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Court of Appeals
Division III
State of Washington
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No. 35495-4

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

JOHN OROZCO,

Appellant,

v.

TEAMSTERS LOCAL UNION No. 760, *et al.*,

Respondents.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	iii
I. ASSIGNMENTS OF ERROR	1
Issues Pertaining to Assignments of Error	1
II. INTRODUCTION	2
III. STATEMENT OF THE CASE.....	4
A. Plaintiff’s Claims and Litigation Efforts.....	4
B. Recusals and Case Scheduling Conference	6
C. Defendants’ Motion to Dismiss	8
IV. ARGUMENT	11
A. Applicable Legal Standard.....	11
B. The Trial Court Erred By Reluctantly Entering the Order Dismissal and Interpreting Its Lack of Discretion Under the Circumstances	12

C.	Even if the Trial Court Were Deprived of Typical Discretion, Principles of Equity Should Preclude this Harsh Outcome	16
D.	Plaintiff Requests Attorneys' Fees Under RCW 49.60.030 and RAP 18.1	18
V.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Mohundro</i> , 24 Wn.App. 569, 604 P.2d 181 (Div. I, 1979)	11-13
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	11, 13
<i>Bus. Servs. of Am. II, Inc., v. WaferTech, LLC</i> , 174 Wn.2d 304, 274 P.3d 1025 (2012).....	16
<i>Cornerstone Equip. Leasing, Inc., v. McLeod</i> , 159 Wn.App. 899, 247 P.3d 790 (Div. I, 2011).....	17
<i>Gott v. Woody</i> , 11 Wn.App. 504, 524 P.2d 452 (Div. II, 1974)	14
<i>Jewell v. Kirkland</i> , 50 Wn.App. 813, 750 P.2d 1307 (Div. I, 1988).....	13
<i>King v. Rice</i> , 2013 Wn.App. LEXIS 1358, (Div. I, June 10, 2013)	14, 15
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn.App. 446, 45 P.3d 594 (Div. III, 2002)	17
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	18
<i>Robinson v. City of Seattle</i> 119 Wn.2d 34, 830 P.2d 318 (1992).....	17
<i>Snohomish Co. v. Thorp Meats</i> , 110 Wn.2d 163, 750 P.2d 1251 (1988).....	14, 15
<i>Wagner v. McDonald</i> , 10 Wn.App. 213, 516 P.2d 1051 (Div. I, 1973).....	13
<i>Wiley v. Rehak</i> , 143 Wn.2d 339, 343, 20 P.3d 404 (2001).....	11
<i>Woodhead v. Discount Waterbeds, Inc.</i> , 78 Wn.App. 125, 129-30, 896 P.2d 66 (Div. I, 1995)	11

Statutes and Regulations

CR 41 *passim*

RAP 18.1 18

RCW 49.60.030(2)..... 18

RCW 49.60.180 5

RCW 49.60.210 5

Other Authorities

WSBA Creed of Professionalism..... Appx. 1

KBCA Guidelines of Professional Courtesy..... Appx.2-3

I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendants' Motion to Dismiss under circumstances where Plaintiff had requested the setting of a trial date and Defendants previously stated no objection to the same.
2. The trial court erred by failing to exercise discretion when case-specific circumstances – Plaintiff's request for a trial date, Defendants' prior lack of objection and affirmative statements about counsel's availability, and the certain delay and logistical difficulty of scheduling a separate hearing – all combined should have led the trial court to deny Defendants' Motion to Dismiss and to schedule a trial date as requested.
3. The trial court erred because the principles of waiver, substantial justice, judicial efficiency and the right to rely on the representations of counsel all require reversal and remand of this case for a trial on the merits.

Issues Pertaining to Assignments of Error

- A. Where Plaintiff's counsel demonstrates an effort confer about the availability for trial in conjunction with responding timely to Defendants' Motion to Dismiss, and defense counsel states no objection to the setting of a trial date, did the trial court properly ignore Plaintiff's request for a trial date because the request was not separately noted? (Assignment of Error Number 1).

