121-123).

On October 29, 2015, two days after their answer was due, Benton County filed an affidavit of prejudice against Judge Bruce Spanner (CP 62-65) and a motion to dismiss on the Zinks' complaint pursuant to CR 12(b)(6) claiming the Zinks' had failed to state a claim upon which relief

could be granted (CP 66-97). The motion was set for November 6, 2015 (CP 95-97).

On October 30, 2015, Zink e-mailed Benton County's legal representative, Mr. Lukson and thoroughly explained to him why she was not available on November 6, 2015, and why she needed the motion to be reschedule until after the first of the year due to her current legal case load, scheduled vacations and the coming holidays (CP 127-129). Lukson refused, stating that because Zink had claimed daily penalties under the PRA the matter could not wait. Lukson stated that a notice of unavailability has no legal effect and that the County would only accommodate her by rescheduling the hearing to dismiss until December 4, 2015 (CP 127; 264).

Zink e-mailed Lukson explaining that this cause of action was a tort claim for damages under 42 U.S.C. §1983 and not a claim for penalties for violation of the Public Records Act (PRA) which had been filed under cause #15-2-01587-4 (CP 267; 303). Therefore, there was no need to resolve the issue as soon as possible. Lukson rescheduled the hearing to dismiss to December 4, 2015 at 1:30 p.m. (CP 131; 133-135).

On November 2, 2015, Zink filed an affidavit of prejudice against Judge Vic VanderSchoor; providing notice to Lukson on November 2, 2015 (CP 101-102); a full month prior to the scheduled hearing on the motion to dismiss.

Four days later, on November 6, 2015, Lukson emailed the Benton County Court Administrator, Tiffany Husom, requesting a special set on December 4, 2015, before one of the other judges who were not recused. Lukson also requested other proposed times and dates for a special set so he could coordinate with Zink on scheduling his motion to dismiss (CP 140-141; 281). Zink was not included in the correspondence with Ms. Husom (CP 281). On November 10, 2015, Ms. Husom responded:

Keep your motion for Dec 4th at 1:30pm. I am putting it on my schedule and will plan to assign a judge, other than Spanner, VanderSchoor, and Swisher.

(CP 140; 281). The Zinks were never notified or included in any of the correspondence associated with Lukson's request for a special set. Ms. Husom did not identify which judge was to be assigned to hear the motion or when a judge would be assigned. Lukson never provided Zink with notification of a special set to hear his motion to dismiss.

On Wednesday, November 25, 2015, ten days prior to the scheduled hearing, Zink e-mailed Lukson about the issue of Judge VanderSchoor presiding over the civil docket on December 4, 2015. Zink requested to know what was going on with the Benton County's motion to dismiss and requested that Lukson strike his motion and reschedule the hearing to after

the first of the year due to Zinks' case load, scheduled vacation⁴ and the holidays (CP 137-138). Lukson responded stating that:

Because of the issue you raised I previously spoke with Court Admin who stated they are going to assign a judge other than Spanner, VanderSchoor, and Swisher (who previously recused himself due to a conflict) for the December 4th hearing.

(CP 137). Zink responded requesting to know which judge had been assigned to the case and objecting to Lukson's omitting the Zinks from the correspondence with the court (CP 149-150). Zink specifically stated that she would **"wait to hear from you as to what judge is going to hear this case on December 4, 2015..."** Lukson responded stating that **he did not know which judge had been assigned to hear his motion** (CP 149).

Except for forwarding Ms. Husom's e-mail stating the court would find a judge to hear Lukson's motion on December 4, 2015, Lukson never responded to Zink's request to know which judge had been assigned and was not provided any notice that the motion to dismiss was to go forward.⁵

Pursuant to Local Civil Rule (LCR) 5(c) bench copies of all pleadings must be submitted to the court electronically by noon one day prior to the scheduled hearing unless the party has no access to a computer or the

⁴ The Zinks were scheduled to leave for California on December 6, 2015 (CP 155).

