

FILED
COURT OF APPEALS
DIVISION II

No. 37357-2-II
THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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DAVID W. DEVIN

Petitioner/Appellant

and

MARK HENDRIX

Respondent

ON APPEL FROM KITSAP COUNTY SUPERIOR COURT
Kitsap County Casue No. 04-2-00800-1

APPELLANT'S BRIEF

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Pro Se

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I. ASSIGNMENT OF ERROR

- A. Did the Superior Court fail to correctly apply CR 41 (b) (2) (B) and thereby commit error in granting Plaintiff/Respondent's Motion to Reinstate this lawsuit and denying Appellant/Defendant's Motion to Reconsider that decision.
- B. Did the Superior Court error in allowing the hearing on the Motion to Reinstate to go forward on inadequate notice to the Appellant/Defendant?
- C. Did the Superior Court error in granting the Plaintiff/Respondent's Motion to Reinstate under the circumstances in that almost 7 years had passed since the alleged original incident took place and a key witness for the Appellant/Defendant was no longer available.

II. ISSUES

- A. Did the alleged incident that provoked this law suite even take place?
- B. Did the attorney for the Plaintiff in the hearing for the Motion for Reinstatement begin his presentation to the court with false information that confused the judge and caused him to make a wrong determination? (VRP – p.2)
- C. Even after it was explained to the Judge that the original attorney for the Plaintiff in the original case was not disbarred until nine months after the case was dismissed, did he not remain confused and in fact, make a statement just prior to his ruling, "It's not clear to me, since that fellow was disbarred at the time—" ? (VRP –p. 6)
- D. If in fact the plaintiff's original attorney was a member in good standing with the bar at the time the original case was dismissed and in fact remained a practicing attorney for nine months thereafter, how can the plaintiff possibly state that he did not receive the Superior Court's notice of the dismissal?
- E. After a case is dismissed, is not proper service required of the party who desires to re-open the case?

- F. When the judge learned that the defendant only received the notice by mail one day before the hearing, should he not have ruled that proper service was not made and the defendant had not been given adequate notice to defend himself?

III. STATEMENT OF THE CASE

The facts in this case are as follows:

- A. The plaintiff's claims that he was hit in the head by a brick that fell from the chimney on March 30, 2001. However, the day after the alleged incident he had no visible wound and in fact was laughing and joking with the defendant's handyman. Despite many requests he never provided proof that he even went to see a doctor. And that is over 88 months ago.
- B. In May or June 2006, the Kitsap County Superior Court Clerk sent a notice of dismissal for want of prosecution to the plaintiff's attorney, John Jackson, more than 30 days prior to the dismissal.
- C. At the time the notice was sent to Mr. Jackson he was an active member of the Washington State Bar Association and was a practicing attorney in Kitsap County. The plaintiff did not respond to the notice of dismissal for want of prosecution.
- D. This case was dismissed by the Clerk of the Court on July 12, 2006.
- E. The defendant's primary witness in this case, Gerald Roux, an employee who performed maintenance work at the rental house where the plaintiff claims he was injured on the day after the incident is alleged to occur, has been willing to testify for more than four years that the plaintiff was not hit in the head with a brick. But now he has left the Puget Sound area and is unavailable as a witness. He is believed to be currently living in New Orleans, Louisiana, but his exact whereabouts are not known.

F. Plaintiff now claims that he personally did not receive notice from the Clerk and his attorney did not advise him of the notice of dismissal.

G. Plaintiff's attorney was disbarred on April 18, 2007 nine months after the dismissal. It is clear that the plaintiff did not even make an attempt to contact his attorney for over three years.

H. On December 4, 2007, the Respondent/Plaintiff filed a motion to reinstate his law suit. Respondent was not properly served with a copy of the motion and only received it via the US Mail one day before the December 14th hearing and therefore had inadequate opportunity to prepare a response.

I. In reading the VRP pages 3-5 it is clear that the judge is confused and thinks that the defendant was properly served and had already filed his response when in fact he had not.

J. The Judge who heard the Motion to Reinstate relied on factual findings which were incorrect and he continued to be confused even after being corrected. The attorney for the plaintiff started his oral argument with the statement that his client had never received notice of the dismissal because his original attorney was disbarred at the time. (VRP-page 2)

K. The Appellant/Defendant correctly pointed out that the original attorney was in good standing with the bar at the time of the dismissal and therefore the plaintiff got the notice. Appellant contends that according to the rule (CR 41 (b) (2) (B), the Respondent/Plaintiff was properly served.

L. However, at the bottom of page 6 of the Verbatim Report of Proceedings, it is clear that the Judge still did not understand that Mr. Jackson was, in fact, not disbarred at the time of the notice. He states, "It is not clear to me, since that fellow was disbarred at that time...". To which Mr. Devin (the Appellant/Defendant) responded, "No, he wasn't at that time. It was 18

months later before he was disbarred.” [Should have said 9 months]. Thus, the transcript is clear that the Judge was mistaken as to whether Mr. Jackson was a member of the Bar when the Notice of Dismissal was mailed.

