

FILED

MAY 22, 2017

Court of Appeals
Division III
State of Washington

COA No. 34647-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RICE LIVING TRUST and DUANE DUVALL,

Respondents,

v.

RICHARD MCCONAHY,

Appellant,

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

 1. The court erred by denying Richard McConahy’s motion for trial continuance.....1

 2. The court erred by entering a judgment and decree quieting title re: reformation of easement route and prescriptive easement, and preliminary injunction after denying the continuance.....1

Issues Pertaining to Assignments of Error

 A. Did the trial court abuse its discretion by denying Mr. McConahy’s motion for trial continuance when he suffered from a medical condition documented by his physicians that prevented him from traveling to attend the trial? (Assignment of Error 1).....1

 B. Did the trial court err by holding a trial in absentia when Mr. McConahy was medically unable to attend and then entering a judgment and decree quieting title re: reformation of an easement route and prescriptive easement, and a permanent injunction? (Assignment of Error 2).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....4

 A. The court erred by denying Mr. McConahy’s motion for trial continuance and entering judgment after trial, thus requiring remand.....4

IV. CONCLUSION.....8

TABLE OF AUTHORITIES

Table of Cases

Chamberlin v. Chamberlin, 44 Wn.2d 689, 270 P.2d 464 (1954)....7

Dloughy v. Dloughy, 55 Wn.2d 718, 349 P.2d 107 (1960).....7

Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896,
43 L. Ed.2d 103 (1975).....7

Harris v. Drake, 152 Wn.2 480, 99 P.3d 872 (2004).....4, 8

In re Hammermaster, 139 Wn.2d 211, 985 P.2d 924 (1999).....7

Mason v. McGee, 15 Wash. 272, 46 P. 237 (1896).....7

State v. Lackey, 153 Wn. App. 791, 223 P.3d 1215 (2009),
review denied, 168 Wn.2d 1034 (2010).....6

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482
P.2d 775 (1971).....5, 6, 7

Strom v. Toklas, 78 Wash. 223, 138 P. 880 (1914).....6, 7, 8

Rule

CR 40(a)(5).....7

I. ASSIGNMENTS OF ERROR

1. The court erred by denying Richard McConahy's motion for trial continuance.

2. The court erred by entering a judgment and decree quieting title re: reformation of easement route and prescriptive easement, and preliminary injunction after denying the continuance.

Issues Pertaining to Assignments of Error

A. Did the trial court abuse its discretion by denying Mr. McConahy's motion for trial continuance when he suffered from a medical condition documented by his physicians that prevented him from traveling to attend the trial? (Assignment of Error 1).

B. Did the trial court err by holding a trial in absentia when Mr. McConahy was medically unable to attend and then entering a judgment and decree quieting title re: reformation of an easement route and prescriptive easement, and a permanent injunction? (Assignment of Error 2).

II. STATEMENT OF THE CASE

On November 21, 2012, Rice Living Trust and Duane Duvall filed a complaint against Mr. McConahy for quiet title re: location of easement, easement by prescription, for damages, and injunctive

relief. (CP 283). Mr. McConahy had several attorneys appear and withdraw in this case. (CP 301, 307, 315, 329).

In the first motion, his then attorney moved for a continuance of the November 2014 trial setting so he could conduct discovery. (See CP 320). That motion was denied on October 13, 2014. (CP 208). Mr. McConahy subsequently moved to dismiss with prejudice. (CP 166). Denying the motion to dismiss, the court also struck the November 2014 trial date. (CP 158).

On June 22, 2015, Mr. McConahy moved for a continuance of the trial set for July 2015 because of pending back surgery. (CP 128). The motion was granted on July 24, 2015. (CP 81). An order confirming trial continuance was filed on August 3, 2015, based on his surgery taking place on July 28, 2015. (CP 76).

Trial was then set for April 21, 2016, but Mr. McConahy pro se moved to expedite continuance of trial on or about April 15, 2016. (CP 64-75). Included in the motion was a June 19, 2015 declaration from Vincent R. Sghiatti, M.D., Mr. McConahy's primary care physician, who documented his patient's disk disease with nerve conduction abnormalities, a progressive condition requiring surgical intervention, and his inability to travel for four months. (CP 65). Dr. Sghiatti also provided a March 17, 2016 declaration stating

Mr. McConahy had two surgeries in July and September 2015 that were apparently unsuccessful. His condition was progressive over the last 18 months and the diagnosis in June 2015 of L5-S1 disk disease with “severe conduction abnormalities velocity at the L5-S1 Nerve Root” was unchanged. (CP 72). Despite the surgeries, nothing had improved; Mr. McConahy was still in severe pain with his disk disease progressing; he could not travel for four months as his condition was getting worse, not better. (*Id.*).

Mr. McConahy also submitted a report by Hooman Melamed, M.D., his orthopedic surgeon, after a visit on October 20, 2015, diagnosing severe discogenic disease with new edema at the endplates and unchanged bilateral neural foraminal stenosis at L3-L4. (CP 67). Even after the surgeries, he had low back pain and bilateral lower extremity pain. (*Id.*). He continued to suffer from severe discogenic disease. (CP 68). A report by Dr. Melamed following a June 12, 2015 visit reflected the severe low back pain radiating to the right leg with parasthesias and spasms. (CP 69). Mr. McConahy continued to have recurrent low back pain after multiple lumbar surgeries. (CP 70).

The court denied Mr. McConahy’s motion to continue because it was untimely; Dr. Sghiatti’s submissions were all the

same in ordering no travel for four months; the doctor's latest declaration was dated March 17, 2016, but was not filed until a month later; and it did not relate Mr. McConahy's progress from the last surgery to the present and neither explained why he could not travel nor stated when he could. (4/19/16 RP 16-17; CP 4-6).

