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No. 66537-5-I

COURT OF APPEALS,
DIVISION ONE
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 18 PM 1:43

Henry Rogers, *Respondent*

v.

Darron Cage, *Appellant*.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT OF APPELLANT IN REPLY

A. This Court should consider the appellant's unlawful-practice-of-law argument on appeal.

In response to Cage's argument that the trial court abused its discretion by granting a motion for continuance filed by a non-lawyer (other than a pro se litigant), Rogers contends that Cage failed to preserve this issue by not presenting this specific argument to the trial court. This contention overlooks two (2) critical features unique to this case.

First, Howard Dean Rogers, who filed the motion to continue on Rogers' behalf, represented to Cage and the trial court in a declaration under penalty of perjury under the laws of the State of Washington that he was "*counsel of record*" for Rogers. See CP at 55 (emphasis added). This Court should not allow Rogers to reap the benefit of RAP 2.5(a) due to the misrepresentation of an individual who merely held power of attorney for Rogers. If obtaining a continuance of the trial date was important to Rogers, he could have and should have retained competent counsel to file the motion on his behalf, rather than "transfer[ing] his 'pro se' right to practice law to [another] person[.]" a practice prohibited by *State v. Hunt*, 75 Wn. App. 795, 807 (1994).¹

¹ Aside from his citation of a legal encyclopedia's premise which has not been adopted by any Washington appellate court, Rogers does not attempt to distinguish the rule set forth in *Hunt*. Moreover, even if the court were to adopt the premise set forth in 17 C.J.S. *Continuance*, § 103, at 332-34 (2011) that, in support of a continuance motion, "the

Secondly, and perhaps most importantly, Rogers' contention presupposes that the trial court would have even considered Cage's argument that the court should disregard the motion because Howard Dean Rogers was engaged in the unlawful practice of law when he filed the motion to continue on Rogers' behalf. That is, even though the motion to continue was noted for consideration for November 22, 2010 (CP at 49), the trial court entered the order continuing the trial date on November 17, 2010. *See* CP at 60. And although his response to the motion was not due until the next day under King County LCR 7(b)(4)(D), Cage's opposition to the motion to continue was filed on November 17, 2010 at 4:27 pm. *See* CP at 61-62. As such, the order continuing trial was entered before Cage's opposition to the motion was even filed, making it extremely unlikely that Cage's "original" arguments against the continuance were even considered by the trial court. See RAP 9.7(a) ("The clerk shall assemble the copies and number each page of the clerk's papers in chronological order of filing[.]").

Therefore, under the unique facts presented case, this Court should decline Rogers' invitation to strictly apply RAP 2.5(a) to Cage's argument

affidavit may be made by the applicant's authorized agent or attorney[.]" this proposition is not helpful to Rogers. This statement merely addresses who make the required affidavit in support of the motion to continue; under CR 11(a), the motion *must* always be signed by an attorney if the party is represented an attorney, or by the party if he or she is not represented by an attorney.

that trial court abused its discretion by granting a motion for continuance filed by a non-lawyer other than a *pro se* litigant.

B. Cage incurred prejudice when the motion to continue was improperly granted.

In his response, Rogers avers that Cage’s “arguments are idle speculations about what might have happened[]” had the continuance not been granted. It is not idle speculation to apply to the law to the record on review. It is undisputed that Rogers was in Thailand at the time of the originally-scheduled trial date (November 22, 2010), even though his counsel at the show cause hearing, Mr. Michael Jordan, “assured the court that his then client, Mr. Henry Rogers would be present for the scheduled trial date.” *See* CP at 61; *see also* CP at 55 (Rogers not available for trial until December 6, 2010). It is undisputed that Rogers’ trial counsel did not appear for Rogers until December 17, 2010. *See* CP at 70. Had the continuance not have been granted improperly, there would have been no qualified individual to try this case on November 22, 2010. And dismissal would have been the result. *See Eriksen v. Mobay Corp.*, 110 Wn. App. 332, 340 (2002) (“If the plaintiff does not appear and is unrepresented at trial, the defendant is entitled to dismissal upon request.”); *see also* CR 40(d) (“When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance.”).

At the very least, even if Rogers had been present for trial on November 22, 2010 and the outcome been the same as below (i.e. writ of restitution issued), Cage would not have been liable for December rent since he would have been forcibly evicted by that time. *Accord* “Notice for Unlawful Detainer,” CP at 14 (“RCW 59.12.090 requires that the [unlawful detainer] action be prosecuted without delay[.]”). As such, Cage incurred prejudice as a result of the continuance being improperly granted.

