

No. 346471

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

RICHARD McCONAHY and JANE DOE MCcONAHY, husband and
wife, and the marital community composed thereof,

Appellant,

v.

THE RICE LIVING TRUST, a Washington Revocable Living Trust; and
DUANE DUVALL, a single person,

Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant chose to wait until the last minute to seek his third trial continuance, based on the same medical reasons as his earlier requests for continuance, with no medical explanation why he could not attend trial.

II. ASSIGNMENTS OF ERROR

Issues Presented by Assignments of Error

A. Did the trial court abuse its discretion by denying Appellant's motion for continuance when the motion was not timely filed or properly served, the trial had been rescheduled twice previously at Appellant's request, Appellant failed to apprise the court of his doctor's March 17, 2016 declaration until April 15, 2016 (four court days before trial), and the motion was only supported by conclusory allegations?

B. Did the trial court err by holding a trial after denying Appellant's motion for continuance?

III. STATEMENT OF THE CASE

On November 21, 2012, the Rice Living Trust ("Rice") and Duane Duvall ("Duvall") filed a complaint against Richard McConahy ("Appellant") in part to quiet title regarding the location of an easement. (CP 283). The filing of the complaint arose after Appellant erected a

roadblock across the easement through his property, which road Rice and Duvall had always used to access their properties. (CP 15-16).

The matter was set for trial on November 18, 2014, two years after the lawsuit was filed. On September 29, 2014, Appellant filed a motion to continue the trial due to his failure to conduct discovery. (CP 210-212). On October 13, 2014 the trial court denied the motion to continue. (CP 208-09).

A Pretrial Conference was set for October 27, 2014, and the deadline for submitting materials to the Judge was October 20, 2014. Rice and Duvall's trial attorney submitted their materials two dates late. On October 22, 2014 Appellant's attorney filed a motion to dismiss based on the late filing (CP 166-167). Prior to the October 27, 2014 hearing, Appellant also faxed to Respondent's attorney a letter dated October 27, 2014, written by Dr. Vincent R. Sghiatti, MD. This letter indicated that Appellant was unable to travel due to Disc Disease and Left Leg Radiculopathy, and required surgical intervention. (CP 118-120). The trial court denied the motion to dismiss, but then granted a continuance, bumping the trial 8 ½ months to July 30, 2015. (CP 102; 158-160).

On June 22, 2015, Appellant moved again for a trial continuance due to a pending back surgery. (CP 128). On June 23, 2015, a Declaration of Vincent R. Sghiatti, M.D., Appellant's physician, was filed with the court, reiterating again Appellant's spinal issues, need for surgery, and his inability to travel for four months. (CP 125-127). The trial court granted a second trial continuance on July 24, 2015, but stated that it was concerned with how the posture of the case had progressed. (CP 81-83; 122-124; 310-312). Trial was continued a year to April 21, 2016. (CP 76-78).

On April 15, 2016, six days before trial was finally set to commence, Appellant attempted to fax a letter/motion to continue the trial a third time to the court and Rice and Duvall's trial attorney, Scott DeTro. It arrived at Mr. DeTro's office after 5:00 p.m. on April 15, 2016 (a Friday), and was not received by Mr. DeTro until Monday, April 18, 2016 (CP 46-50; 64-75; RP 5-6). Appellant also sent a March 17, 2016 Declaration from Dr. Sghiatti which repeated nearly verbatim his June 23, 2015 declaration, except to state that Appellant's condition had been progressive for 18 months (rather than nine months), and that he had received "two surgical inventions (sic) for his Disc Disease July 2015 and September 2015." (CP 64-65, 72).

The trial court denied Appellant's third motion for continuance. (CP 47). The court found (1) that Appellant had made two prior requests for continuance which resulted in two prior First Set trial dates being continued; (2) the third motion was not timely under Okanogan County Local Rules; (3) Appellant had not properly served the motion on opposing counsel; (4) Appellant failed to timely apprise the court of his doctor's March 17, 2016 Declaration (waiting until just before trial to file it); and (5) the doctor's letter failed to state any progress since the last trial continuance or the reason why Appellant could not travel (when his last "procedure" was seven (7) months earlier). (CP 48-49; RP 15-16).

