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Court of Appeals
Division III
State of Washington
8/21/2019 2:20 PM

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Case No. 363481

JEFFREY C. JONES,
Appellant,

v.

CHELAN COUNTY, a municipal corporation,
Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION & ARGUMENT SUMMARY

Pursuant to his notice of appeal, Jeffrey C. Jones, seeks review of the judgment entered by the Chelan County Superior Court on August 30, 2018 as well as all interlocutory orders, including the order granting partial summary judgment entered by the superior court on February 22, 2016. In his briefing submitted to this Court, however, Mr. Jones only assigns error to the superior court's denial of his motion to continue. He offers no argument or authority concerning any other orders or judgments, thereby abandoning his appeal of the same.

Trial in the superior court was set for August 23-24, 2018. The superior court sent Mr. Jones notice of the trial date months in advance of the August date. Chelan County (the "County"), as well, sent Mr. Jones correspondence on July 2, 2018, setting forth the trial date. Both the superior court's notice and the County's correspondence were sent to Mr. Jones at his valid mailing address. Despite the advance notice, Mr. Jones did not file a motion to continue until three days prior to trial. Mr. Jones's motion, unsupported by any affidavit or declaration, stated he was unaware of the trial date and needed additional time to hire an attorney. At the time of Mr. Jones's motion to continue, the superior court matter had been pending for approximately five (5) years. Mr. Jones had already received a prior continuance of the trial date in order to seek legal counsel

after attorney Robert Sealby – Mr. Jones’s second attorney that appeared in the superior court matter but the sixth attorney that represented Mr. Jones in his dispute with the County over his operation of an unlawful recreational vehicle park – withdrew from representation. Furthermore, witnesses for both the County and Mr. Jones had passed away during the pendency of the superior court matter. Mr. Jones’s motion to continue was heard on the first day of trial – August 23, 2018. All of the County’s remaining witnesses were present.

A review of the facts in this matter leads to the conclusion that the superior court did not abuse its discretion by denying Mr. Jones’s untimely request for a continuance of the trial date. The superior court’s orders and judgment, therefore, should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the superior court abused its discretion by denying Mr. Jones’s untimely motion for continuance of the August 23-24, 2018, trial date after Mr. Jones had been provided timely notice of the trial date by both the superior court and the County, the underlying action had been pending since 2013, trial had been previously continued in part so Mr. Jones could retain another attorney after having already been represented by several previous attorneys, witnesses in the matter had passed away

during the pendency of the matter, and the County's remaining witnesses were present for trial.

III. COUNTERSTATEMENT OF THE CASE

On December 23, 2013, the County filed in the Chelan County Superior Court a Complaint for Order Declaring Zoning and Shoreline Violations, Declaring Nuisances, Ordering Corrective Actions, Abatement, Injunctive Relief, and Imposing Costs, Fines, and Lien against Jeffrey C. Jones with respect to his real property located in Dryden, Washington. CP 004-012. The complaint alleged six claims, summarized as follows: (1) operation of an unpermitted recreational vehicle park/campground; (2) occupancy of recreational vehicles for more than ten days during a sixty day period; (3) excess vehicles stored on real property; (4) unpermitted development of a riparian buffer; (5) unpermitted development within the shoreline jurisdiction; and (6) nuisance. CP 004-012.

On February 11, 2014, attorney Chancey Crowell filed a notice of appearance on behalf of Mr. Jones. CP 015. On March 15, 2014, Mr. Jones answered the complaint asserting that his property was not subject to county regulations because the uses occurring on it were "grandfathered," i.e. legally nonconforming. CP 026-032.

On December 22, 2015, the County filed a motion for summary

judgment. CP 651-652. Hearing on the motion was held on January 22, 2016. CP 742. Not long after the hearing, one of the County's witnesses in the case, Morrell Ernest Thies, passed away. CP 973, 978-979. On February 22, 2016, the superior court entered an order granting summary judgment on four of the County's six claims. CP 782-789. The order granting summary judgment set forth numerous findings of fact and conclusions of law. CP 782-789. The two claims that remained for trial were the claims associated with Mr. Jones's unlawful operation of a recreational vehicle park/campground and the unlawful occupancy of recreational vehicles. CP 782-789.