IV. ARGUMENT

A. The respondent’s attorney brought this case before Judge Spearman on a technicality and a false statement of fact. The technicality is that his client allegedly did not receive the notice of dismissal of the law suit issued by the court when in fact his attorney did receive it and that is sufficient notice.

B. The mis-statement of fact was the respondent’s attorney statement that the Respondent/Appellant’s original attorney was disbarred at the time this case was dismissed in July 2006. The fact is that the respondent’s original attorney was a member of the bar when the notice was mailed by the court and was not disbarred until nine months later.

C. On page 6 of the VRP, the defendant, Mr. Devin corrected this mis-statement of fact as follows: “His whole case is—He is citing the fact the defendant’s lawyer was disbarred and therefore, he didn’t get the notice. But actually Mr. Jackson was an attorney in good stead with the bar at the time the case was dismissed. So according to the rule, he was properly served.”

D. However, at the bottom of page 6, the Judge still does not understand. For he states, “It is not clear to me, since that fellow was disbarred at that time—“ To which Mr. Devin responded, “No, he wasn’t at that time. It was 18 months later before he was disbarred. (Should have said 9 months).

E. Nevertheless, Judge Spearman persisted in ruling for the plaintiff stating that he was not going to use this technicality that there wasn’t any progress on this case to stop it being decided on it’s merits.

F. For the record, the defendant did not say anything about lack of progress. He simply stated that the entire reason for the plaintiff's motion to reopen this case, namely that the plaintiff's original lawyer was disbarred at the time the case was dismissed is false information.

G. Since the case was dismissed by the court on July 12, 2006, some 18 months prior to the motion for re-instatement, the defendant should have been properly served by the respondent's attorney. And he should have been given at least 20 days to reply. Judge Spearman was incorrect in his ruling that the defendant was properly served. And he was confused by thinking that the Answer, Affirmative Defense and Counterclaim to the motion had already been filed when it had not.

H. So we have a very bizarre situation. On the one hand the judge rules that the plaintiff did not get proper notice of the cancellation of the law suit by the court because his attorney was disbarred at that time, which is false. And on the other hand the judge ruled that the defendant was properly served via mailing when in fact mailing does not constitute proper service when initiating a law suit which is what this is.

I. Because the Defendant/Appellant did not receive the Motion for Reinstatement of the law suit until just the day before the December 14 hearing, he did not have time to prepare much of a response and it was not filed with the court ahead of time so the judge did not read the five points contained therein until the hearing. And it is clear by reading of the Verbatim Report of Proceedings that the Judge really had his mind made up by the time the defendant handed him his Answer, Affirmative Defenses and Counterclaim. So the defendant did not receive a fair hearing.

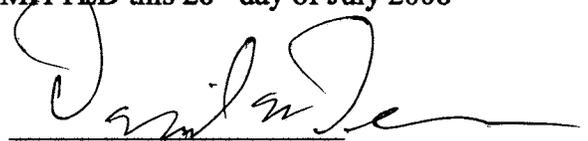
J. As can be read on page 4 of the VRP, the judge mistakenly considers the defendant's June 15, 2004 filing of his Answer, Affirmative Defense and Counterclaim to the original law suit as his response to the Motion for Reinstatement. On page 5, the judge again states, "Yes, your Answer, Affirmative Defenses and Counterclaim I believe are already on file, sir." To which the defendant responded, "No" and it was only then that the defendant was allowed to hand his response to the Judge. But by that time, it is again clear from the transcript that the judge had already made up his mind.

V. CONCLUSION

A. Based on CR 41 (b) (2) (B), the decision of the Superior Court to reinstate this case should be reversed and this case should be remanded with instructions to the Superior Court that it should be dismissed. In addition, the Superior Court erred by allowing the hearing on the Motion to Reinstate to go forward on inadequate notice.

B. The Appellant/Defendant should be granted an award of fees and costs under RCW 4.84 in that the respondent's Motion to Reinstate was not well founded in law or fact.

RESPECTFULLY SUBMITTED this 28th day of July 2008



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DAVID W. DEVIN)
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Appellant,)
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vs)
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MARK HENDRIX)
)
Respondent)
)

Court of Appeals Case No. 37357-2-II

DECLARATION OF MAILING

I, David W. Devin, declare that on July 28, 2008, I mailed via U.S. Postal Service certified mail, a copy of the Appellant's Brief to the attorney for the Respondent at the address given in the court file.

Attorney for the Respondent: James Morton Beecher
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (RCW 9A.72.085)

Signed in Gig Harbor, Washington this 28st. day of July, 2008



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DECLARATION OF MAILING