⁵ 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)(emphasis added).

internet.⁶ **Failure to file bench copies electronically can result in a continuation of the hearing, imposition of terms or entry of other orders as may be appropriate.** LCR 5(c).

Having heard nothing from Lukson or Ms. Husom concerning which judge was assigned to preside over Benton County's motion to dismiss and not receiving the required notice of hearing (LCR 7(b)(7)(F)(iv)), the Zinks did not file an answer to the motion since it was obviously not going forward.

On the morning of December 4, 2015, Lukson emailed Zink to find out if she had filed a response to his motion to dismiss (CP 156). Zink responded that Judge VanderSchoor was still the sitting judge presiding over the civil docket for that afternoon and he could not hear the motion. Zink clarified that:

Since I never received a special set notice I never sent my response objecting to your request to dismiss. I couldn't have

⁶ Bench Copies. Unless a party does not have access to a computer or the internet, bench copies of all such documents, as well as settlement positions statement in civil and domestic cases, shall be submitted electronically via the internet at <http://www.benton-franklinsuperiorcourt.com/submit-bench-copies/> or <http://motion.co.franklin.wa.us/>. Parties without access to a computer and the internet shall deliver bench copies to the Court Administrator at the Benton County Justice Center. All bench copies must be submitted not later than noon one court day prior to the scheduled hearing, proceeding or trial. No bench copies, except settlement position statements, shall be submitted to the Court unless a copy has been served upon or mailed to opposing counsel or party if unrepresented if they are entitled to notice by law.

If a party fails to submit bench copies as set forth above the Court may continue the hearing, impose terms and enter other orders as may be appropriate. LCR 5(c)(emphasis added).

uploaded it as required since I had no idea who the judge would be.

As I told you I'm not going to waste time on a case that won't go forward. So I'd suggest that you reschedule or wait until another judge takes the bench.

(CP 155). Lukson responded that Zink was provided with notice of the hearing for December 4, 2015 and he planned to proceed with the hearing despite the lack of an assigned judge (CP 154).

Zink responded that she had right to proper notice and to know the identity of the assigned judge rather than just a quick note from Husom to him stating a judge would be assigned at the last minute (CP 153). Zink clarified that she had contacted him over a week prior to the hearing to find out if the motion was to go forward and which judge was assigned to hear his motion and the information was not provided.

Zink also reminded Lukson that the last time a judge was assigned to hear a motion at the last minute, the trial court did not even read the briefing since there was no time as he was in negotiations all day. Zink stated that the motion to dismiss involved important legal issues that should not be decided hastily in a last minute decision without the benefit of briefing (CP 154).

Lukson responded that Zink had better appear to make her argument of lack of notice to the judge since he planned to argue for dismissal of the

action that day at 1:30 (CP 153). Lukson did not indicate which judge had been assigned or whether a judge had been assigned.

The Zinks resides in Mesa, Washington, approximately 35 miles from the Benton County Justice Center; a 40 to 45-minute drive one way. Zink responded that they would not be in court that day since they never received proper notice from Lukson's office concerning his motion to dismiss. Zink stated that it was a long drive simply to argue proper notice was not given when it was obviously not given. Zink again told Lukson that they were leaving that weekend and would be available in a couple weeks to continue the litigation (CP 318).

Despite the lack of notice or an assigned judge, the hearing went forward (RP (December 4, 2015) 1-10). The Honorable Judge Alexander C Ekstrom presided over Benton County's motion for dismissal pursuant to CR 12(b)(6); failure to state a claim upon which relief can be granted. At the hearing, Lukson explained to Judge Ekstrom that Zink was not present due to an ongoing issue with the Zinks not being available in November. Lukson told the trial court that given the potential for penalties Zink is requesting under the PRA along with the myriad of other claims, he was not comfortable allowing this case to continue. (RP (December 4, 2015) 2:16-25). Lukson stated that Zink had agreed to a December 4, 2015 hearing but then she "strategically, knowing he was on the civil docket, trying to delay the matter further, affidavit Judge VanderSchoor from the case (*Id.* 3:1-3).