- B. Does CR 41(b)(1) deprive the trial court from exercising its discretion under the case-specific circumstances where 1) Plaintiff conferred with defense counsel about setting a trial date, 2) defense counsel stated no objection to Plaintiff's inquiry about a trial date, 3) Plaintiff requested the setting of a trial date in response to Defendants' motion, 4) the parties experienced added difficulty to schedule hearings due to the necessity of a visiting judge, and 5) the trial judge expressed a willingness to set a trial date? (Assignments of Error Numbers 1 and 2).
- C. Where defense counsel represents that he has no objection to scheduling the case for trial, is Plaintiff's counsel justified in relying on that representation? (Assignment of Error Number 3).

II. INTRODUCTION

Following a telephonic hearing with Visiting Judge Scott Sparks on June 26, 2017, on July 11, 2017, the court entered an Order Granting Defendants' Motion to Dismiss¹ pursuant to CR 41(b)(1).² (CP 87-88). In response to Defendants' Motion to Dismiss, Plaintiff had requested specifically that the trial court set the case for trial. (CP 67-69). Prior to filing the motion response, Plaintiff's counsel held a meet-and-confer teleconference with Defendants' counsel for the purpose of discussing their mutual availability for trial. During their discussion, Defendants' counsel stated no objection, a representation upon which Plaintiff's

¹ The terms "Defendants" or "Local 760" are used interchangeably herein as identifiers for the Defendants-Appellees Teamsters Local Union No. 760 and Mr. Crouch.

² CR 41(b)(1) states that "Any civil action shall be dismissed, without prejudice for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. . . . If the case is noted for trial before the hearing on the motion, the action shall not be dismissed."

counsel justifiably relied. (CP 71-74). Unfortunately, at the time of the hearing on Defendants' motion, defense counsel retracted his lack of objection by then stating a procedural objection to scheduling the case for trial. Defendants continued to request that the trial court dismiss the case in its entirety. (RP 4:2 – 5:25).

The trial court reluctantly granted Defendants' Motion to Dismiss. When granting Defendants' request for dismissal, the trial court believed that it lacked discretion to grant a trial date under the circumstances of this case. Even so, Judge Sparks stated his preference to grant Plaintiff's request for a trial date, assuming he were not constrained in his ability to exercise judicial discretion; he twice referenced review by the appellate court, as well as the possibility of the case returning to him for trial. (RP 10:23 – 11:16). Not only should Judge Sparks have exercised discretion under these case-specific circumstances to deny the motion to dismiss, but his decision to the contrary results in manifest injustice. Plaintiff now seeks the appellate review of Judge Sparks' decision, and requests reversal and remand of the dismissal order.

III. STATEMENT OF THE CASE

A. Plaintiff's Claims and Litigation Efforts

Plaintiff-Appellant John Orozco, known more familiar by his colleagues, union members and the general community as "Juan Orozco," worked for Defendants as an Organizing Director. Mr. Orozco is a bilingual professional who possesses a depth of experience in union campaigns, community organizing and civil rights issues. In this position, Local 760 charged Mr. Orozco with responsibility for outreach initiatives and organizing campaigns that were endorsed by Local 760. (CP 22-25). His organizing efforts and voting outcomes were appreciated by his employer and, despite the defendants' lack of follow-through with conducting regular performance evaluations, he did receive favorable supervisory feedback on a verbal basis. *Id.* Although Local 760 sought to organize and represent an ever-growing population of permanent and seasonal Latino workers in Central Washington, Mr. Orozco experienced a racially-charged work environment that included negative comments based on race and other anti-immigrant sentiments. Unfortunately, after complaining about these experiences, Mr. Orozco did not observe his employer take any actions to remediate the situation. Instead, Defendants suddenly terminated Mr. Orozco on December 7, 2012, an action which violated earlier reassurances that he would receive due process and face

termination only on a “just cause” basis if his performance fell short of expectations. *Id.* Defendant Leonard Crouch, the Treasurer/Secretary for Local 760, was the person of authority that terminated Mr. Orozco’s employment. (CP 29).

