

FILED
Court of Appeals
Division III
State of Washington
5/13/2020 11:04 AM

NO. 371298

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CONFEDERATED TRIBES AND BANDS

OF THE YAKAMA NATION,

Appellant,

v.

OKANOGAN COUNTY,

Respondent.

REPLY BRIEF OF APPELLANT

Shona Voelckers, WSBA No. 50068
Yakama Nation
Office of Legal Counsel
PO Box 151
Toppenish, WA 98948
(509) 865-5121
Attorney for Appellant

R. Joseph Sexton, WSBA No. 38063
Amber Penn-Roco, WSBA No.44403
Galanda Broadman, PLLC
8606 35th Avenue NE, Suite L1
Seattle, WA 98115
(206) 557-7509
Attorneys for Appellant

TABLE OF CONTENTS

I. ARGUMENT..... 5

A. Trial Court’s Order Was Based On a Perceived Lack of Jurisdiction to Grant Yakama Nation’s Motion. 5

B. Washington State Supreme Court Precedent is Directly Applicable to This Proceeding. 8

C. The County’s Repudiation of its Settlement Agreement with the Yakama Nation is An Extraordinary Circumstance..... 9

D. The County Has Failed to Diligently Pursue its Settlement and Court-Ordered Obligations..... 10

E. The Yakama Nation’s Appeal is Valid. 13

F. Sanctions Are Inappropriate. 14

II. CONCLUSION 15

TABLE OF AUTHORITIES

CASES

| | |
|--|----|
| <i>Beckman v. Wilcox</i> , 979 P.2d 890, 891-92 (1999)..... | 6 |
| <i>Blair v. Chalich</i> , 135 Wn. App. 1034 (2006)..... | 8 |
| <i>Bowman v. Webster</i> , 42 Wash. 2d 129, 135, 253 P.2d 934, 938 (1953)..... | 5 |
| <i>Condon v. Condon</i> , 177 Wn.2d 150, 298 P.3d 86 (Wash. S. Ct. 2013)..... | 7 |
| <i>Halvorsen v. Ferguson</i> , 46 Wash.App. 708, 723, 735 P.2d 675 (1986)... | 14 |
| <i>In re Marriage of Thurston</i> , 92 Wn. App. 494, 496, 963 P.2d 947 (1998) | 8 |
| <i>Keeling v. Sheet Metal Workers Int'l Ass'n, Local Union 162</i> , 937 F.2d 408, 410 (9th Cir. 1991)..... | 8 |
| <i>Kinney v. Cook</i> , 150 Wash. App. 187, 195, 208 P.3d 1, 5 (2009)..... | 14 |
| <i>Lutz Tile, Inc. v. Krech</i> , 136 Wash.App. 899, 906, 151 P.3d 219 (2007). | 14 |
| <i>Wachovia SBA Lending, Inc. v. Kraft</i> , 165 Wn.2d 481, 200 P.3d 683 (Wash. S. Ct. 2009)..... | 8 |
| <i>Whatcom County v. Hirst</i> , 186 Wn.2d 648, 381 P.3d 1 (2016) | 10 |

STATUTES

| | |
|----------------------|----|
| RCW 19.27.097 | 11 |
| RCW 4.84.330 | 7 |
| RCW 58.17.0110 | 11 |

RULES

RAP 18.9..... 13

I. ARGUMENT

The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) has demonstrated that the trial court retained the requisite jurisdiction to enforce its own order. Okanogan County (“County”) failed to refute this point. The County did not provide any authority demonstrating that the trial court lacked jurisdiction to vacate an order of dismissal. Rather, the County devoted a large percentage of its briefing confusing the underlying facts of this matter and advancing arguments irrelevant to the sole issue before this Court. The Court should not consider these distractions. Instead, the Court should focus on the issue at hand: whether a court in this State retains jurisdiction to enforce its own orders after dismissal of a case without prejudice.