Lukson stated that he had contacted Tiffany (Ms. Husom) and explained to her that there were several judges that were recused from the case and that he would like to set it up for December 4th. Tiffany informed him that finding a judge would not be a problem (*Id.* 3:4-7). Lukson told the court that Zink was upset when he informed her that a different judge had been assigned to the case and that he had e-mails to prove it (*Id.* 3:7-13).

Lukson explained to the court that Zink was merely upset because his notice had not included that it was a special set, which is not a requirement of the court, and he sent Zink the attachments to the e-mails he'd sent to Husom and her replies that she would arrange a different judge (*Id.* 3:14-23). Lukson stated that he told Zink she needed to appear today to make her argument for lack of notice so she could ask for more time, etcetera but she declined and now she is not available for the rest of December so he was going forward with his motion to dismiss (*Id.* 3:24-5).

Judge Ekstrom requested to see a copy of the email agreement between the two parties which Lukson provided (*Id.* 4:6-5:23). Judge Ekstrom requested to know if in Lukson's opinion "is this matter specially set by dint of it being taken off the regular docket and placed before an available judge?" (*Id.* 6:5-7). Lukson agreed that it was but stated that he had informed Zink that this matter would be put before one of the remaining four judges, Zink did not respond until that morning when he asked where her response was and even if it was a special set, Zink had

proper notice and there is no requirement in the rules to note for motion docket; rather that is just a courtesy to the clerk's office and court admin, (*Id.* 6:8-24).

Judge Ekstrom agreed stating that a:

Special set would imply that one had gone to court administration and asked for a particular time and been assigned a particular judge, whereas **I was assigned this file late yesterday** as a matter that simply couldn't be heard on the regular docket. That is our normal practice, to just simply find an available judge for whatever docket if a judge cannot hear a case.

(*Id.* 7:9-15)(emphasis added). Judge Ekstrom stated that he had reviewed Mr. Lukson's briefing, had no questions of Lukson, noted that the Zinks, acting pro se, were not present and signed the order dismissing Zinks' tort claim (*Id.* 7:22-9:2); CP 63-64). Which Lukson emailed to Zink that same day (CP 161).

On December 14, 2015, Zink filed a timely motion for reconsideration of the dismissal of her tort claim against Benton County (CP 108-190; 191-192; 193-194). Zink specifically outlined the events that took place as recounted in this statement (*Id.*). Zink specifically pointed out that without knowing which judge was assigned to the case, neither party could file bench copies by noon the day before as required by LCR 5(c) so that the presiding judge could read the pleadings prior to the

hearing. Zink reminded Judge Ekstrom that the last time he was assigned to hear a motion involving Zink in another cause of action at the last minute, the hearing had to be continued as there was no time for the judge to read the material and understand the arguments being made (CP 112).

Zink informed the court that Judge VanderSchoor had been recused over a month prior to the December 4, 2015, hearing providing ample time for Benton County to arrange for a special set on December 4, 2015, provide notice of the hearing and specify which judge was to hear the case. Benton County did none of these things. Rather, when Zink asked which judge would be hearing the case, Lukson stated he did not know and never provided the name of the presiding judge. Zink also provided argument that the order was not consistent with the requirements of CR 12(b)(6) and must be reversed (CP 115-118).

Zink also provided the court with her case schedules printed from the on-line court index, clearly indicating the case load she was juggling during November through December (CP 111-112). With the exception of the 11 and 13-year-old cases against the City of Mesa, in all but one cause of action currently filed against Zink, litigation was initiated by third party class actions of sex offenders notified of Zink's request for sex offender records by various law enforcement agencies across the state. In the one action not initiated by third party class action, a case concerning whether scanning paper copies was creating a new record and whether an agency can outsource copying and printing to a local vendor, was initiated by

Benton County against Zink. Although Zink did request review of the decisions and orders of the court, winning on appeal, she did not initiate any of the cases she was currently acting as pro se litigant in. Rather she was merely defending her rights in the only fashion she could since the expense of an attorney was out of the question. Therefore, either Zink was forced to represent herself or withdraw her requests (*Id.*).