Following his loss of employment, Mr. Orozco filed a lawsuit in Yakima County Superior Court on July 8, 2014. His Complaint included claims of breach of promise of specific treatment, employment discrimination on the basis of race and national origin in violation of RCW 49.60.180, retaliation in violation of RCW 49.60.210, as well as defamation. (CP 3-9). Defendants filed separate Answers in response to Mr. Orozco’s claims. (CP 10-19). As the case progressed, Plaintiff’s counsel found it necessary to re-state the asserted claims and voluntarily dismiss the defamation claim. The parties cooperated on a Stipulation and Order Granting Leave to Plaintiff to File Amended Complaint. (CP 49-50). On December 7, 2015, Mr. Orozco filed an Amended Complaint. (CP 20-29).

The parties dedicated significant time and effort toward discovery and preparation of their respective cases for trial. Mr. Orozco issued three (3) sets of Interrogatories and Requests for Production, and two (2) sets of Requests for Admission. Mr. Orozco and his counsel also conducted approximately seven (7) deposition examinations of Defendants and their

various witnesses. (CP 71-72). Although months elapsed between the last discovery engagement and Defendants' Motion to Dismiss, the parties had substantially completed discovery and their cases were ready in every practical respect for a trial on the merits.

B. Recusals and Case Scheduling Conference

After more than a year into this litigation, Mr. Orozco's case caught the attention of the Yakima County Superior Court, either due to the parties' stipulation (CP 49-50)³ or because Plaintiff's counsel proactively identified the need for a case schedule and contacted the trial court for the same. (CP 51). It is understood that Mr. Crouch's wife is employed in some capacity within the court system in Yakima, which triggered a string of judicial recusals.⁴ (CP 40-48). The Clerk of the Yakima County Superior Court determined that the entire judicial panel was unable to hear this case.

The parties then were assigned to Kittitas County Superior Court Judge Scott Sparks, located in Ellensburg, who assumed judicial duties on a "trade basis" with the judges of the Yakima County Superior Court. (CP 72-73). The parties understood this to be different than a venue transfer,

³ Unbeknownst to the parties, Judge Hahn first recused herself on December 1, 2015, but subsequently signed the Order to grant Plaintiff leave to amend on December 17, 2015. (CP 40, 49-50).

⁴ It is unfortunate that the Yakima County Superior Court did not address this issue at an earlier time, as the parties reasonably believe that the basis for recusal existed since the inception of this case.

as they were instructed to file pleadings and schedule motions through the Yakima County Superior Court.

Mr. Orozco then proceeded to arrange for a Case Scheduling Conference by way of a special⁵ telephonic hearing.⁶ (CP 51-58). Plaintiff sought to establish a case schedule with reasonable scheduling deadlines and a trial date. (CP 52-54). On May 31, 2016, the parties appeared at a case scheduling hearing with Judge Sparks. Counsel for Local 760 stated no opposition to the scheduling deadlines proposed by Mr. Orozco. (CP 56-57). Mr. Orozco proposed several case scheduling deadlines, but did not propose a specific trial date due to the foreseeable difficulty of arranging for Judge Sparks' special appearance in Yakima County. (CP 52-54). The parties agreed to scheduling deadlines, but they did not receive a specific trial date.⁷ The parties then proceeded to litigate the case and mutually allowed the agreed pretrial deadlines to lapse. (CP 72-73).

⁵ Due to the assignment to Visiting Judge Sparks, the parties were unable to avail themselves of the regular timelines and motion docket of the Yakima County Superior Court, which necessarily complicated the procedure and speediness for review of any issue filed by the parties.

⁶ This hearing required special scheduling for Judge Sparks to appear from Ellensburg, a court employee administering the hearing from Yakima and counsel for each party appearing from their respective locations in Seattle, all via CourtCall.

⁷ It is undisputed that the parties agreed on the record to certain pre-trial deadlines with Judge Sparks, but no order was entered following this hearing.