On March 21, 2016, Mr. Jones filed a notice of appeal with respect to the order granting summary judgment, *Jeffrey C. Jones v. Chelan County*, Case #314968-III. CP 791.

Shortly thereafter, on March 31, 2016, Mr. Crowell, having been terminated by Mr. Jones, filed a notice of intent to withdraw in the superior court matter. CP 804-805. In the notice, Mr. Crowell stated the last known address for Mr. Jones was P.O. Box 431, Dryden, Washington, 98821 (the "Dryden mailing address"). CP 805.

In the appellate matter, proceedings were continuously delayed as Mr. Jones requested and received several extensions of time for filing his appellate brief. *See e.g.* CP 878, 885, 889. On October 4, 2016, attorney

Robert Sealby entered an appearance on behalf of Mr. Jones in both the superior court and appellate matters. CP 891-892. On November 9, 2016, without submitting any briefing, Mr. Jones voluntarily withdrew his appeal. A mandate was issued on November 14, 2016. CP 893.

On August 18, 2017, the County filed and served a note for trial setting. CP 894-896. The superior court sent notice of trial to both the County and Mr. Sealby on October 4, 2017. CP 898. The initial trial date was set for February 20-21, 2018. CP 898.

On January 16, 2018, Mr. Sealby filed a notice of intent to withdraw as counsel for Mr. Jones, effective January 30, 2018. CP 899-901. The notice reflected a new mailing address for Mr. Jones at P.O. Box 552, Leavenworth, Washington, 98826 (the “Leavenworth mailing address”). CP 900.

On January 19, 2018, the County mailed its ER 904 notice with attached documents to Mr. Sealby, and personally served the same on Mr. Jones. CP 902-907, 915.

On February 9, 2018, the County and Mr. Jones signed a stipulated order of continuance of the February 2018 trial date. CP 918-919. Continuance was based, in part, on the fact that Mr. Sealby had withdrawn from representation and Mr. Jones intended to retain legal counsel prior to commencement of trial. CP 919. After signing the stipulation, Mr. Jones

expressed to the County's legal counsel, April D. Hare, that he would like to settle his superior court matter. CP 972.

On February 12, 2018, the superior court, based on the stipulation of the parties, entered an order continuing trial to a date to be later determined by the court. CP 919.

On March 6, 2018, the superior court sent to Mr. Jones at P.O. Box 552, Dryden, Washington, 98821, an amended notice of trial date informing the parties that trial was scheduled as first set for August 23-24, 2018. CP 922. The superior court sent a second amended notice of the August 2018 trial date to Mr. Jones at P.O. Box 552, Dryden, Washington, 98821, on June 14, 2018. CP 925.

On June 28, 2018, the superior court re-sent the second amended notice of trial date to Mr. Jones at the Leavenworth mailing address. CP 981; RP 10. There is no evidence that the U.S. Post Office returned the June 28, 2018, notice as undeliverable.

On July 2, 2018, Ms. Hare, based on Mr. Jones's previous expressed interest in settling the case, sent to Mr. Jones at the Leavenworth mailing address a draft stipulated judgment. CP 972. Enclosed with the draft stipulated judgment was a two-page cover letter in which the County reminded Mr. Jones that the superior court matter was set for trial on August 23-24, 2018. CP 976. The letter was not returned

as undeliverable. CP 972.

On August 13, 2019, the County personally served another copy of the draft stipulated judgment on Mr. Jones. CP 972. That same day Mr. Jones left a telephone message for Ms. Hare asking for a continuance so he could get a lawyer. CP 972-973. Ms. Hare attempted to contact Mr. Jones twice informing him that the County would object to a continuance since the matter had already been continued so Mr. Jones could obtain an attorney. CP 973. Mr. Jones failed to return any of the County's calls. CP 973.