Zink provided the court with evidence that:

- 1) She had a hearing scheduled by the King County Superior Court on November 6, 2015; the date Lukson had originally scheduled his motion to dismiss (CP 172);
- 2) The docket for Cause #13-2-02037-5, a case consolidated with two other actions initiated against Zink in Benton County, clearly showing which judges participated in the dispositive decision concerning the exemption and injunction of the sex offender records; now found to be non-exempt. (CP 175-185);
- 3) The case schedule for the latest case initiated in Benton County, cause #15-2-01587-4; a fifth sex offender case initiated against Zink due to Benton County notification of another group of sex offenders of her request of two years prior; and
- 4) The amount of time Zink had spent on cause #15-2-01587-4 due to Benton County's actions.

Lukson responded with his own version of the e-mails stating:

Zink responded with frustration that she was not aware what judge was assigned to the motion to dismiss hearing. Id. at pg. 69. Defendants responded informing Ms. Zink they did not know who the judge would be at the hearing either. Id. at pg. 72. (CP 109:20-24). Lukson argued that he had no other responsibility to notify Zink of any hearing change or which judge was to hear his motion under CR 12(b)(6) as his motion was scheduled to go forward with one of the remaining un-recused judges.

On February 5, 2016, the Honorable Judge Ekstrom issued a written memorandum denying Zinks' motion for reconsideration (CP 325-328). In denying Zinks request to reconsider, Judge Ekstrom stated that:

After reviewing the briefing and submissions of the parties, in particular the e-mails between the parties, the Court is compelled to conclude that Plaintiffs, having failed to respond to the substantive motion, sought to delay the resolution of the motion by every means available (other than those that would have been proper), and voluntarily failed to appear in an attempt to further this goal. Service of the note for motion was proper pursuant to LC 7(b)(7)(A), and the Plaintiffs were not affirmatively misled by Defendants. To the contrary, Plaintiffs reveal in their filings, including by not limited to the corresponded itself, sufficient experience with court process such that a conclusion that their non-appearance on December 4, 2015 was the result of "excusable neglect" on, on this record, completely unwarranted. CR 6(b)(2). The maintenance of an

action imposes obligations upon the Plaintiff which were not met in this case. Dismissal was appropriate.

(CP 327). Zink timely filed this appeal on March 2, 2016.

V. ARGUMENT

1. Standard of Review and Criteria Needed to Dismiss a Cause of Action Pursuant to CR 12(6)(b)

A trial court's dismissal of a cause of action under CR 12(b)(6) is a question of law and review is de novo. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, ¶5, 233 P.3d 861 (2010). A plaintiff does not fail to state a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962).

Under a CR 12(b)(6) motion, Plaintiff's factual allegations are assumed to be true. *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985). An action may only be dismissed under CR 12(b)(6) if the defendant can prove "beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to the requested relief." *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (quoting *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984); *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978). *Stangland v. Brock*, 109 Wn.2d 675, 677, 747 P.2d 464 (1987).

Here the trial court dismissed Zinks' cause of action simply because the Zinks did not attend the CR 12(b)(6) hearing due to a lack of proper notice from BC (LCR 7(b)(7)(F)(iv)(CP 153-159). Despite court rules requiring notification, the trial court concluded that BC had no obligation to notify the Zinks of the hearing to dismiss, stating that the Zinks "non-appearance on December 4, 2015, was unwarranted since maintenance of an action imposes obligations upon the Plaintiff which were not met in this case (CP 327). This is the wrong application of the requirements of CR 12(b)(6) which requires the trial court to find that BC proven beyond a doubt that no set of facts entitle the Zinks to their requested relief. The trial court's decision and order dismissing Zinks' claims against BC must be reversed and remanded for proper application of CR 12(b)(6).