A. Trial Court’s Order Was Based On a Perceived Lack of Jurisdiction to Grant Yakama Nation’s Motion.

The trial court denied Yakama Nation’s Motion to Vacate the Stipulated Order of Dismissal after concluding that it did not have jurisdiction to vacate the dismissal. RP 28-31. Because it did not vacate the dismissal order, the court erroneously failed to reach Yakama Nation’s substantive motions, including the proper remedy for the County’s failure to comply with the court’s Stipulated Order of Dismissal.

The trial court's Order Denying CR 60 Motion to Vacate Stipulated Order of Dismissal does not outline the basis for the court's decision. CP 239-240. Accordingly, we turn to the trial court's statements during the hearing to ascertain the basis for the court's decision. *See Bowman v. Webster*, 42 Wash. 2d 129, 135, 253 P.2d 934, 938 (1953) ("Where the findings of fact are incomplete or defective in some particular so that a doubt exists as to the theory on which the case was decided, we are sometimes able to overcome the difficulty by referring to the oral or memorandum decision of the trial court.").

During the hearing, the trial court stated: "I'm denying the motion at this point, based on the pleadings, as such, and I think I've indicated, given – some case authority that I have reviewed dealing with voluntary dismissals." RP 31. Earlier, the trial court outlined its thinking:

When a party, and I -- have reviewed authorities. I have . . . come across, pretty much, the language that is set out in earlier Washington cases, including the *Wachovia SBA Lending v. Kraft* case that voluntary dismissals leave the party as if the action had never been brought and it cites *Beckman v. Wilcox*, 96 Wn. App. 355, it's a 1999 case and then *State v. Taylor*, 150 Wn.2d 599, a 2003 case. Basically,

no substantive issues are resolved and basically the plaintiff
may refile the suit.

RP 28. In *Beckman v. Wilcox*, the court stated the “question before us is whether the trial court retained jurisdiction to award attorney fees.” 979 P.2d 890, 891-92 (1999). In *Beckman*, the court examined whether the voluntary dismissal of a case divested the court of jurisdiction, stating “the effect of a voluntary dismissal ‘is to render the proceedings a nullity and leave the parties as if the action had never been brought.’” *Id.* at 892. *Beckham* examines the finality of a voluntary dismissal and the impact of that finality on the court’s jurisdiction.

The trial court then discussed the Stipulation and Order of Dismissal, finding that “clear intent here of dismissing this action” based on the fact that the term “[d]ismissed is capitalized” and holding that the parties agreed to “dismiss the action in its entirety —relying upon word that—here, that the County would do certain things, which, I think I hear the County state that they have not completed that, nor have met any deadlines.” The trial court ultimately held “in this case, the Yakama Nation chose to voluntarily dismiss the action – the Court’s going to find that it will deny its request, at this point, to set aside the order of Dismissal” RP 28-30.

Given the cases cited and the trial court’s statements, the court based its decision on the fact that it did not believe it had jurisdiction over the

matter after it issued the Order of Dismissal; that, the Order of Dismissal was final and afterwards, the parties were left as if the case had not been brought. As demonstrated in the Yakama Nation's brief, the trial court's belief that it did not retain jurisdiction is reversible error.

B. Washington State Supreme Court Precedent is Directly Applicable to This Proceeding.

The precedent cited in the Yakama Nation's Brief of Appellant is directly applicable to the current proceeding. In *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (Wash. S. Ct. 2013), the parties had a dispute, the parties settled the dispute, and, pursuant to the settlement, the trial court entered a stipulation and order of dismissal. The present matter involves the same fact scenario. In *Condon*, the Washington Supreme Court examined whether the trial court retained jurisdiction to enforce a settlement agreement after a case had been dismissed. The Court held that trial courts do retain jurisdiction. *Id.* at 90. *Condon* is on point even if its underlying facts are no identical to the facts in this case. It is binding precedent and the trial court here should have followed its ruling that remains good law in this state.