C. Defendants' Motion to Dismiss

Although the parties previously agreed on the record to certain case scheduling deadlines and permitted those deadlines to lapse, Local 760 filed a Motion to Dismiss for want of prosecution pursuant to CR 41(b)(1). (CP 59-66). The hearing on this motion again required special scheduling arrangements, including the telephonic appearance of Visiting Judge Sparks. (*Id.*, RP 1-11). Counsel for Mr. Orozco stated his surprise that Local 760's counsel had apparently engaged in an apparent *ex parte* contact to schedule the special hearing date without prior consultation. (RP 6:24 – 7:12). Regardless, Mr. Orozco filed his Response to Defendants' Motion to Dismiss and Request for Trial Setting. (CP 67-75). Counsel also presented argument in opposition based on Plaintiff's timely request for a trial date and principles of equity. (RP 7:13 – 9:20). When filing his response, it is abundantly clear that Mr. Orozco requested the trial court simply and more efficiently to schedule a trial date at the specially-arranged hearing where the visiting trial judge and all parties were scheduled to be present. *Id.*

Prior to the telephonic hearing date on June 26, 2017, counsel for Mr. Orozco proactively conferred with counsel for Local 760 about his availability for potential trial dates. (CP 67-68). Opposing counsel indicated no objection to scheduling a trial date, but indicated his lack of

availability until January 2018.⁸ (CP 72-73). Due to the unique circumstances and restrictions of scheduling trial with a visiting judge from an adjoining county, Mr. Orozco's counsel felt it inappropriate to attempt a selection of a trial date without first conferring with Judge Sparks at the scheduled hearing.⁹ *Id.* In response, Mr. Orozco specifically requested the trial court schedule this matter for trial and, in doing so, recognized the logistical difficulties of selecting a trial date under the unique circumstances of also scheduling Judge Sparks' appearance in Yakima County as a visiting judge. (CP 67-69). Because counsel for Mr. Orozco conducted a trial date scheduling conference with opposing counsel and requested Judge Sparks to set a trial date, Plaintiff complied with the expectations, if not the spirit, of CR 41(b)(1). (CP 67-75). Under the circumstances, requiring Mr. Orozco to note separately a hearing to set a trial date would only delay the inevitable and cause the parties to incur additional attorney fees and costs needlessly. Such a result fails to advance the means of justice and promotes procedural form over substance.

⁸ But for Local 760's unanticipated procedural objection and the requirement to pursue this matter through appellate review, it reasonable to assume that the parties would already be preparing their respective cases for trial presentation in January 2018.

⁹ It is undisputed that noting a separate hearing for a trial date scheduling conference would occur *after* the hearing on Defendants' Motion for Dismiss. This would necessarily require the parties to incur additional fees and costs, in addition to the elapsed time and logistics of scheduling an *entirely separate* hearing with Judge Sparks.

Although counsel for Local 760 identified his soonest trial availability and the absence of any objection to the selection of a trial date, Local 760 nevertheless stated a procedural objection at the court hearing. (CP 72-73; RP 4:2 – 5:25). Notably, the trial court recognized the absurd result of this situation when it reluctantly granted Defendants’ Motion to Dismiss. (CP 87-88). From a practical standpoint, Mr. Orozco asserted that a separate hearing would do nothing to alter the apparent availability of Defendants’ counsel for trial. (RP 8:8 – 9:20). While Judge Sparks accepted the notion that his ability to exercise judicial discretion was limited, he stated the preference to agree with Mr. Orozco and to schedule a trial date. (RP 10:23 – 11:16). Judge Sparks also twice referenced an assumed review by Division III, as well as the possibility of the case returning before him for trial. *Id.* Not only should Judge Sparks have exercised discretion under these case-specific circumstances, but his decision results in manifest injustice and a reward for its unexpected objection to the trial date scheduling. Plaintiff now seeks appellate review for a common-sense reversal and remand to the court below for trial on Plaintiff’s claims.