2. Zinks Were Not Provided Adequate Notice of the Hearing and Had No Opportunity to Provide a Response to the Judge Reviewing the Motion to Dismiss

The trial court determined, based on the e-mails between the parties concerning e-mail service (CP 125), that Benton County had provided adequate notice of the hearing, despite the fact that no judge could hear the motion on the "regular docket" for December 4, 2015 and the motion was stricken. In making this determination the trial court stated:

Special set would imply that one had gone to court administration and asked for a particular time and been assigned a particular judge, whereas **I was assigned this file late**

yesterday as a matter that simply couldn't be heard on the regular docket.

(RP (December 4, 2015) 7:8-13)(emphasis added). Zink notified BC that the sitting judge on the civil docket for December 4, 2015, was recused on November 3, 2015 when she provided copies via e-mail (CP 104) and on November 25, 2015 when she e-mailed Lukson to find out the status of his motion (CP 137-138).

Zink's recusal of a judge was no different from BC's recusal of a judge five days earlier (CP 62-65). In fact, as Lukson states in his e-mails to the Court Administrator, other judges in Benton County had been recused from hearing the case (CP 140-141). Zink did not recuse Judge VanderSchoor a day or even days prior to the hearing which was scheduled on the "regular" civil docket before Judge VanderSchoor (CP 103-104). Rather, Zink provided BC with a 30-day notice of the recusal. BC knew that the hearing had to be stricken and had ample time to reschedule and provide proper notice as required under LCR 7(b)(7)(F)(iv)(CP.137; 140). BC refused to do so.

Further, Zink again contacted BC on November 25, 2015 (ten days prior to the hearing) to determine whether the hearing to dismiss was to go forward (CP 137-138). At that point in time BC could still have met their obligations under court rules, sought the assignment of a judge to hear the motion on December 4, 2015, and provided Zink with proper notice so she

could adequately respond (LCR 7(b)(7)(A)).⁷ Instead, BC responded that they were told to keep the date and a judge would be assigned at some point in time; in this case late in the day the day prior to the hearing (RP (December 4, 2015) 7:12-13).

When Zink requested to know which judge was to be assigned, BC responded that they did not know (CP149). BC did not meet their obligations in bringing a motion to dismiss by following through as required by local court rules. Instead, BC waited until the day of the hearing, contacted Zink to find out why a response was not filed and then refused to reschedule when Zink objected to the lack of notice (CP 155-1566); telling the trial court that:

So Miss Zink and I have had some ongoing debates over noting this matter for my motion to dismiss. It originally was noted up, filed October 29th of this year, noted up for November 4th hearing.⁸ Miss Zink stated that she was unavailable that date as well as every other date in November, and so I was not happy with that, given the potential for penalties she's requesting under

⁷ Any attorney desiring to bring any issue of law on for Hearing shall file with the Clerk and serve on all opposing counsel, not later than **six (6) court days prior to the day on which the attorney desires it to be heard, a note for the motion docket** which shall contain the title of the court, the cause number, a brief title of the cause, the date when the same shall be heard, the words "Note for Motion Docket," the name or names of each attorney involved in the matter, the nature of the motion, and by whom made. It shall be subscribed by the attorney filing the same and shall bear the designation of whom the attorney represents. The foregoing provisions shall not prohibit the hearing of emergency motions at the discretion of the Court. LCR 7(b)(7)(A).

⁸ The motion to dismiss was originally noted up for November 6, 2015 (CP 95-97; 121).

