

FILED
Court of Appeals
Division III
State of Washington
1/16/2018 9:34 AM
NO. 354954
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION III

JOHN OROZCO, a/k/a JUAN OROZCO, a married person,

Plaintiff/Appellant,

v.

TEAMSTERS LOCAL UNION No. 760, an organizing entity, and
LEONARD CROUCH, and individual,

Defendant/Respondent.

· APPELLANT'S REPLY BRIEF

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.

Judith A. Lonnquist, WSBA No. 06421
1218 Third Avenue, Suite 1500
Seattle, WA 98101
LOJAL@aol.com
Tel: (206) 622-2086

Attorneys for Plaintiff

TABLE OF CONTENTS

Table of Contents i

Table of Authoritiesiii

I. INTRODUCTION 1

II. DEFENDANTS’ CASES ARE DISTINGUISHABLE.....1

III. THE UNUSUAL CIRCUMSTANCES OF THIS CASE
WARRANT REVERSAL OF THE TRIAL COURT’S RULING....4

IV. CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Mohundro</i> , 24 Wn.App. 569, 604 P.2d 181 (Div. I, 1979)	4
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	4
<i>Bus. Servs. of Am. II, Inc., v. WaferTech, LLC</i> , 174 Wn.2d 304, 274 P.3d 1025 (2012).....	2, 3
<i>Jewell v. Kirkland</i> , 50 Wn.App. 813, 750 P.2d 1307 (Div. I, 1988).....	4
<i>Polello v. Knapp</i> , 68 Wn.App. 809, 847 P.20 (1993)	2, 3
<i>Roller v. Department of Labor & Industries</i> , 128 Wn.App. 922, 927, 117 P.2d 385 (2005).	1
<i>Snohomish Co. v. Thorp Meats</i> , 110 Wn.2d 163, 750 P.2d 1251 (1988).....	1, 2
<i>Wagner v. McDonald</i> , 10 Wn.App. 213, 516 P.2d 1051 (Div. I, 1973).....	4

Statutes and Regulations

CR 41.....	<i>passim</i>
------------	---------------

I. INTRODUCTION

As established by the Declaration of Brian Dolman and discussed in Plaintiff's Opening Brief, on June 16, 2017, Plaintiff's counsel Brian Dolman contacted Defendants' counsel David Ballew to discuss, *inter alia*, scheduling a trial date by mutual agreement. Mr. Dolman proposed the scheduling of a trial date as early as September, 2017.¹ Mr. Ballew did not object to that proposal, agreed that the trial should take 4 days, and disclosed that he could not be available for trial until the last two weeks of January 2018. *Dolman Declaration*, ¶5. Significantly, although Mr. Ballew confirmed that the parties' counsel had a teleconference on June 16, 2017 (Second Decl. of David Ballew ISO Defendants' Motion to Dismiss), no where, either before the trial court, or in this Court, did he deny the contents of that teleconference as described by Mr. Dolman. Accordingly, those facts are verities on appeal,² and establish that defense counsel reneged on his commitment when seeking to dismiss this case for want of prosecution. Similarly unrefuted is the litany of scheduling problems caused by the recusal of the entire Yakima County bench.

II. DEFENDANTS' CASES ARE DISTINGUISHABLE

In their Response brief, Defendants rely on three cases: *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 750 P.2d 1251 (1988); *Bus. Services of Am. II v.*

¹ For ease of reference, Mr. Dolman's June 20, 2017 declaration is attached as an Appendix to this Reply Brief.

² *Roller v. Department of Labor & Industries*, 128 Wn.App. 922, 927, 117 P.2d 385 (2005).

Wafer Tech., LLC, 174 Wn.2d 304, 274 P.3d 1025 (2012); *Polello v. Knapp*, 68 Wn.App. 809, 847 P.2d (1993). In *Thorp Meats*, the trial court had dismissed a case despite the fact that the plaintiff had filed a note for trial setting. In a divided decision, the Court of Appeals reversed the order of dismissal. *Snohomish County v. Thorp Meats*, 46 Wn.App. 13, 728 P.2d 1084 (1986). The Supreme Court granted review and affirmed the appellate decision, finding that filing a note for trial precluded dismissal pursuant to CR 41(b)(1). But neither the appellate court nor the Supreme Court ruled that where no trial setting note has been filed, a motion to dismiss must be granted.³ Indeed, the Supreme Court expressly noted that the provisions of CR 41(b)(1) “encourage cases to be heard on their merits,” noting that “involuntary dismissal for want of prosecution ‘is punitive or administrative in nature and every reasonable opportunity should be afforded to permit the parties to reach the merits of the controversy,.’” 110 Wn.2d at 168.