On August 15, 2018, the County sent to Mr. Jones at his Leavenworth mailing address its trial brief, proposed witness list, and proposed findings of fact and conclusions of law. CP 926-956.

On August 20, 2018, Mr. Jones filed a motion for continuance stating that he needed time to hire an attorney. CP 961-964. The motion was filed only three days prior to trial, making it untimely.¹ The motion was not supported by either an affidavit or declaration. In his motion, Mr. Jones argued that he had been informed of the trial date a week prior on August 13, 2018. CP 962. The County filed its objection to the motion and supporting declaration on August 21, 2018. CP 967-970.

¹ Pursuant to local rule, pretrial motions must be filed with the clerk and served on all parties at least five (5) court days before the date fixed for such hearing. Chelan County Sup. Ct. Local Rule 7(C).

On August 23, 2018, the superior court took up Mr. Jones's motion for continuance. Upon inquiry from the superior court, Mr. Jones's stated he was seeking a continuance because he allegedly failed to receive notice of the trial date and because he needed to hire an attorney. RP 11. Mr. Jones confirmed the Leavenworth mailing address was the appropriate address. RP 10. The superior court denied the continuance and proceeded with trial. RP 18.

On the second day of trial, Mr. Jones presented to the superior court a complaint he submitted to the U.S. Postal Service on June 11, 2015, pertaining to his Dryden mailing address. CP 1003-1004; RP 189. The superior court again denied Mr. Jones's motion to continue. RP 190-191. The trial continued and after presentment of witnesses and evidence by both parties, the superior court took a recess to review the exhibits before rendering its decision. RP 229. Prior to the recess, the superior court informed the parties that court would resume at 1:30 p.m. RP 229-230; CP 1001. Mr. Jones appeared via telephone when court resumed. RP 231; CP 1001. The superior court entered findings of fact and conclusions of law in favor of the County on its remaining two claims. CP 985-998. With the consent of the parties, the court set presentment of final judgment for 4:00 p.m. on August 30, 2018. RP 256-259. Mr. Jones failed to appear for the August 30, 2018, presentment hearing. CP 1045. Final

judgment was entered on August 30, 2018. CP 1026-1044.

On September 28, 2018, Mr. Jones file a notice of appeal of the final judgment. CP 1049. On October 1, 2018, attorney Daniel Appel, on behalf of Mr. Jones, filed an amended notice of appeal, seeking review not only of the final judgment, but of all interlocutory orders, including the order granting partial summary judgment. CP 1077-1079.

IV. LEGAL AUTHORITIES & ARGUMENT

A. Standard of Review

Whether to grant a motion to continue is within the discretion of the trial court. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004). The appellate court reviews a trial court's decision to deny a motion to continue for abuse of discretion. *Id.* "A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary." *Id.* Discretion is abused when no reasonable person would take the view adopted by the trial court. *Jankelson v. Cisel*, 3 Wn. App. 139, 142, 473 P.2d 202 (1970). If reasonable persons "differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Id.* Reversal and order for a new trial is a severe measure. *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 813, 881 P.2d 1020 (1994).

B. The Superior Court Did Not Abuse Its Discretion When It Denied Mr. Jones's Untimely Request for Continuance.

When a case is set and called for trial, it must be either tried or dismissed, unless good cause can be shown by one of the parties for a continuance. Wash. Sup. Ct. Civ. Rule ("CR") 40(d); *Dewitt v. Mullen*, 193 Wn. App. 548, 555, 375 P.3d 694 (2016); *Bramall v. Wales*, 29 Wn. App. 390, 393, 628 P.2d 511 (1981). In determining whether to grant or deny a motion to continue, a trial court may properly consider a variety of factors, including

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.

Trummel v. Mitchell, 156 Wn.2d 653, 670-71, 131 P.3d 305 (2006).