the Public Records Act, Along with a myriad of other claims. And so I asked that we have it sooner. We went back and forth. She picked the date of December 4th, and we proceeded along. Miss Zink then affidavited Judge VanderSchoor from the case, **in my opinion strategically, knowing he was on the civil docket, trying to delay the matter further. After that I contacted Tiffany, explained to her that there were several judges that had been affidavited from the case, explained to her that I would like to set it up for December 4th.** She informed me that that would not be a problem. Last Friday⁹ Miss Zink contacted me and stated that it looked like we wouldn't be able to have the hearing because Judge VanderSchoor was still the civil presiding. I informed her that I had already taken care of that, that I informed the court admin and that we had a different judge. **She was not happy with me about that, and I have emails to that effect. Then this morning I emailed Miss Zink, informed her that I hadn't received a response to the motion to dismiss. She stated that she wasn't filing one, that I hadn't provided her proper notice, because my note for motion didn't state that it was special set. I told her that I didn't think that that was a requirement of the Court, that I'd given her notice, and I have a copy of the notice here, the amended note for**

⁹ Zink contacted Lukson on Wednesday, November 25, 2015; ten days prior to the hearing (CP 137-138).

motion,¹⁰ and that I had informed her and attached my emails that I'd sent to Tiffany that she was going to arrange a different judge to hear this matter.

I told her that I recommended that she appear today to make her argument for lack of notice, your Honor, so that she could ask for more time, etcetera. She declined and said that she was not going to, that she was unavailable for the rest of the month of December, and that she would be available potentially in January. And I stated that I was going to go forward with my motion today.

(RP (December 4, 2015) 2:16-4:5)(footnotes added)(emphasis added). BC, in fact, did not: 1) provide the Zinks with proper notice of the hearing; 2) meet their obligations in bringing their motion forward; or 3) prove beyond doubt that the Zinks can prove no set of facts, consistent with their complaint, which would entitle them to the requested relief.” *Stangland v. Brock*, 109 Wn.2d 675, 677, 747 P.2d 464 (1987). Rather, BC simply presented a motion to an available judge on December 4, 2015, for approval. This is error of the court rules and well established case law.

A motion to dismiss under CR 12(b)(6) requires more than a cursory review by a trial court judge. Dismissal of Zinks’ claims required the trial court to find that BC had proven Zink could prove no facts consistent with

¹⁰ Lukson provided Zink with an amended notice on November 2, 2015 setting the hearing on the motion to dismiss on the “regular docket” before Judge VanderSchoor (CP 98-100). No other notice was provided.

her complaint for which relief could be granted. The trial court's decision and order to dismiss Zinks' claims based on a lack of appearance at a hearing due to lack of proper notice rather than whether BC met their burden of proof concerning Zinks' claims must be reversed and remanded for proper application of CR 12(b)(6).

3. Due to Benton County's Failure to Provide Notice Zinks were Not Able to Meet the Obligations for Responding to Motions Under Local Court Rules

BC's lack of proper notice of the hearing to dismiss precluded Zinks from meeting their obligations in responding to BC's motion to dismiss. Pursuant to LCR 7(b)(1)(B), The Zinks were required to file a response to the motion by noon one day prior to the scheduled hearing.¹¹ BC became aware that the judge presiding over the hearing could not hear the motion and the motion was stricken from the docket on November 3, 2015 (CP 103-104). BC knew they were required to reschedule and contacted the Court Administrator on November 6, 2015, to do so (CP 140).¹²

¹¹ Each party opposing the Motion shall at least by noon, one (1) day prior to the argument, serve upon counsel for the moving party and file with the Clerk a brief containing reasons and citations and of the authorities upon which he relies, together with all affidavits and photographic or other documentary evidence any supporting material. Bench copies shall be submitted as provided in LCR 5. LCR 7(b)(1)(B).

¹² 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).

Despite contacting the Court Administrator for a special set (*Id.*), BC did not meet their obligation and follow through to assure that a judge was assigned in a reasonable amount of time. Even after Zink contacted BC on November 25, 2015, BC ignored their obligation to assure a judge was assigned for the December 4, 2015, hearing and continued to refuse to provide proper notice so that Zink could meet her obligations in responding to the BC's motion; including providing bench copies for the reviewing judge.