On April 21, 2016, trial was held and Appellant failed to appear. (CP 9). The trial court entered findings of fact and conclusions of law and a judgment and decree quieting title, granting a prescriptive easement, and granting a permanent injunction. (CP 8, 26). Appellant appealed. (CP 1). Appellant has gone through four (4) attorneys in this case to date and is currently on number five (5). (CP 301-303; 307-309; 315-316; and 329-330).

IV. ARGUMENT

A. Standard of Review.

A decision to deny a continuance is reviewed for a manifest abuse of discretion. *Jankelson v. Cisel*, 3 Wn. App. 139 (1970); *In re Custody of C.D.*, 188 Wn. App. 817, 828 (Div. 3 2015). A court abuses its discretion when it's decision is based, "upon a ground, or to an extent, clearly untenable or manifestly unreasonable." *Balandzich v. Demaroto*, 10 Wn. App. 718, 721 (1974), (citing, *Friedlander v. Friedlander*, 80 Wn.2d 293, 298 (1972)).

B. The trial court did not abuse its discretion in denying Appellant's motion to continue the trial.

Whether a motion for continuance should be granted or denied is within the sound discretion of the trial court. *Balandzich v. Demeroto*, 10 Wn. App. 718, 720 (1974).

In *Balandzich*, the court stated:

In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

10 Wn. App. 718, 720 (1974). Courts also look to the diligence of the moving party as a factor in deciding motions for continuance. See *In Re Custody of C.D.*, 188 Wn. App. at 828 (2015) (citing *In re Dependency of V.R.R.*, 134 Wn. App. 573, 580-81 (2006)).

Courts generally are liberal in continuing a cause based on illness, but courts do impose limitations on the extension of this courtesy. See *Puget Sound Machinery Dept. v. Brown Alaska Co.*, 42 Wash. 681, 683 (1906); *Chamberlin v. Chamberlin*, 44 Wn.2d 689, 700 (1954). In *Chamberlin*, the appellate court overturned the trial court's refusal to grant a continuance in a divorce trial where the wife had taken seriously ill a week before the trial and lived 2,000 miles from the court. *Id.* at 705-706. The appellate court found that there had been no previous continuances, and that adjudication of the wife's marital status without being heard was unreasonable in that case. *Id.* at 702, 706.

In contrast, a number of other cases confirm that continuances for health reasons must be balanced against the factors weighed in all continuances, such as prompt disposition of litigation, prejudice, history of litigation, diligence, and previously granted continuances. See *Traynor v. White*, 44 Wash. 560, 562 (1906); *Puget Sound Mach. Depot v. Brown*

Alaska Co., 42 Wash. 681, 683 (1906); *Balandzich v. Demeroto*, 10 Wn. App. 718, 720 (1974).

In *Traynor*, the court found no abuse in denying a third motion to continue a contract dispute even though the defendant's doctor indicated Defendant was ill and unable to travel from New York for trial. *Traynor v. White*, 44 Wash. 560, at 561, 563. Defendant's second motion for continuance, which was granted, was also based on sickness and absence from the state. *Id.* at 561. In denying the third request for continuance, the court reasoned that the rights of the other party should be taken into consideration, along with all matters and circumstances connected with the case, and in light of all circumstances, the Supreme Court could not say there was such abuse. *Id.* at 562-563.

In *Puget Sound*, the appellate court found no abuse of discretion where the trial court denied a fourth request for continuance due to the illness of the appellant company's president. The action was commenced in June, 1904. On January 7, 1905, the case was set for trial for February 24, 1905. At the request of appellant, the cause was continued until February 28, 1905. It was again continued until April 17, 1905, and appellants urged a further continuance (which was granted until May 1,

1905). *Puget Sound Mach. Depot v. Brown Alaska Co.*, 412 Wash 681, at 682. The grounds given for each continuance was that the company president was confined to his home by illness and unable to come to Seattle for trial. *Id.* The Supreme Court ruled as follows:

It is always well for trial courts to be liberal in the matter of granting continuances where a party or a material witness, on account of sickness or other unavoidable reason, is unable to be present at the time set for the trial of the cause, proper terms being imposed in order to save the opposing party harmless. But there must of necessity be some limitations on the extension of this courtesy and consideration. Ordinarily the action of the trial court in passing upon a request for a continuance is a matter of discretion and will not be reviewed by an appellate court in the absence of a showing that said discretion was abused. In view of the fact that this action had been pending for many months, that two or more continuances had been granted on the request of appellants, and that they had been notified by the trial court that the hearing would certainly be proceeded with at the date to which it was last continued, and in the light of all the facts shown by the record before us we are unable to say that the trial court abused its discretion.

Id. at 683.

In *Balandzich*, plaintiff sued defendant for injuries and damages from an automobile collision. The appellate court found no abuse where the trial court denied a seventh request for a continuance. *Balandzich v.*

Demeroto, 10 Wn. App. 718 (1974). The sixth continuance request was based on plaintiff's wife being in the hospital and the plaintiffs' attorney having withdrawn. *Id.* at 719-20. The plaintiffs did not obtain new counsel until six days before trial, and immediately sought another continuance. *Id.* The trial court denied the continuance, and the appellate court affirmed, stating it could not say the trial court's exercise of discretion was manifestly unreasonable. *Id.*, at 721.

Finally, in the unpublished case of *Rommel v. Torpey*, 180 Wn.App. 1037 (2014) [cited per GR 14.1(a) as non binding authority], Plaintiff *Rommel* in September 2009 sued her neighbors for trespass and removal of trees. *Rommel* moved to continue the trial six (6) times, with the second through sixth time based on her ill health. The evidence before the trial court was *Rommel* had cancer, and that the cancer and treatment were debilitating and made it difficult for her to function.

On February 16, 2012 *Rommel* filed another motion for continuance, which the trial court denied, and subsequently entered a judgment and order of dismissal. On appeal, *Rommel* argued that in light of her health, the trial court manifestly abused its discretion in denying her motion for continuance.

The Appellate court cited and referred to the *Chamberlin, Traynor, Puget Sound and Balandzich* cases in its opinion as authority. It also noted that the trial court had acknowledged *Rommel's* illness and unfortunate situation. It then went on to find, in part as follows:

“However, it also expressed concern that, by granting yet another motion, it was inviting Rommel to continue bringing motions in the future. Like in *Puget Sound, Traynor, and Balandzich*, Rommel had previously requested, and been granted, several continuances. The court further recognized that another continuance had prejudiced Torpey and Harlin....”

In light of the totality of the circumstances, the Appellate Court held that the trial court did not abuse its discretion in denying Rommel's motion for a continuance.

As in *Traynor, Puget Sound, Balandzich and Rommel*, here the trial court noted that Appellant has had two first set trial dates struck and reset at his request (CP 48), and that the case had been pending since November 2012. (CP 283). At the time of Appellant's second request for trial continuance, the court expressed concern that Appellant was in control of his own health situation and how that affected the ability to proceed to trial. (CP 311). Appellant was known to have needed surgery as far back as October 2014 but put it off until trial was imminent. (CP 86-90; 118-

120). This pattern of manipulating his health situation and obtaining letters from his doctors to avoid trial was apparent to the trial court. (CP 49; RP p. 14, ln. 16 - p. 19, ln. 3).

In addition, Appellant had his physician's Declaration for a month, but chose to wait until six (6) calendar days before trial to seek a continuance based on that doctor's Declaration (which simply duplicated what was said in the doctor's earlier letter/Declaration). Finally, Appellant's doctor failed to state any reason why Appellant could not travel seven (7) months after his last procedure. Given the totality of the circumstances, the trial court here did not abuse its discretion.

Appellant cites as authority *Harris v. Drake*, 152 Wn.2d 480 (2004) for the proposition that the trial court abused its discretion by denying the continuance. But that was not the *Harris* court's holding. *Harris* filed suit in May 1998, the original trial date was continued from June 1999 to September 1999, and continued again to April 2001. *Id.*, at 484-85.