In his briefing, Mr. Jones argues that the superior court abused its discretion in denying his motion to continue on the basis that he failed to receive notice of the August 23-24, 2018, trial date.² Brief of Appellant 5-7. Mr. Jones failed to support his motion, however, with an affidavit or

² In a similar fashion, Mr. Jones also told the superior court he had no knowledge of the documents provided by the County pursuant to Wash. Evidence Rule 904. RP 19, 21-22. However, the record reflects that those same documents were personally served on Mr. Jones by the Chelan County Sheriff. CP 915.

declaration attesting to the fact that he failed to receive the notice. The only other “evidence” Mr. Jones presented to the superior court in support of his motion was a three-year old complaint he submitted to the U.S. Postal Service indicating he was not receiving mail at his Dryden mailing address. CP 1000, 1003-1004; RP 189-190. The superior court noted, and the record reflects, however, that it sent notice of the August trial date to Mr. Jones at his *Leavenworth* mailing address. CP 981; RP 10-11. Therefore, Mr. Jones’s postal complaint failed to support his allegations that he failed to receive the notice.

In his briefing, Mr. Jones seeks to raise doubt as to the superior court’s actions, arguing that it is reasonable to infer that the superior court failed to mail out the notice based on 1) the filing date of the notice and 2) the County’s failure to cite to the notice in its written objection to the continuance. Brief of Appellant 5. Neither the filing date³ nor the County’s written objection⁴, however, are indicative of when the superior court sent notice of the August 23-24, 2018, trial date. Rather, the

³ It is often that pleadings or documents are filed with a court after the date a purported activity occurred. For example, Ms. Walker was served with a subpoena on August 11, 2018, however, the return of service was not filed with the superior court until September 24, 2018. CP 1047-1048. Also, Mr. Jones filed numerous affidavits dated several years before they were eventually filed with the superior court. *See* CP 674-688.

⁴ During oral argument on the motion, the County cited the superior court’s June 2018 notice as a basis for the County’s objection to continuance. RP 14.

superior court is in the best position to know whether it did or did not send notice to Mr. Jones.

Furthermore, Mr. Jones received notice of the trial date when, on July 2, 2018, the County sent to his Leavenworth mailing address a cover letter setting forth the trial date. CP 972, 976. The letter was not returned to the County as undeliverable, CP 972, and Mr. Jones does not dispute receiving the letter. Therefore, even if Mr. Jones had not received notice from the superior court, he was by the end of the first week of July made aware of the August trial date. Under these facts, the superior court correctly determined Mr. Jones had received timely notice of the August trial date.⁵

Nor does Mr. Jones's citation to *Mackay v. Mackay*, 55 Wn.2d 344, 347 P.2d 1062 (1959), support his argument that the superior court abused its discretion. *Mackay* is distinguishable in the fact that a trial court had noted a hearing as "subject to call" without specifying a date. *Id.* at 349. Neither the trial court nor the parties made an effort to call the matter for hearing and therefore no hearing date was set. *Id.* Furthermore, even though still represented by counsel, the appellant's attorney failed to

⁵ Even if the Court were to take Mr. Jones's argument that he didn't receive notice until August 13, 2018 of the trial date as true, Mr. Jones did not file a motion to continue until a week later and only three days prior to trial. Continuances may be denied where a party learns of grounds for a continuance but delays in bringing the request until the time of trial. See e.g. *Fruitland Irr. Co. v. Smith*, 54 Wash. 185, 186-87, 102 P. 1031 (1909).

appear on the date continuance was requested and denied. *Id.* Therefore, given the circumstances, the appellate court found abuse of discretion. *Id.* Unlike *Mackay*, however, the superior court in this matter had specified a date for trial – August 23-24, 2018 – and Mr. Jones had been provided notice of that trial date by both the superior court and the County.

In his briefing Mr. Jones argues that as a result of the superior court's denial, he was unable to present testimony from witnesses that could support his case regarding historic use of the property. Brief of Appellant 6. Continuance based on lack of evidence, however, must be supported by an affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. CR 40(e); *see also Makoviney v. Svinth*, 21 Wn. App. 16, 29, 584 P.2d 948 (1978) (reciting that motion to continue accompanied by an oral offer of proof but no affidavit is insufficient). As previously stated, Mr. Jones failed to submit any affidavit or declaration in support of his motion to continue.