In *Bus. Services of Am. II v. Wafer Tech., LLC.*, the Supreme Court considered the same issue – whether a trial judge lacked the discretion to dismiss a case where a note for trial setting had been submitted. Here again, the focus of the Court’s inquiry was CR 41(b)(1), described by the Court as whether the rule “applies in this case to limit the trial court’s inherent discretion to dismiss.” 174 Wn.2d at 308. The holding in such case does not mandate dismissal of the case, where, as here, unacceptable litigation practice has occurred.

³ Such a holding, of course, would be dicta.

The *Wafer Tech* Court explained: “Where dilatoriness of a type not described by [the rule] is involved, a trial court’s inherent discretion to dismiss an action for want of prosecution remains [citing cases]. Such dilatoriness ‘refers to unacceptable litigation practices other than mere inaction [citing *Wallace v. Evans*, 131 Wn.2d 572, 577, 934 p.2d 662 (1997)].” *Id.* Here, defense counsel’s commitment to length of trial and to a time for its setting and then later reversal of those commitments is an “unacceptable litigation practice other than mere inaction,” which should have been considered by the trial judge as allowing him discretion to deny Defendants’ motion to dismiss.

The third case cited by Defendants, *Polello v. Knapp*, is similarly distinguishable. That case involved a claim that Knapp’s failure to note his counterclaim for trial was an “unacceptable litigation practice.” 68 Wn.App. at 816-17. The *Polello* Court held that under the factual circumstances of the case, plaintiff’s response that the counterclaim had been discharged in bankruptcy did not require a note for trial, and thus did not constitute an unacceptable litigation practice exempting the case from CR 41’s applicability. The *Polello* decision, however, does not address other unacceptable litigation practices such as those present in this case.

III. THE UNUSUAL CIRCUMSTANCES OF THIS CASE WARRANT REVERSAL OF THE TRIAL COURT'S RULING

Under the unique factual circumstances of this case, the trial court should not have assumed that CR 41(b)(1) limited its judicial discretion, nor should it have imposed its severe order granting dismissal of the case. An order of dismissal must be tempered by the reasonable exercise of judicial discretion to ensure for the proper administration of justice. *Anderson v. Mohundro*, 24 Wn.App. 569, 575, 604 P.2d 181 (Div. I, 1979). While the trial court is empowered to impose reasonable sanctions for actions relating to a breach of court rule or order, such as the failure to comply with a case scheduling order,⁴ it must do so consistent with fundamental fairness and the least severe sanction.⁵ In addition, the trial court retains the discretionary authority to manage its own affairs for the purpose of promoting justice and the orderly disposal of cases. *Wagner v. McDonald*, 10 Wn.App. 213, 217-18, 516 P.2d 1051 (Div. I, 1973).

According to CR 41, the trial court may order dismissal of a case for want of prosecution, unless the case is noted for trial before the hearing date on the motion to dismiss, or if the failure to schedule a hearing lies with the party bringing the motion to dismiss. CR 41(b)(1). Significant and unique factual circumstances weigh in favor of the exceptions contained with CR 41, which call

⁴ *Jewell v. Kirkland*, 50 Wn.App. 813, 817, 750 P.2d 1307 (Div. I, 1988).

⁵ *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

for the necessary exercise of discretion. *Id.* First, Plaintiff did, in fact, request the case be set for trial, but refrained from scheduling a separate hearing due to the inefficiencies associated with relying on the availability of a visiting judge.⁶ (CP 71-72). Second, Plaintiff's counsel held a meet-and-confer session with counsel for Local 760 and secured his commitment against objecting to the setting of a trial date. (CP 72-74). It is clear that the commitment by counsel to refrain from objecting, and Plaintiff's justified reliance thereon, was a cause for plaintiff counsel's decision that seeking a separate hearing to establish a trial date was unnecessary. None of the cases relied upon by Defendants involve the complex circumstances and equitable considerations that hallmark this case.