In contrast, the precedent relied upon by the trial court analyzed the finality of decisions with regards to a specific statute, RCW 4.84.330, and whether a dismissal order results in a final judgment to trigger relief

available under that statute. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (Wash. S. Ct. 2009). Only a final judgment under RCW 4.84.330 would trigger relief thereunder, and a dismissal is not a final judgment. The Yakama Nation is not claiming relief under RCW 4.84.330 and it is not arguing there was a final judgment. The precedent relied up on by the trial court is inapplicable and any dicta that supports the court's position is superseded by *Condon*.

C. The County's Repudiation of its Settlement Agreement with the Yakama Nation is An Extraordinary Circumstance.

The County's actions, including the complete repudiation of a settlement agreement memorialized in the Stipulation and Order of Dismissal, provide the necessary extraordinary circumstance to grant the Yakama Nation's relief. *Blair v. Chalich*, 135 Wn. App. 1034 (2006) (unpublished) (court found that defendant's failure to transfer property to plaintiff as stipulated to in order of dismissal represented extraordinary conditions that permitted plaintiff to vacate dismissal); *In re Marriage of Thurston*, 92 Wn. App. 494, 496, 963 P.2d 947 (1998) (same); *see also Keeling v. Sheet Metal Workers Int'l Ass'n, Local Union 162*, 937 F.2d 408, 410 (9th Cir. 1991) (party's repudiation of a settlement agreement was an exceptional circumstance justifying vacation of an order of dismissal).

Here, the parties did not merely have a settlement agreement independent of a stipulated order of dismissal ending litigation. The Stipulation was incorporated into the Order of Dismissal, the Order of Dismissal contains direct and unambiguous orders from the trial court to the County. CP 41-42. The County's complete repudiation of its duties under the Stipulation and Order of Dismissal provide the circumstances necessary to demonstrate an extraordinary circumstance. The County is not only failing to abide by its settlement obligations to the Yakama Nation – the County continues to act in violation of a valid court order.

D. The County Has Failed to Diligently Pursue its Settlement and Court-Ordered Obligations.

The County failed to diligently pursue its obligations under the Order of Dismissal and Stipulation. The Order of Dismissal ordered the County to repeal and replace the Comprehensive Plan and Zone Code no later than December 31, 2018. CP 41. The Stipulation, incorporated into the Order of Dismissal, requires the County to “give serious consideration to all issues raised by the Yakama Nation . . .” CP 38. The County alleges that it has been “diligently” working on repealing and replacing the Comprehensive Plan and Zone Code. Brief of Respondent, p. 1. Further, the County asserts that it “continued outreach and consultations with the Yakama Nation.” *Id.* However, as found by the trial court, it has

completely failed to repeal and replace either the Comprehensive Plan and Zone Code. CP 28-29.

The County's lack of action to-date demonstrates that it has not been "diligently" working to meet its settlement obligations. While it has, at least, published a draft revised Comprehensive Plan, it has not even published a draft revised Zone Code. CP 260. Further, it has routinely failed to respond to correspondence from the Yakama Nation, leading to the Motion to Vacate. *See* CP 123-142 (Declaration of Shona Voelckers in Support of CR 60 Motion to Vacate Stipulated Order of Dismissal, providing list of correspondence from the Yakama Nation in 2018 and 2019 that went unanswered by the County).

The County alleges that it has adopted interim controls, as evidence of its progress. Brief of Respondent, p. 10. However, many of the "interim controls" taken by the County were not interim land use regulations; but were related to legal water availability and were created to address the fact that the County's development approval regulations were in conflict with the State's water laws. For example, Ordinance 2018-13 provides that it was issued to bring the County into compliance with the water availability requirements of *Whatcom County v. Hirst*, 186 Wn.2d 648, 381 P.3d 1 (2016)A. CP 85-86. Ordinance 2019-10 outlines the requirements of WAC 173-548 and outlines change needed to make the local regulations adhere to

the State's water laws. CP 119-121. *See also* Ordinance 2019-5 (bringing the County's regulations into compliance with RCW 58.17.0110 regarding water supply) (CP 64-66) and Ordinance 2019-9 (bringing the County's regulations into compliance with RCW 19.27.097 regarding adequate provisions of water) (CP 69-71). These "interim controls" were independent actions taken by the County and the contents of the ordinances are not related to the Stipulation or Order of Dismissal; the ordinances are not evidence of the County's compliance.