Before trial the court granted Harris' motion to exclude Dr. Bede, who had performed a PIP IME on Harris, and whom Drake identified as his medical expert. Drake moved for continuance of the April 1, 2001 trial

date, which was denied. On appeal, Drake argued this denial was an abuse of discretion. The Supreme Court disagreed, stating:

However, the trial had already been continued multiple times and Harris had made cross-country trips more than once to attend the trial. At some point a trial must proceed. Therefore, we cannot say that under the circumstances of this case it was an abuse of discretion for the trial court to deny Drake's motion for continuance. (emphasis ours)

Id., at 493.

Appellant also cites *State v. Lackey*, 153 Wn. App. 791, 799 (2009) as authority for granting a continuance based on illness. However, that case involved a criminal matter, a material witness who was ill who requested a four (4) week delay, and the impact of same on defendant's right to a speedy trial.

C. Appellant's Motion Failed to comply with Court Rules regarding filing and service.

Appellant's third motion for continuance and declarations were not properly filed or served. First, Okanogan County Local Rules do not authorize fax filing, plaintiff's counsel never consented to service by fax per CR 5(b)(7), and Appellant failed to comply with GR 17(a)(2) and (5). (CP 46-50; RP 5, 10-11). Okanogan County Local Rule 7 (misidentified as Local Rule 10 in the Verbatim Report) states:

(a) Scope of Rules. Except when specifically provided in another rule, this rule governs all motions in civil cases.

(b) Dates of Filing, Hearing and Consideration.

(1) *Filing.* The moving party shall serve and file the motion and supporting documents no later than five court days before the date the party wishes the motion to be considered.

Appellant's motion was faxed after 5:00 p.m. to plaintiff's counsel on Friday, April 15th, meaning by court rules it was not received until Monday April 18th. See CR 5(b)(7). The motion was heard on Tuesday, April 19 on one day's notice, in clear violation of local rule 7 and CR 6(d).

D. Appellant failed to act with diligence.

As stated by the Court in *Custody of C.D.* 188 Wn. App. 817 (2015), the diligence of the party requesting the motion is a factor to consider. The trial court here found Appellant's failure to submit the new Declaration from his doctor for over a month to have not been timely (RP 16), which supports a finding of lack of diligence.

Furthermore, Appellant's basis for the continuance was not sufficiently explained to inform the court why he could not attend the April 21, 2016 trial date. Appellant's affidavit from his doctor only identifies "procedures" performed nine and seven months prior to the trial

date (CP 72), and gave no reason why Appellant could not travel for another four (4) months. (RP 15-16). Further, Dr. Sghiatti made no statement regarding the type of surgical interventions, or their failure or success. (CP 46-50). Appellant also failed to provide any explanation at the hearing why seven months after the last procedure he could not travel, or why he could not have timely informed the court of his inability to attend trial in April 2016. (RP 15-16). Appellant instead elected to wait until the last minute to request a third continuance, hoping the mere request, without any explanation why it was needed, would be enough.

E. Prejudice to Respondent.

Respondent and his counsel had prepared multiple times for and was ready for trial, and Respondent's three (3) witnesses had cleared their schedules a third time to testify on April 21, 2016. Any further delay would have precluded Respondent Duvall from obtaining permits due to the legal dispute over access. (RP 11-12).

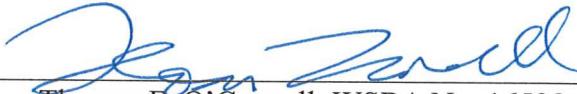
V. CONCLUSION

The trial court did not abuse its discretion in denying Appellant's third request for trial continuance. Appellant failed to timely file and

properly serve his motion in violation of court rules, was not diligent in seeking a continuance, and his motion was not supported by any evidence why he could not travel seven (7) months after his last procedure. Accordingly, this Court should affirm the trial court's denial of Appellant's third (3) motion for continuance.

RESPECTFULLY SUBMITTED this 22nd day of June, 2017.

DAVIS, ARNEIL LAW FIRM, LLP

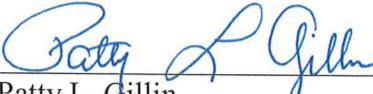
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

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