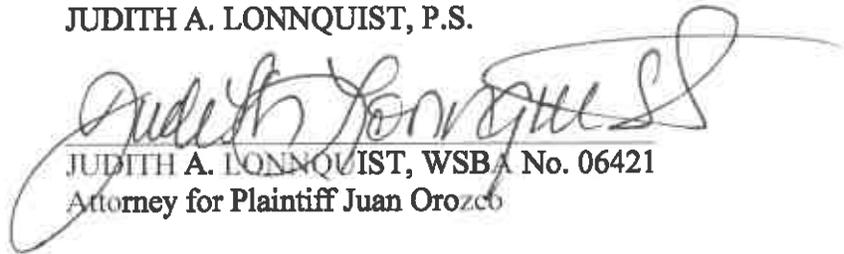
IV. CONCLUSION

For reasons set forth in Plaintiff's Opening Brief and herein, Plaintiff respectfully requests that this Court reverse the decision of the trial court and remand this case for trial.

⁶ Even if the parties were to stipulate to the *earliest* availability of counsel for Local 760 in January 2018, Plaintiff's counsel was unable to note the case for trial at that time in a unilateral fashion. Rather, any availability for trial was contingent upon the ability of 1) Judge Sparks to leave his courtroom in Kittitas County, 2) a judge of the Yakima County Superior Court to trade judicial services, and 3) to provide a courtroom and support services at the Yakima County Courthouse.

Respectfully submitted this 16th day of January, 2018.

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.



JUDITH A. LONNQUIST, WSBA No. 06421
Attorney for Plaintiff Juan Orozco

CERTIFICATE OF SERVICE

I, Morissa Knudsen, an employee of the Law Offices of Judith A. Lonquist, P.S., declare under penalty of perjury that on January 15, 2018, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

Party	Method of Service
David W. Ballew Reid, McCarthy, Ballew & Leahy, LLP 100 West Harrison Street, North Tower, Suite 300 Seattle, WA 98119	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Regular Mail <input type="checkbox"/> Facsimile


Morissa Knudsen

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Hon. Scott R. Sparks, Visiting Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

JOHN OROZCO, a/k/a JUAN OROZCO,
a married person,

NO. 14-2-02075-8

Plaintiff,

v.

DECLARATION OF BRIAN L.
DOLMAN IN SUPPORT OF
PLAINTIFF'S RESPONSE
AND REQUEST FOR TRIAL SETTING

TEAMSTERS LOCAL UNION No. 760,
an organizing entity, and LEONARD
CROUCH, an individual,

Via Telephonic Hearing:
June 26, 2017 at 10:00 a.m.

Defendant.

BRIAN L. DOLMAN hereby states and declares as follows:

1. I am one of the attorneys for the Plaintiff in the above-entitled matter. I am over the age of 18 years and competent to testify to the matters herein. This declaration is offered in support of Plaintiff's Response to Defendants' Motion to Dismiss and Request for Trial Setting.

2. **Case Preparation:** The Court is advised that each party has participated fully in the above-referenced litigation. Defendants have issued Interrogatories and Requests for Production to Plaintiff, as well as Requests for Production, to which Plaintiff provided answers and responses to the same. Plaintiff issued three (3) sets of

1 Interrogatories and Requests for Production, and two (2) sets of Requests for Admission.
2 Likewise, Defendants issued responses and answers to these discovery pleadings. In
3 addition, the parties conducted an array of depositions: Defendants deposed Plaintiff
4 twice and Plaintiff conducted approximately seven (7) depositions. Considering the
5 parties' active participation in discovery and the need to proceed to trial, Plaintiff
6 respectfully requests this matter be scheduled for trial at this Court's earliest availability.

7 **3. Scheduling Conference with Judge Sparks:** The parties last held a
8 scheduling conference with Judge Sparks on May 31, 2016. Plaintiff scheduled this
9 scheduling conference after the parties experienced judicial recusals and due to the lack of
10 any appreciable case scheduling order. During this telephonic scheduling conference, the
11 parties collaborated with Judge Sparks and agreed to deadlines for a discovery cutoff and
12 deadline for dispositive motions. The parties allowed the deadlines to lapse and Plaintiff
13 requests that the Court allow them to proceed to trial.