The Yakama Nation filed its Motion to Vacate based on months of inactivity and obstinate refusal by the County to communicate and engage on the County's abject failure to comply with the plain terms of the trial court's order memorializing the settlement agreement the County negotiated and voluntarily entered into. CP 258-266. The Yakama Nation relied upon the County's promises in good faith when it dismissed its lawsuit without prejudice, to its significant detriment. Now the trial court's refusal to enforce its own order gives the County cover to continue to flout its court-ordered obligations to the prejudice of the Yakama Nation and compound the real harm the Yakama Nation has suffered by relying upon the County's agreement to settle this matter and obligate itself to take certain actions within a certain amount of time.

The County disregarded the Stipulation and Order of Dismissal and ignored multiple inquiries from the Yakama Nation over the course of 2018 and 2019, forcing the Yakama Nation to file the Motion to Vacate to enforce the County's promises. Contrary to the County's repeated claims in the trial court and before this Court that it is diligently trying to meet its court-ordered obligations despite the deadline on those obligations passing at the end of 2018, as of the date of this brief's filing the County has still failed to meet any one of its stipulated obligations. The Yakama Nation's sole request was for the trial court to re-open the litigation in order to enforce its own order and hold the County responsible to its settlement obligations.

E. The Yakama Nation's Appeal is Valid.

The Yakama Nation's appeal is valid; the matter is ripe and justiciable. Although the court failed to get to the substantive motions before it, it is uncontested that the County failed to comply with the trial court's Stipulation and Order of Dismissal and is therefore in continual violation of a Washington State Superior Court order. RP 28-29. In a memorandum opinion issued by the trial court in a related matter, the court examined the Stipulation and Order of Dismissal at issue here and specifically acknowledged that the issues in this matter would be ripe and justiciable after the deadline in the Stipulation, December 31, 2018, passed. CP 203.

The matter before the Court of Appeals is based on the Yakama Nation's initial lawsuit challenging the County's Comprehensive Plan and Zone Code, as they existed when the Complaint was filed, in 2016. CP 8-24. The Yakama Nation is not appealing the draft land use regulations that the County is currently in the process of developing. Accordingly, the Yakama Nation is not challenging the County's legislative process. Rather, the underlying proceeding arose out of the Yakama Nation challenge to the County's *current* Zone Code. There is effective relief available. In its Motion to Vacate, the Yakama Nation was requesting that the trial court vacate the Order of Dismissal for the limited purpose of enforcing the Stipulation and/or requiring the County to seek relief and set a new deadline by which it would be able to comply with the terms of the settlement agreement the County voluntarily negotiated and committed itself to. Accordingly, as the matter is ripe and justiciable, and as there is effective relief available, the appeal is valid.

F. Sanctions Are Inappropriate.

Sanctions against the Yakama Nation are inappropriate. RAP 18.9, governing violations of rules, provides that the appellant court may order a party that "files a frivolous appeal . . . to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply" In considering whether an appeal is frivolous and subject

to fees, “all doubts as to whether an appeal is frivolous are resolved in favor of the appellant.” *Kinney v. Cook*, 150 Wash. App. 187, 195, 208 P.3d 1, 5 (2009). An appeal is frivolous only “if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal.” *Id.* (citing *Lutz Tile, Inc. v. Krech*, 136 Wash.App. 899, 906, 151 P.3d 219 (2007), *review denied*, 162 Wash.2d 1009, 175 P.3d 1092 (2008)). Further, an “appeal that is affirmed merely because the arguments are rejected is not frivolous.” *Id.* (citing *Halvorsen v. Ferguson*, 46 Wash.App. 708, 723, 735 P.2d 675 (1986)).