IV. ARGUMENT

A. Applicable Legal Standard

The case on appeal presents a unique set of circumstances, including an undisputed lack of any objection to setting the case for trial, as applied to CR 41. *See* CR 41(b). Washington courts, as a general policy, discourage arbitrary dismissals and do not resort to such rulings lightly. *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 129-30, 896 P.2d 66 (Div. I, 1995) (citing *Anderson v. Mohundro*, 24 Wn.App. 569, 575, 604 P.2d 181 (Div. I, 1979), *review denied*, 93 Wn.2d 1013 (1980)). The question of whether a court rule is applied properly to the specific facts and circumstances of a case is a question of law and subject to *de novo* review. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001). The imposition of a severe sanction, such as dismissal, without consideration of less severe sanctions is also reviewed for abuse of discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

Appellant contends this Court should review *de novo* the totality of circumstances, which include the following:

- 1) Plaintiff's earlier effort to conference with the court to establish a case schedule and trial date (CP 52-54);

2) Plaintiff's purposeful action to confer with defense counsel about his trial availability before the hearing on Defendants' Motion to Dismiss (CP 71-74);

3) the absence of any stated objection by defense counsel to setting the case for trial (*Id.*);

4) Plaintiff's plain request for a trial date in response to Defendants' motion (CP 67-69);

5) the added difficulty and complicated logistics of securing the availability of a visiting judge due to prior recusals of the entire bench from Yakima County (CP 72-73);

6) the lack of any appreciable prejudice to Defendants given the parties' engagement in discovery and readiness for trial (*Id.*); and

7) the expression of the trial judge regarding a preference in favor of setting a trial date, as requested. (RP 10:23 – 11:16).

B. The Trial Court Erred By Reluctantly Entering the Order of Dismissal and Interpreting Its Lack of Discretion Under the Circumstances

Under the unique factual circumstances of this case, the trial court should not have disregarded its judicial discretion, nor should it have imposed a 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,¹⁰ it must do so consistent with fundamental fairness and the least severe sanction.¹¹ 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 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.¹² (CP 71-

¹⁰ *Jewell v. Kirkland*, 50 Wn.App. 813, 817, 750 P.2d 1307 (Div. I, 1988).

¹¹ *Burnet, supra*.

¹² 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.

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 the decision against seeking a separate hearing to establish a trial date. CR 41(b)(1) (the failure to bring the same on [a] hearing was caused by the party who makes the motion to dismiss).

Assuming *arguendo* that the discretionary powers of the trial court are revoked under CR 41(b)(1), dismissal is only warranted when the *circumstances fit within the rule*. *Gott v. Woody*, 11 Wn.App. 504, 506-507, 524 P.2d 452 (Div. II, 1974). When applying the circumstances of this case to CR 41, the trial court should have recognized application of an exception and avoided the unduly harsh result of dismissal.

Local 760 relies on *Thorp Meats* and the *King*¹³ decisions as support for mandatory dismissal under rule CR 41. *See Snohomish Co. v. Thorp Meats*, 110 Wn.2d 163, 166-69, 750 P.2d 1251 (1988); *see also King v. Rice*, 2013 Wn.App. LEXIS 1358, *4-10 (Div. I, June 10, 2013). Neither case can be squared with the circumstances on appeal, however. In *Thorp Meats*, the responding party to a CR 41 motion filed separately a

¹³ Mr. Orozco anticipates that Local 760 will cite to *King v. Rice* pursuant to GR 14.1(a), which is nonbinding authority that Division III may consider for its relevant persuasive value.

request for a hearing to set a trial date, but also secured from the court administrator a trial date before the hearing. *Thorp Meats*, 110 Wn.2d at 165. While this decision of the Washington Supreme Court does ratify the notion that a case can be dismissed unless it is noted for a trial setting before a motion to dismiss, it also recognized that circumstances may justify the use of the trial court's inherent authority. *Id.* at 168-70. This case also did not consider the circumstances, such as here, where Plaintiff requested the trial court to set a trial date, Plaintiff's counsel conferred with defense counsel regarding trial availability, Plaintiff's counsel relied on the lack of objection from defense counsel, and the parties were unable to access the Yakima County Superior Court through the regular motion docket. Each of these circumstances warrants an exception under CR 41 and/or the permissible exercise of discretion by the trial court to manage its own docket.