The issue of a lack of proper notice was brought to the attention of the trial court on request for reconsideration (CP 108-119)(LCR 7(b)(7)(E)).¹³ Despite the evidence and facts provided by the Zinks the trial court determined the Zinks failed to “respond to the substantive motion, sought to delay the resolution of the motion by every means available (other than those that would have been proper), and voluntarily failed to appear in an attempt to further this goal.” (CP 328). The trial court did not explain what the Zinks could have done differently that would have been considered proper procedure by the trial court other than attend a hearing, 35-40 miles away, which was required to be continued (LCR 7(b)(7)(E)) to request a continuance. BC knew they did not provide proper notification

¹³ The motion will not be heard unless there is on file proof of service of notice upon the attorney for the opposing party or there is an admission of service by opposing counsel. LCR 7(b)(7)(E).

and BC should have stricken their motion and re-noted it pursuant to court rules.

At hearing, the trial court knew or should have known that the Zinks could not have responded or provided bench copies as required to the presiding judge since he was not assigned to hear the motion until late in the day one day prior to the hearing (RP (December 4, 2015) 7:12-13). Further, the trial court knew or should have known that an agreement to e-mail service is not an indication that notification requirements for a motion to dismiss had been met (RP (December 4, 2015) 4:6-7:16). Furthermore, the trial court knew or should have known that at some point in time BC was informed as to which judge had been assigned in order for BC to provide briefing for the judge to review (RP (December 4, 2015) 7:17-23); but did not inform Zink so she could also provide briefing.

Finally, a trial court should know the basic rules for motions, decisions and orders. Dismissing Zinks' claims simply because they did not provide any written response due to lack of notice or refused to attend a hearing 35-40 miles from her home simply to argue lack of notification and request a continuance pursuant to LCR 7(b)(7)(E) is error of law. BC did not provide any evidence that they notified the Zinks of the hearing in a timely fashion and the remedy for BC's failure to meet their obligation was to strike the hearing and reset the motion providing proper notification. BC refused to do so and demanded that the Zinks attend the hearing (CP 153). There was no need to force the Zinks into attending a

hearing 35-40 miles from their home simply to argue lack of proper notice when Lukson knew or should have known the rules of the court. The trial court's decision and order of dismissal must be reversed and remanded for proper consideration of BC's motion to dismiss pursuant to CR 12(b)(6).

4. Appearance of Fairness Issues Arise Since Benton County Had Access to the Court While the Zinks Did Not

The trial court's decision that the Zinks did not meet their obligations in maintaining an action warranted dismissal is an erroneous application of court rules concerning proper notice under LCR 7(b)(7)(F)(iv). BC was obligated in bringing forth a motion to dismiss to properly note the motion for hearings such that the Zinks would know the hearing was to go forward and bench copies could be provided to the judge hearing the motion by noon the day prior to the hearing (LCR 7(b)(1)(B)). Because the hearing was not properly scheduled pursuant to court rules, the Zinks had no opportunity to respond. The trial court judge clarified the he was assigned to hear the motion to dismiss the day before the scheduled hearing.

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)(emphasis added). Clearly, the Zinks could not have provided the trial court with bench copies by noon one day

prior to the hearing as required by LCR 5¹⁴ since the judge hearing the motion was not assigned to hear the motion until late in the afternoon the day prior to the hearing. Pursuant to LCR 7(b)(7)(E) the motion could not go forward. Furthermore, Lukson never responded to the Zinks' request to know the judge hearing the motion (CP 149-150). Rather, Lukson simply state he had no idea who the judge would be (CP 149) and never contacted the Zinks again until the day of the hearing to find out why a response was not filed (CP 156). Lukson did not even contact the Zinks when he discovered which judge would hear his motion the day prior to the hearing.

THE COURT: All right. Mr. Lukson, what is your motion at this time?

MR. LUKSON: So I would like to proceed, your Honor, on the merits of my motion to dismiss. I believe Miss Zink had proper notice and opportunity to be here. **I don't know if you've had an opportunity to read my briefing in this matter.**

THE COURT: **I have reviewed your briefing, and I have no questions of you.**

¹⁴ Bench copies shall be submitted as provided in LCR 5. LCR 7(b)(1)(B). **All bench copies must be submitted not later than noon one court day prior to the scheduled hearing, proceeding or trial.** No bench copies, except settlement position statements, shall be submitted to the Court unless a copy has been served upon or mailed to opposing counsel or party if unrepresented if they are entitled to notice by law. LCR 5(c)(emphasis added).