14 **4. Last Communications with Defendants' Counsel:** In August 2016, Mr.
15 Ballew contacted my office to state Defendants' intention to petition the Court to request
16 an extension of the summary judgment briefing deadline. I was prepared to receive a
17 motion on this issue, but the agreed deadline passed and I had received no such motion.
18 After my vacation in January, I then made several calls to Mr. Ballew about a trial setting,
19 but was unsuccessful making contact. I thought I had ratified this request via email, but
20 discovered that I might be mistaken about this typical follow-up technique, as I could not
21 locate any such email.

22 **5. Trial Setting Meet-and-Confer:** Pursuant to CR 41(b)(1), Plaintiff's case
23 shall not be dismissed if the case is noted for a trial date. Given the unique circumstances
24 of this case, I do not believe that Plaintiff can unilaterally note a trial date and respectfully
25 requests the Court schedule the same. More specifically, Plaintiff understands that, due to
26 the assignment to a visiting judge, the Court will need to coordinate a trial date where

1 Judge Sparks may travel to Yakima and “trade” judicial duties with a Superior Court
2 Judge from Yakima County. For this reason, I conducted a teleconference with
3 Defendants’ counsel on June 16, 2017.

4 During our teleconference, I proposed the scheduling a trial date after some
5 reasonable preparation time, provided that the Court might be able to accommodate the
6 parties as early as the September timeframe. Defendants did not voice any objection to the
7 setting of a trial date, as Mr. Ballew stated a view that trial scheduling is a matter within
8 the discretion of this Court. Unfortunately, due to his existing schedule, Mr. Ballew is
9 unable to confirm any availability for trial until the last two weeks of January 2018. We
10 concurred, however, that the parties could present their cases at trial in an estimated four
11 (4) days. As such, Plaintiff respectfully requests the Court note this matter for trial under
12 these unique circumstances.

13 6. **No Prejudice:** Counsel for both Plaintiff and Defendants allowed the case
14 to remain in limbo without any motions practice or a definitive trial date. There is
15 currently no need for additional discovery or dispositive motions practice. Considering
16 that the parties engaged fully in discovery, Defendants will not suffer any prejudice by
17 setting a trial date. Plaintiff’s counsel engaged in appropriate action to confer with
18 opposing counsel regarding trial setting parameters and Plaintiff now respectfully requests
19 this Court set a trial date.

20 7. **Conclusion:** Based on the foregoing, there is a need for a definite trial date
21 that will prompt these parties to prepare to present their respective cases. There is no
22 prejudice to either party by scheduling a trial date under the unique case administration
23 circumstances of this matter. Because Plaintiff has requested a trial setting without any
24 objection, the Court should deny Defendants’ motion and schedule this matter for trial.

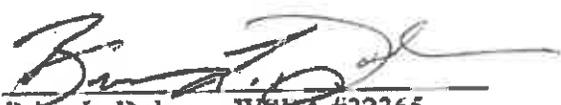
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I hereby declare under penalty of perjury under the laws of the State of Washington
that the foregoing is true and correct.

DATED this 20th day of June, 2017.

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.

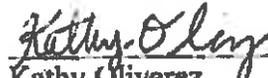

Brian L. Dolman, WSHA #32365
Attorneys for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I, Kathy Olivarez, an employee of the Law Offices of Judith A. Lonquist, P.S., declare under penalty of perjury that on June 20, 2017, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

Party	Method of Service
David W. Ballew Reid, McCarthy, Ballew & Leahy, LLP 100 West Harrison Street, North Tower, Suite 300 Seattle, WA 98119	<input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Regular Mail <input type="checkbox"/> Facsimile


Kathy Olivarez

LAW OFFICES OF JUDITH A. LONNQUIST, P.S.

January 16, 2018 - 9:34 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35495-4
Appellate Court Case Title: John Orozco v. Teamsters Local Union No. 760, et al
Superior Court Case Number: 14-2-02075-8

The following documents have been uploaded:

- 354954_Briefs_20180116092329D3442467_9717.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellants Reply Brief FINAL.pdf

A copy of the uploaded files will be sent to:

- david@rmbllaw.com
- morissa@lonnquistlaw.com
- shellyt@rmbllaw.com

Comments:

Sender Name: Morissa Knudsen - Email: morissa@lonnquistlaw.com

Filing on Behalf of: Judith A. Lonquist - Email: lojal@aol.com (Alternate Email:)

Address:
1218 Third Avenue
Suite 1500
SEATTLE, WA, 98101
Phone: (206) 622-2086

Note: The Filing Id is 20180116092329D3442467