The unique factual circumstances of this case, should prompt the Court to look beyond the *King* decision. Specifically, Mr. King could not provide an "explanation for his failure to note the matter for trial for eight months after his bankruptcy proceedings were finally dismissed." *King*, 2013 Wn.App. LEXIS 1358 at *8. Mr. Orozco, on the other hand, provided a detailed explanation for the inefficiencies associated with noting a separate hearing date with a visiting judge, in addition to the

justified reliance on the representations of opposing counsel. Although inapplicable to the situation in *King*, there are factual circumstances to support the fact that the verbal commitment by defense counsel – *the lack of objection to scheduling a trial date* – contributed to the decision against scheduling a separate hearing. (CR 72-74); CR 41(b)(1).

Finally, neither party to this cause should be lauded or awarded for their respective actions when managing this case. While the passage of time lies with inaction by both counsel, there is no basis to commend or reward Local 760 for its actions below. *See e.g. Bus. Servs. of Am. II, Inc., v. WaferTech, LLC*, 174 Wn.2d 304, 312, 274 P.3d 1025 (2012). Because the circumstances in this case are unique and justify an exception under CR 41, the harsh outcome of dismissal should have been avoided by the trial court. Mr. Orozco requests that this Court remand this action for a trial setting and an eventual trial on the merits.

C. Even if the Trial Court Were Deprived of Typical Discretion, Principles of Equity Should Preclude this Harsh Outcome

As recognized by Judge Sparks during the hearing on Defendants' Motion to Dismiss, the dismissal order results in an unduly harsh outcome and an unjust reward to Local 760 for renegeing on its previous tacit consent, both of which should be avoided if equitable doctrines were to be applied by the trial court. (RP 1-11). The right *conditions and*

circumstances must enable the trial court to promote equity by doing substantial justice. See *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 460-61, 45 P.3d 594 (Div. III, 2002). Because Judge Sparks believed that he was unable to exercise judicial discretion, he was similarly prohibited from doing substantial justice. This is wrong and must be remedied.

As above, Mr. Orozco's counsel secured a commitment from defense counsel that Local 760 would refrain from objecting to the setting of a trial date under these unique case circumstances. (CP 71-74). Plaintiff relied reasonably on this representation during a pre-hearing conference. The doctrines of equitable estoppel and waiver should have prevented dismissal of this action, as the change of position by defense counsel caused inequitable consequences. *Cornerstone Equip. Leasing, Inc., v. McLeod*, 159 Wn.App. 899, 907-10, 247 P.3d 790 (Div. I, 2011). The doctrine of equitable estoppel requires a statement that is different from a position later asserted, reasonable reliance on that statement, as well as an injury to the relying party if the court were to allow the first party to contradict or repudiate their prior statement. *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992). Without question, Local 760 repudiated its earlier statement when stating an objection and demanding dismissal at the hearing. (RP 4:2 –

5:25). Plaintiff incurred an injury after a justified reliance on the representations of counsel for Local 760, as there is no more severe an injury than dismissal under the circumstances. Moreover, the standards of the legal professional permit counsel to rely on the commitments made by a fellow lawyer.¹⁴ (Appx. 1-3). The principles of equity, substantial justice and detrimental reliance on the promise of opposing counsel must be applied to the circumstances of this case, and must empower the court to promote equity when scheduling this case for trial upon remand.

D. Plaintiff Requests Attorneys' Fees Under RCW 49.60.030 and RAP 18.1

Plaintiff is entitled under RCW 49.60.030(2) to reasonable attorneys' fees on appeal because his underlying substantive WLAD claims allow for an award of fees. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004). Plaintiff requests such fees on appeal. RAP 18.1.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court reverse and remand this matter for a trial setting and further

¹⁴ Mr. Orozco attaches hereto an Appendix the WSBA Creed of Professionalism, "My word is my bond in my dealings with the court, with fellow counsel and with others," and the King County Bar Association Guidelines of Professional Courtesy, "2. A lawyer should honor promises and commitments."

proceedings consistent with its opinion. Given the unique circumstances of this case, the trial court should have been permitted to exercise its typical discretion and CR 41(b)(1) should not have warranted a non-discretionary dismissal. The trial court also should have recognized Plaintiff's efforts to establish suitable trial date, together with the lack of objection from the moving party, as exceptions to CR 41(b)(1).