MR. LUKSON: OK, and I would just ask that your Honor dismiss the case for failure to state a claim based on the briefing that I filed in this matter.

THE COURT: I will do so. Do you have a proposed order?

MR. LUKSON: Yes, I do, your Honor. And this order does state that you heard argument from myself as well as Miss Zink or the plaintiffs in this matter. So I think it may need to be --

THE COURT: I will excise the portion that does not accurately reflect

what happened here today.

(RP (December 4, 2015) 7:16-8:11)(emphasis added). Not only was BC's notice inadequate (CP 153), BC had access to the trial court which the Zinks did not have. This is evidenced by the fact that Lukson was able to get his pleadings before the judge prior to the hearing while the Zinks were not (CP 153-154). This is of the appearance of fairness doctrine and equal protection under the law. The Zinks have a "right" to provide a response to be considered by the trial court opposing BC motion to dismiss which requires the same access to the courts afforded to BC.

VI. COSTS

The Zinks request this Court to award them fees and costs under RAP 14. Pursuant to RAP 14.1 the appellate court which accepts review and makes final determination (RAP 14.1(b)) decides costs in all cases (RAP 14.1(a)). As the substantially prevailing party in this cause of action, the

Zinks respectfully request this Court to award them fees and costs for this appeal. See *Mount Adams Sch. Dist. v. Cook*, 150 Wn.2d 716, 727, 81 P.3d 111 (2003).

VII. PUBLICATION

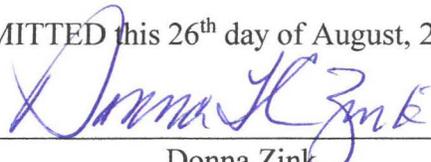
The Zinks respectfully request the court to publish its decision on this matter as the issues addressed herein are all of great public importance, most importantly the issue of whether an action can be dismissed pursuant to CR 12(b)(6) based on nonattendance at a hearing and whether proper notice pursuant to LCR is required in order for a trial court to dismiss an action under CR 12(b)(6).

VIII. CONCLUSION

. The trial court's decision and order dismissing Zinks' cause of action is error, an abuse of the court's discretion and the determination of whether BC's motion to dismiss meets the requirements of CR 12(b)(6) must be remanded back for proper application of court rules after proper notification pursuant to LCR 7(b)(1)(A) or 7(b)(7)(F)(iv).

RESPECTFULLY SUBMITTED this 26th day of August, 2016.

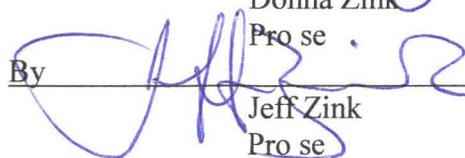
By



Donna Zink

Pro se

By



Jeff Zink

Pro se

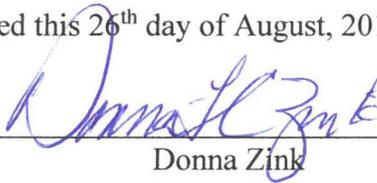
IX. CERTIFICATION OF SERVICE

I declare that on the 26th day of August, 2016, I did send a true and correct copy of appellant's "BRIEF OF APPELLANTS DONNA AND JEFF ZINK" via e-mail service to the following addresses as agreed upon by all parties to this matter:

- RYAN LUKSON
WSBA #43377
Benton County Prosecuting Attorney
7122 W. Okanogan Place, Bldg. A
Kennewick, Washington 99336
Phone: 509-735-3591/Fax: 509-222-3705
E-mail: Ryan.Lukson@co.benton.wa.us.

Dated this 26th day of August, 2016.

By



Donna Zink
Pro se