Furthermore, contrary to Mr. Jones's argument, two of his witnesses, Loren Gere and Shirley DeWillers, were able to testify at trial regarding historic use of Mr. Jones's property. *See* RP 165-177, 193-211.

The record also reflects other factors supporting the superior court's decision to deny continuance of the trial. Besides finding that Mr.

Jones had received timely notice, the superior court noted that the matter had been pending since 2013. RP 13. The County, as well, filed a declaration showing it would be prejudiced if trial were continued. The County, for example, had already gone through the trouble and expense of subpoenaing its witnesses for trial and that those witnesses had made arrangements to be and were present for trial. CP 973. One of the County's witnesses, Ms. Walker, had travelled from Western Washington for the trial. RP 15. The County also alerted the superior court to the fact that some of its witnesses were elderly or had medical conditions. CP 973. In particular, one of its witnesses had already passed away during the pendency of the case. CP 973, 978-979. Mr. Jones, as well, indicated to the superior court that two of his witnesses had also passed. RP 14. Therefore, there was evidence of potential loss of witnesses/evidence should the trial be continued.

Furthermore, Mr. Jones had already received a previous continuance in order to obtain yet another attorney. Washington courts have held that an attorney's withdrawal is not a compelling reason for granting a continuance, reasoning that "if a contrary rule should prevail, all a party desiring a continuance, under such circumstances, would have to do would be to discharge his counsel or induce him to file a notice of withdrawal." *Jankelson*, 3 Wn. App. at 141 (internal citations omitted).

Therefore, trial courts do not abuse discretion when a continuance is denied following withdrawal of an attorney. *See e.g. Martonik v. Durkan*, 23 Wn. App. 47, 49-51, 596 P.2d 1054 (1979) (no abuse of discretion even though attorney withdrew approximately ten (10) days before trial date); *Peterson v. Crockett*, 158 Wash. 631, 636, 291 P. 721 (1930) (attorney's withdrawal on the eve of a trial was not compelling grounds for a continuance).

When the superior court inquired as to his efforts to obtain legal counsel in the six months since the last continuance, Mr. Jones failed to provide any indication that he would be able to retain an attorney if given more time. *See* RP 12-13. Rather, Mr. Jones stated the opposite, indicating that attorneys were “just too busy” and if he wanted to get an attorney, “he would have to go out of town.” RP 13.

Based on the above, a reasonable minds could conclude that the superior court acted properly by denying Mr. Jones’s motion for continuance. Therefore, the superior court did not abuse its discretion in denying further delay in the proceedings.

C. Mr. Jones Has Abandoned His Appeal of the Summary Judgment Order.

Mr. Jones fails to assign any error to the superior court’s order granting partial summary judgment. The appellate courts do not consider

issues that are abandoned on appeal. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). A party abandons an issue by failing to pursue it on appeal by failing to brief the issue. *Id.*; *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977). The only issue presented and argued in Mr. Jones's brief concerns the superior court's denial of his motion to continue the trial date. Mr. Jones fails to address the superior court's order granting partial summary judgment that was entered long before the disputed motion to continue. Therefore, Mr. Jones has abandoned his appeal of the superior court's order granting partial summary judgment.

V. CONCLUSION

For the forgoing reasons, the superior court's judgment and all interlocutory orders should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of August, 2019.

DOUGLAS J. SHAE
Chelan County Prosecuting Attorney

By: 

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Deputy Prosecuting Attorney
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DECLARATION OF SERVICE

On the date set forth below, I deposited in the U.S. First Class Mail, postage prepaid, a true and correct copy of the document, BRIEF OF RESPONDENT, to the following person(s):

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

SIGNED this 21st day of August, 2019 in Wenatchee, Washington.


PAM FAIRCLOTH

CHELAN COUNTY PROSECUTING ATTORNEY

August 21, 2019 - 2:20 PM

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Superior Court Case Number: 13-2-01300-7

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