C. The actions of the parties do not support Rogers’ interpretation of the oral lease.

In his response, Rogers again contends that the reason he paid Cage \$3,000 around the time which he claims Cage was in default for rent was that Cage extorted the money from him by threatening to report Rogers to the IRS for income tax fraud. Other than to declare that he was “frightened,” Rogers does not satisfactorily answer the question why he would feel compelled to submit to a demand for money under threat of prosecution for tax fraud where he enlisted the services of a tax professional and did nothing more than sign an income tax return. This omission, coupled with the undisputed facts of the case², demonstrate the

² Rogers acknowledged that he lived at the property from April 1st until the latter part of June (RP at 15); Rogers had a copy of the key to the property (RP at 15); Rogers could come and go as he pleased (RP at 15-16); Rogers paid one month’s utility bills at the property (although he claimed he was just helping Cage out) (RP at 16); Rogers paid to

error in the trial court's challenged findings of fact. The issue in this case is sufficiency of the evidence. The trial court's findings must be supported by "substantial evidence," which is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91 (1978).

Here, the evidence was simply insufficient to find that (1) "Defendant(s) now occupy the above described premises at a rent of \$1522.11 per month plus condo fees and utilities (\$50.74 per day), payable on the 1st day of each calendar month[;]" and (2) "Defendant(s) are in default of the payment of rent in the amount of \$9564.45 for the period set forth on notice, on file herein, which amount is now past due and owing to the plaintiff(s)."

D. Rogers is not entitled to fees on appeal.

Rogers asks for fees on appeal, claiming that it is frivolous. In determining whether to impose sanctions under RAP 18.9, the appellate court considers the following:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should

have the carpets cleaned and bought groceries (RP at 16); Rogers' bank statements were coming to the property (RP at 18); the light bill was in Rogers' name (although he claimed this was Cage's doing) (RP at 18-19); and Rogers' explanation of the email sent to Cage "begging [Cage] to find out what [Cage] thought [Rogers] owed [Cage] money for." See RP at 21-22. Additionally, the check sent to the IRS by Rogers shows his address as being "17418 – 119th Lane SE G-12, Renton, WA 98058," the address of the property at issue in the unlawful detainer case. *See* Ex. 2.

be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

See Clapp v. Olympic View Publishing Co., LLC, 137 Wn. App. 470, 480 (2007).

Here, the discussion and debate alone regarding the issue of the propriety of the continuance militates against imposition of fees in this case. *See Advocates for Responsible Development v. Western Washington Growth Management Hearings Board*, 170 Wn.2d 577, 580 (2010) (“Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous.”). This appeal is not frivolous within the meaning of RAP 18.9. This Court should deny Rogers’ request for fees on appeal.

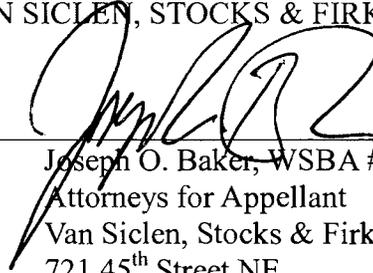
II. CONCLUSION

For all the foregoing reasons and the reasons set forth in the appellant’s opening brief, Mr. Cage, respectfully requests that this Court reverse and vacate the monetary judgment entered against him on or about December 17, 2010 in the amount of \$9,564.45, plus \$400 in attorney’s fees.

Dated this 15th day of July.

VAN SICLEN, STOCKS & FIRKINS

By

A handwritten signature in black ink, appearing to read 'J. Baker', is written over a horizontal line. The signature is stylized and cursive.

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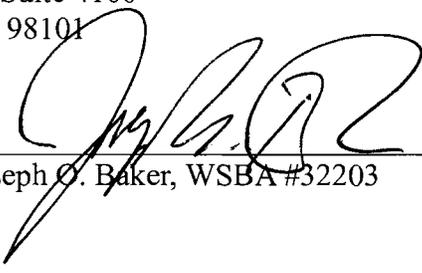
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CERTIFICATE

I certify that on July 18, 2011 I caused a copy of the foregoing **REPLY BRIEF OF APPELLANT** to be served on the following individuals by messenger delivery:

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