Finally, Mr. Orozco requests this Court remand this matter with instruction for the trial court to consider application of its equitable powers, especially when counsel justifiably relied on the representations and lack of objection by counsel for Local 760. Equity dictates that Local 760 should have been prohibited from repudiating its prior position. Should the Court grant the relief requested, Plaintiff further requests the attorneys' fees and costs necessarily incurred on this appeal.

RESPECTFULLY SUBMITTED this 9th day of November, 2017.

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CERTIFICATE OF SERVICE

I, Kathy Olivarez, an employee of the Law Offices of Judith A. Lonnquist, P.S., declare under penalty of perjury that on November 9, 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 type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Regular Mail <input type="checkbox"/> Facsimile


Kathy Olivarez

**Appendix to
Appellant's Opening Brief**



Washington State Bar Association

Creed of Professionalism

As a proud member of the legal profession practicing in the state of Washington, I endorse the following principles of civil professional conduct, intended to inspire and guide lawyers in the practice of law:

- **In my dealings with lawyers, parties, witnesses, members of the bench, and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness.**
- **My word is my bond in my dealings with the court, with fellow counsel and with others.**
- **I will endeavor to resolve differences through cooperation and negotiation, giving due consideration to alternative dispute resolution.**
- **I will honor appointments, commitments and case schedules, and be timely in all my communications.**
- **I will design the timing, manner of service, and scheduling of hearings only for proper purposes, and never for the objective of oppressing or inconveniencing my opponent.**
- **I will conduct myself professionally during depositions, negotiations and any other interaction with opposing counsel as if I were in the presence of a judge.**
- **I will be forthright and honest in my dealings with the court, opposing counsel and others.**
- **I will be respectful of the court, the legal profession and the litigation process in my attire and in my demeanor.**
- **As an officer of the court, as an advocate and as a lawyer, I will uphold the honor and dignity of the court and of the profession of law. I will strive always to instill and encourage a respectful attitude toward the courts, the litigation process and the legal profession.**

This creed is a statement of professional aspiration adopted by the Washington State Bar Association Board of Governors on July 27, 2001, and does not supplant or modify the Washington Rules of Professional Conduct.

7. A lawyer should not make unfounded accusations of unethical conduct about opposing counsel.

The legal system works best when it has the respect and confidence of the court, lawyers, and the public. Unfounded accusations of unethical conduct diminish respect for the entire profession. If a lawyer genuinely believes that opposing counsel has engaged in unethical conduct and believes it can be clearly established, the matter should be referred to the appropriate bar committee or the court. If the lawyer does not believe that the matter is clear enough to be referred to the appropriate bar committee or the court, it should not be publicized.

8. A lawyer should be punctual.

A lawyer should respect the commitments of others by arriving at depositions, hearings, and meetings on time. A lawyer should attempt to notify all participants when he or she will be unavoidably late. When a lawyer is aware that a witness will be late for a scheduled event, the other participants should be notified.

9. A lawyer should seek informal agreement on procedural and preliminary matters.

When a party in a civil matter is entitled to something, such as information or documents in discovery, normally it should be provided without resort to formal procedural mechanisms such as motions, hearings, or orders. Whenever appropriate, facts that are not in dispute should be stipulated in writing to avoid the time, expense, and effort required to establish them by formal proof. If there is no dispute that a document is genuine or authentic, or that foundation otherwise can be established for its admission, a lawyer should normally not require an adversary to obtain the testimony of a custodial or other foundation witness. It is recognized that in criminal defense cases, counsel has an obligation to require that the

prosecution prove its case, and this guideline is not intended to suggest concessions that are inconsistent with such an obligation. Lawyers should remain sensitive to the need to follow up any informal agreement with appropriate formal procedures in order to preserve the record.

10. A lawyer should not engage in invidious discrimination.

A lawyer should avoid words or conduct intended to convey disrespect for another person because of the person's sex, race, age, religion, national origin, disability, sexual orientation, or marital status. Also, a lawyer should not condone such words or acts on the part of others.

