

COURT OF APPEALS
DIVISION II
MAY 29 2014
No. 39014-1-17
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WIVES AND MOTHERS OF PRISONERS OF THE STATE
Appellant;

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
PIERCE COUNTY

The Honorable Ronald Culpepper
No. 08-2-05790-4

OPENING BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. Assignments of Error.

1. The trial court erred when it entered its order dismissing this lawsuit on February 13, 2009.

2. Issues Pertaining to Assignments of Error.

1. Do the requirements of CR 11(a) require a party to cite existing law or make a good faith argument for a change of existing law before a trial court can consider its motion?

2. If a case is set for trial or it has been less than twelve months since any issue of law or fact has been joined can the trial court dismiss in accordance with CR 41(b)(1)?

3. What degree of specificity must a written order contain for a trial court to hold that the order has been violated by a party and dismiss in accordance with CR 41(b)(2)(D)?

4. If a party has alleged grounds for dismissal in accordance with CR 41(b)(1) may the trial court then dismiss in accordance with CR 41(b)(2)(D)?

5. Is Appellant entitled to reasonable attorney fees and costs in accordance with RCW 42.56.550 or equitable principals.

B. STATEMENT OF THE CASE

Wives and Mothers of Prisoners of the State (WMPS) is a Washington non-profit corporation. WMPS alleged in its complaint and amended complaint that Department of Social and Health Services (DSHS) had violated provisions of the Public Records Act, RCW 42.56 et seq. CP 1-5. The lawsuit was filed in Pierce County Superior Court on March 3, 2008.¹ An order setting the original case schedule was entered August 7, 2008. An amended case scheduled was entered October 6, 2008 and a trial date of October 5, 2009 was set at this time.

After WMPS Director Richard Scott filed a motion to proceed pro se, Defendant filed a Response In Objection to Proceed Pro Se and Motion to Strike and Impose Sanctions Pursuant to CR 11.² After argument, the trial court imposed sanctions of \$500.00. CP 6-8. In the order signed by the trial court, it stated the following:

That Mr. Scott shall pay the sum of Five Hundred Dollars (\$500.00) in terms to reimburse defendant for attorneys' fees and costs incurred to response to Mr. Scott's Motion to Proceed *Pro Se* as permitted pursuant to CR 11.

¹WMPS was represented by counsel but counsel subsequently withdrew.

²The motion had already been struck by WMPS Director Richard Scott but the hearing was held on the sanctions with WMPS being represented by counsel.

The order further stated “[t]hat this matter shall be and hereby is stayed until such time as Mr. Scott satisfies the sanctions ordered in paragraph 9, above.” There was no language in the order stating that Mr. Scott both has to pay the terms personally and pay by a certain date.

On February 3, 2009, DSHS filed a Motion to Dismiss and Enter Judgment. CP 9-11. In this motion, Defendant claimed that the trial court had ordered Mr. Scott to pay the terms “personally.” *Id.* Defendant asked the trial court to dismiss for failure to prosecute.

The allegations of WMPS’ failure to prosecute was based upon the fact that Director Scott had yet to pay his sanction of \$500.00.³ In its Response, WMPS argued that Defendant’s Motion to Dismiss did not meet the requirements of CR 11(a) in that it failed to cite to one statute, case, or court rule in support of its motion. CP 12-13. Plaintiff also argued that the motion violated the provisions of CR 41(b). At the same time, money to pay all sanctions, whether against WMPS or Director Scott, was placed in the court registry by counsel for Plaintiff.⁴ CP 37.

³WMPS was sanctioned \$175.00 for filing a Motion for Reconsideration of the October 10, 2008 order. The sanction was not against Director Scott and this sanction is not being challenged in this appeal.

⁴A total of \$675.00 was submitted to cover both the initial and subsequent sanction.

For the first time in the Reply, Defendant informed WMPS of a possible legal ground for the motion to dismiss. CP 14-27. Defendant stated that CR 41(b) only permitted dismissal without prejudice and they were asking for dismissal with prejudice and cited to 41(b)(2)(D) as the alleged authority, the “catch-all” section of CR 41.⁵

C. SUMMARY OF ARGUMENT

WMPS will first show that Defendant failed to support its motion to dismiss with legal argument, violating the requirements of CR 11(a). Appellant will also show that any legal authority was provided in the reply brief, not providing WMPS the opportunity to respond.

Appellant will then show that under any reasonable interpretation, the trial court abused its discretion when it dismissed the case for want of prosecution when the case was set for trial and the “lack of prosecution” was less than four months. WMPS will finally show that even under the theory advanced by Respondent in its reply to dismissal motion, the trial court abused its discretion because neither WMPS or WMPS Director Richard Scott disobeyed any written order imposed by the trial court.

⁵DSHS could have struck its motion upon receiving WMPS’ response and refiled it with citations but it did not.