Here, sanctions are inappropriate. There is direct and binding precedent that contradicts the trial court’s holding. Accordingly, there are debatable issues where reasonable minds may differ. As the County noted, the Yakama Nation’s appeal was targeted, briefing focused on the issue of whether a trial court possess the requisite jurisdiction to enforce its own orders. Accordingly, sanctions are inappropriate.

II. CONCLUSION

The Yakama Nation respectfully requests that this Court reverse the Superior Court’s Order Denying Motion to Vacate, and remand the case with instructions to the Superior Court to vacate the Order of Dismissal, entered on March 21, 2017.

DATED this 13th day of May, 2020.

Respectfully submitted,

GALANDA BROADMAN, PLLC

/s/ R. Joseph Sexton

R. Joseph Sexton, WSBA NO. 38063
Amber Penn-Roco, WSBA NO. 44403

YAKAMA NATION
OFFICE OF LEGAL COUNSEL

/s/ Shona Voelckers

Shona Voelckers, WSBA No. 50068
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now, and at all times herein mentioned, a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Suite L1, Seattle, Washington 98115.

3. Today, I filed the foregoing document with the Court of Appeals, Division III via its e-filing system.

4. Today, I served the foregoing document, via U.S. Mail and electronic mail, on the following parties:

David Gecas
Okanogan County Prosecutor's Office
PO Box 1130
Okanogan, WA 98840-1130
dgecas@co.okanogan.wa.us
thargraves@co.okanogan.wa.us
Attorney for Okanogan County

Mark Johnsen
J. Derek Little
Karr Tuttle Campbell
701 5th Avenue, Suite 3300
Seattle, WA 98104-7055
mjohnsen@karrtuttle.com
dlittle@karrtuttle.com
jlikit@karrtuttle.com
jnesbitt@karrtuttle.com

swatkins@karrtuttle.com
Attorneys for Okanogan County

Tim Trohimovich
Futurewise
816 Second Avenue, Suite 200
Seattle, WA 98104
tim@futurewise.org
Attorney for Futurewise & Methow Valley Citizens Council

Alan M. Reichman
Attorney General of Washington
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
alanr@atg.wa.gov
ecyolyef@atg.wa.gov
Attorney for Washington State Department of Ecology

Shona Voelckers
Yakama Nation Office of Legal Counsel
PO Box 150
Toppenish, WA 98948-0150
shona@yakamanation-olc.org
Attorney for Yakama Nation

The foregoing statement is made under penalty of perjury and under
the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 13th day of May, 2020.



Wendy Foster

GALANDA BROADMAN

May 13, 2020 - 11:04 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37129-8
Appellate Court Case Title: Confederated Tribes and Bands of the Yakama Nation v. Okanogan County
Superior Court Case Number: 16-2-00312-7

The following documents have been uploaded:

- 371298_Briefs_20200513110246D3335179_3814.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Yakama Nation v. Okanogan - Reply Brief - FINAL BRIEF.pdf

A copy of the uploaded files will be sent to:

- alice@galandabroadman.com
- amber@galandabroadman.com
- dgecas@co.okanogan.wa.us
- dlittle@karrtuttle.com
- jlikit@karrtuttle.com
- mjohansen@karrtuttle.com
- shona@yakamanation-olc.org
- swatkins@karrtuttle.com
- thargraves@co.okanogan.wa.us
- wendy@galandabroadman.com

Comments:

Sender Name: Wendy Foster - Email: wendy@galandabroadman.com

Filing on Behalf of: Robert Joseph Sexton - Email: joe@galandabroadman.com (Alternate Email:)

Address:
PO Box 15146
Seattle, WA, 98115
Phone: (206) 557-7509

Note: The Filing Id is 20200513110246D3335179