The case proceeded to bench trial on April 21, 2016, in Mr. McConahy's absence. (CP 9). The court entered findings of fact and conclusions of law and a judgment and decree quieting title re: reformation of easement route and prescriptive easement, and permanent injunction. (CP 8, 26). This appeal follows. (CP 1).

III. ARGUMENT

A. The court erred by denying Mr. McConahy's motion for trial continuance and entering judgment after trial, thus requiring remand for new trial.

The court's decision on a trial continuance rests in its discretion and is reviewed for abuse of that discretion. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). An abuse of discretion occurs when the decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn. 12, 26, 482 P.2d 775 (1971).

Mr. McConahy had a very painful and serious medical condition documented by Drs. Sghiatti and Melamed. Even after two surgeries in 2015, his severe discogenic disease had not improved and was still progressing, causing severe lower back pain and bilateral lower extremity pain. The doctors documented Mr. McConahy's disease was not getting better, had progressed over the last 18 months, and his inability to travel was the same in April 2016 as it was in April 2015.

Faulting Dr. Sghiatti, the court noted his declaration did not articulate what was going on with Mr. McConahy from the September 2015 surgery to the present and failed to state his history/progress and why he could not travel. (4/19/16 RP 16-17; CP 4-6). To the contrary, Dr. Sghiatti declared nothing had changed for the better since his June 2015 letter opinion; Mr. McConahy's discogenic disease had progressed over the last 18 months; and he was still in severe pain. (CP 66; 72). The doctor thus stated his patient could not travel for four months. (CP 72). His opinion as to Mr. McConahy's ability to travel remained the same because the patient's medical condition had not improved to the point where he could.

Since the court's reason for denying the continuance based on its perceived inadequacies in Dr. Sghiatti's declaration prohibiting travel is unsupported by any reasonable reading or interpretation of the doctor's diagnosis, its decision was based on an untenable reason. *Junker*, 79 Wn.2d at 26. Indeed, a bona fide illness is a recognized reason for granting a trial continuance. *Strom v. Toklas*, 78 Wash. 223, 229, 138 P. 880 (1914); *State v. Lackey*, 153 Wn. App. 791, 799, 223 P.3d 1215 (2009), *review denied*, 168 Wn.2d 1034 (2010).

As for the untimeliness of asking for a continuance, the court nonetheless proceeded to consider the motion. Mr. McConahy and counsel argued the motion, which was decided on the merits. (4/19/16 RP 4-17; CP 4). Whether it was timely is moot as the court did consider the motion. Thus, its untimeliness was not a tenable reason for denying it. *Junker*, 79 Wn.2d at 26.

The court also gave as a reason for denying the continuance its granting of two prior motions to continue by Mr. McConahy. The court was incorrect. The 2014 motion to continue trial was denied. (CP 158). After denying Mr. McConahy's motion to dismiss, the court struck the November 2014 trial date. (*Id.*). The only continuance granted by the court was in 2015. (CP 81). Its

reliance on two previous continuances is thus unsupported by the record and is an untenable reason. *Junker*, 79 Wn.2d at 26.

Washington courts have long recognized that cases should be decided on their merits, rather than by default or on technical grounds. See, e.g., *Mason v. McGee*, 15 Wash. 272, 46 P. 237 (1896); *Dloughy v. Dloughy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960). Because Mr. McConahy's documented medical condition prevented him from traveling, he was unable to be present at trial and did not appear. (CP 9). What resulted was a trial by default where he did not present his evidence and only the plaintiffs offered theirs. CR 40(a)(5); *Strom*, 78 Wash. at 229.

Mr. McConahy did not voluntarily absent himself from trial. He was ordered by his doctor not to travel and he followed that order. Trials *in absentia* are not favored. *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed.2d 103 (1975); *In re Hammermaster*, 139 Wn.2d 211, 215, 985 P.2d 924 (1999). Mr. McConahy acted in good faith and as diligently as he could under the circumstances. (4/19/16 RP 12-13). The case was decided by default when the court should have granted the motion for continuance when a documented medical condition prevented Mr. McConahy from traveling. *Chamberlin v. Chamberlin*, 44 Wn.2d

689, 704, 270 P.2d 464 (1954). The court abused its discretion by denying the continuance. *Harris*, 152 Wn.2d at 493.

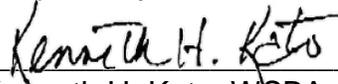
The motion for continuance was improperly denied, so the remedy is a new trial where both parties can present their evidence and the case decided on its merits. *Strom, supra*.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. McConahy respectfully urges this Court to (1) reverse the order denying the motion for trial continuance and (2) remand for new trial where he can present his case for determination on its merits.

DATED this 22nd day of May, 2017.

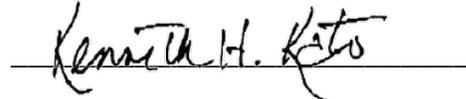
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on May 22, 2017, I served by USPS a copy of the Brief of Appellant on Thomas O'Connell, 617 Washington St., Wenatchee, WA 98801; and W. Scott De Tro, 700 Okoma Dr., Ste 700A, Omak, WA 98841.



KATO LAW OFFICE
May 22, 2017 - 7:44 AM
Transmittal Letter

Document Uploaded: 346471-rmconahy brief 346471.pdf

Case Name: rice living trust v mcconahy

Court of Appeals Case Number: 34647-1

Party Respresented: appellant mcconahy

Is This a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court #: ____

Type of Document being Filed:

- Designation of Clerk's Papers / Statement of Arrangements
- Motion for Discretionary Review
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill / Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition / Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Proof of service is attached

Sender Name: Kenneth H Kato - Email: khkato@comcast.net