(adopted by KCBA Board of Trustees 10/6/99)

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King County Bar Association
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GUIDELINES OF PROFESSIONAL COURTESY

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PREAMBLE

Lawyers are expected to play many demanding roles, including that of advocate promoting a client's interests, frequently in opposition to the interests of others. A strong commitment to high professional standards is required. In fulfilling their duty to represent clients zealously, lawyers should be mindful of their obligation to the administration of justice, which is designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

The Rules of Professional Conduct define the minimum requirements for lawyers with complex and often competing obligations to their clients, to their adversaries, and to the system of justice. The Rules presuppose an adversary system that is not an end in itself, but rather a means to justice, and that is tempered accordingly. In their preamble, the Rules call on lawyers to hold themselves to a higher standard than the minimum required to avoid disciplinary action.

These guidelines of professional courtesy are not rules and are not intended to be treated like rules. While some of them address conduct required by the Rules of Professional Conduct, others call for more than what the Rules require. Some are rather specific; others use general language that would be inappropriate in an enforceable rule, but appropriate as a statement of principle intended to guide individual judgment and behavior. The adoption and revision of these guidelines represent an ongoing attempt to define and promote the highest standards of professional conduct.

1. A lawyer should treat others with courtesy and respect.

A lawyer should treat other people, including judges and court personnel, other lawyers and their staffs, opposing parties, and witnesses, with courtesy and respect. This principle applies to all encounters and communications, not just those that occur in formal settings such as a court hearing. The adversarial nature of many professional encounters does not justify an exception to this principle.

2. A lawyer should honor promises or commitments.

A lawyer should endeavor in good faith to honor all express promises and agreements with others, whether oral or written. A lawyer's word is a commitment on which others may rightfully rely. If unforeseen circumstances prevent a lawyer from honoring a promise or commitment, the lawyer should immediately notify all persons who might otherwise rely on it.

3. A lawyer should never knowingly deceive another.

Honesty among lawyers is essential to our legal system. It is recognized that an adversarial relationship requires all sides to advocate their interests vigorously. This guideline does not suggest that there is an obligation (apart from those required by ethical canons, laws, or court rules) for a lawyer to disclose anything that may harm a client's interest, or to refrain from forceful expression of opinions helpful to the client's position. It is directed against deliberate and deceptive acts or omissions by lawyers.

4. A lawyer should make reasonable efforts to schedule matters with other counsel by agreement.

A lawyer should recognize scheduling interests of other counsel. Depositions, hearings, meetings, and other events requiring the presence of other counsel should be scheduled

by agreement whenever possible. The courtesy requested by this guideline should not be used for the purpose of obtaining delay or an unfair advantage. This principle does not remove the necessity of serving formal notice as required by statute or rule; misunderstandings can be avoided if formal notice is sent after an agreement is reached. Notice of cancellation of depositions, hearings, and the like should be given at the earliest possible time.

5. A lawyer should be timely in responding to other lawyers and considerate of their time.

Much of a lawyer's work, such as negotiations, drafting or revising drafts of documents, and exchange of information is done without specific deadlines. Nevertheless, there is an expectation that a lawyer who is to respond to the other lawyers engaged in the matter will do so with reasonable promptness, so it is not necessary to make repeated requests or leave an accumulation of unanswered messages. If a lawyer is not able to respond in a timely manner or by a promised date, the other lawyers should be informed in advance. Revised drafts of documents should be accurately marked to show changes to facilitate review.

6. A lawyer should not seek or threaten to seek sanctions against opposing counsel for mere tactical advantage.

Seeking sanctions against opposing counsel may impugn the integrity of that individual. Such action should be taken only when the lawyer requesting sanctions believes in good faith that they are warranted. Alternatives such as agreement with opposing counsel, protective orders, motions *in limine*, and limits on discovery should be explored before stronger measures are sought. This guideline is not intended to discourage appropriate use of sanctions. When sanctions are sought, the party requesting them should do so in a professional manner, stating the supporting facts upon which the request is based, and avoiding personal attacks against opposing counsel or parties.

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

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