

68804-9

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NO. 68804-9

COURT OF APPEALS
DIVISION I

COURT OF APPEALS
STATE OF WASHINGTON
2013 JUN 28 AM 10:36

DIANE ROMMEL, Appellant

vs.

JAMES TORPEY AND TANYA HARLIN, Respondents.

BRIEF OF APPELLANT DIANE ROMMEL

Raymond V. Gessel
Attorney for Appellant

1048 West James Street
Suite 102
Kent, Washington 98032
(253) 856-2745
raymond@raymondgessel.com
WSBA 13787

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I. INTRODUCTION

This case involves a denial of a motion to continue and a following dismissal, without prejudice, of a case which, because of the applicable statute of limitations, became a dismissal with prejudice.

II. ASSIGNMENTS OF ERROR

2.1 The trial court erred in denying the Appellant's motion to continue the trial in the case due to the Plaintiff's poor health.

2.2 The trial court erred in dismissing the Appellant's case without prejudice because of the applicable statute of limitations barred a re-filing of the case.

III. STATEMENT OF THE CASE

The parties to this lawsuit are adjacent landowners. Appellant, Diane Rommel, filed her complaint on or about 16 Sep 2009 against the Respondents. (CP 1-9) In her complaint she alleged that Defendants had cut trees on her property, spread

synthetic chemicals designed to kill vegetation on Ms. Rommel's property, egged her property and extended their septic drain field onto Ms. Rommel's property. CP 1-9. A case schedule was issued by the Clerk setting the trial date for 7 Mar 2011 and setting the cutoff for disclosure of possible primary witnesses for 4 Oct 2010. CP 10-15. Defendants' filed their answer, affirmative defenses and counter-claim on 26 Oct 2009. CP 18-26. Plaintiff decided to switch attorneys which required a request for a continuance which was filed by new counsel on 5 Oct 2010. CP 27- 30. The parties stipulated to a continuance. CP 31-32. On 3 Dec 2010 Plaintiff requested an extension of the deadline for the disclosure of witnesses. CP 34-37.

Preparing the case for trial became difficult for Plaintiff because of her ill health. She suffered from multiple back problems including bronchitis, eye, and gastrointestinal problems (CP 49, line 24-25), "bone thinning" resulting in extreme pain (CP 49, line 1-23). Plaintiff had surgery to address some of her

problems. CP 50, lines 1-8. Her health was so poor that she was unable to work with her attorney because of her inability to travel and sit for long periods of time. CP 50, lines 1-19. Plaintiff's motion to continue was granted on 28 Feb 2011. CP 75-77. The trial date was re-set to Jun 20, 2011. CP 79. Unfortunately, the Plaintiff's ill health only got worse. Trial was continued at the Plaintiff's request to 6 September 2011. CP 94 through 97. Plaintiff's condition got to the point where she required surgery. See Declaration of Diane Rommel, CP 107 through 109, Declaration of Robin L. Jones, MD, CP 110 – 111. Trial was then continued to 26 Mar 2012. CP 112-115. In its order, the court limited the testimony to disclosed witnesses (CP 115 line 6), reserved Defendant's motion to exclude testimony of an expert witness disclosed by Plaintiff (CP 115, line 7) and imposed terms against Plaintiff for \$1,500.00 as a condition of the continuance (CP 115, lines 1-2).

The Plaintiff's condition did not improve. Consequently, at

the time scheduled for trial, Plaintiff sought an additional continuance and Defendant sought a dismissal. CP 117 through 122, 127 through 134. The court denied the Plaintiff's motion and granted the Defendant's motion, allowing the dismissal to be with prejudice.

IV ARGUMENT

A. THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN DENYING THE PLAINTIFF'S MOTION FOR A CONTINUANCE WHERE THE PLAINTIFF SUFFERED ILL HEALTH AND THERE WAS VERY LITTLE, IF ANY PREJUDICE TO THE DEFENDANT IN CONTINUING THE TRIAL

Continuances are within the discretion of the trial court.

The standard for review is manifest abuse of discretion. See *Martinok v. Durkan*, 23 Wn. App. 47, 50, (Wn. App. 1979). A “manifest abuse of discretion occurs where a court's ruling is manifestly unreasonable or is based upon untenable grounds or done for untenable reasons. *State ex. rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, (1971).

In exercising its discretion, the court may properly

consider 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.

Balandzich v. Demeroto, 10 Wn.App. 718, 720. (Wash.App. Div. 1 1974).

In the present case, the Plaintiff had a multiplicity of health problems that had plagued her. While the case had been pending for some time, the Defendants would not have been prejudiced by an additional continuance to allow the Plaintiff to regain her health.

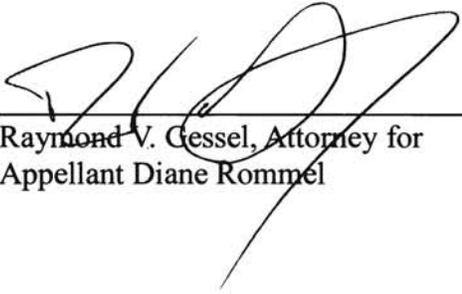
B. THE COURT ABUSED ITS DISCRETION IN DISMISSING THE CASE WITHOUT PREJUDICE SINCE A REILING OF PLAINTIFFS' CLAIMS WOULD HAVE BEEN BARRED BY THE STATUTE OF LIMITATIONS.

The court dismissed the Plaintiff's case without prejudice. Unfortunately, the Plaintiff's claims occurred prior to her filing on September 16, 2009. The statute of limitations on all of Plaintiff's

claims, with the exception of continuing trespasses was three years. See RCW 4.16.080 (1). While the Trial Court dismissed the case without prejudice, the dismissal was, in effect, with prejudice since the Plaintiff would not be able to re-file its case.

CONCLUSION

The Trial court abused its discretion in denying the motion for a continuance and dismissing the Plaintiff's claims. The decisions of the court should be reversed and the matter remanded. Respectfully submitted this 27th day of June, 2013.



Raymond V. Gessel, Attorney for
Appellant Diane Rommel

CERTIFICATE OF MAILING

The undersigned declares under penalty of perjury under the laws of the State of Washington that he served the foregoing BRIEF OF APPELLANT on the Respondents, by depositing the same in the US mail, postage pre-paid and addressed to TYLER K. FIRKINS, VAN SICKLEN, STOCKS & FIRKINS, 721 45th Street, NE, Auburn, WA 98002-1381 on 27 Jun 2013.

Signed at Kent, WA on 27 Jun 2013.


Raymond P. Gueset
WSAA 13787