D. ARGUMENT

1. STANDARD FOR A MOTION TO DISMISS MADE PURSUANT TO CR 41.

As WMPS was not notified under what legal theory the motion to dismiss was brought under, it is unsure what legal standard would be appropriate to apply in this case. A motion to dismiss under CR 41(b) is reviewed for an abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002). An abuse of discretion is defined as a decision which is “is manifestly unreasonable or is based on untenable grounds or untenable reasons.” *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

2. DSHS VIOLATED THE MANDATES OF CR 11(a) BY FAILING TO PROVIDE ANY LEGAL JUSTIFICATION FOR THE RELIEF SOUGHT.

Defendant explicitly stated that it was the failure to prosecute which justified its bringing the motion but provided no legal justification for this request. The trial court abused its discretion when it dismissed this case with prejudice because some legal justification must be provided when such a draconian result as dismissal is sought. Court rules also demand it.

The language setting forth the requirements of CR 11(a) is simplicity itself. In relevant part, it states the following:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Defendant DSHS violated CR 11(a) when it filed its motion to dismiss because it failed to support the motion with existing law or make a good faith to change the present law.⁶ There simply was no citation to authority in the motion.

Our appellate courts specifically ignore arguments made without any citation of authority or citation to the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citing RAP 10.3(a)(5) and *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989)). It is also required that cites to the

⁶DSHS arguably also violated CR 7 by not providing the grounds for the motion “with particularity.” CR 7(b)(1).

Washington Court of Appeals be published. GR 14.1.⁷ Clearly it is an abuse of discretion to consider a dispositive motion made without a citation to authority. Such a motion could also be considered frivolous.

A frivolous motion is defined where “no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of [success].” *Millers Cas. Ins. Co. of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983). The failure to cite to authority can make a motion frivolous. *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). Thus, this Court can find that the motion to dismiss was frivolous.

After receiving WMPS’ response, DSHS advanced a totally different theory of dismissal, namely that the action was brought under CR 42(b)(2)(D). The problem is that WMPS never had a chance to respond. It is a rule of our appellate courts that no new issues may be presented in a reply brief. RAP 10.3(c). This rule corresponds to the rule governing summary judgment proceedings.

There is no specific instructions for a motion to dismiss in our civil rules but motions on the pleadings that consider matters outside the

⁷It is logical that if our courts are sticklers for proper pleading including using published cases only from our state, then providing no authority is unacceptable.

pleadings are treated as a summary judgment motion and arguably, the issues presented here are outside of the amended complaint and summary judgment rules would apply. CR 12(c). CR 56(c) discusses not only how the motion is brought but how the moving party may file rebuttal documents. To rebut means only one thing – “to defeat, refute, or take away the effect of something.” Black’s Law Dictionary 1267 (6th Ed. 1990). There is no permissive language to permit the filing of new documents or issues and as such, DSHS’ argument fails.

3. DEFENDANT FAILED TO ARGUE THAT DISMISSAL WAS PROPER IN ACCORDANCE WITH CR 41(b) AND APPELLANT SHOWED HOW IT WAS IMPROPER AT THAT TIME.

a) Dismissal For Failure To Prosecute Following The Court’s October 10, 2008 Order Cannot Stand Because The Case Was Noted For Trial And Less Than One year Had Elapsed Between The Order And The Motion To Dismiss.

Defendant has argued that because Appellant did not pay the sanctions within four months after the October order, this case has to be dismissed for want of prosecution. Nothing can be further from the truth. CR 41(b)(1) forbids dismissal when a case when it has been noted for trial. *Snohomish County. v. Thorp Meats*, 110 Wn.2d 163, 166, 169, 750 P.2d 1251 (1988).

In *Thorp Meats*, the County sued to get the Defendants to restore a land fill. *Id.* at 164. After close to three years, the County moved for default. The defendants then filed a note for trial setting within the statutory 30 day period. After a hearing, the motion to dismiss was granted. The Court of Appeals reversed. *Id.* at 165.

Before the Supreme Court, the County argued that the trial court had “inherent authority” to dismiss any action it chooses. *Id.* at 167-68. Unfortunately for the County, the Supreme Court applied the express provisions of CR 41(b)(1) and ruled that there is no discretion when a trial date is noted. It was the express language added in 1967 which made the difference. *Id.* at 167-68. The language of CR 41(b)(1) is explicit: “If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.”

Pierce County has a case management program and a trial date was set and then amended by order of the court. The holding of *Thorp Meats* can lead to only one interpretation – this case cannot be dismissed for lack of prosecution.

There is also a one year grace period in CR 41(b)(1) governing the motion to dismiss. The plain language states that

[a]ny civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counter claimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined . . .

As pointed out, there had only been four months since the October order when Defendant brought the motion to dismiss. Either way, it would be an abuse of discretion to permit dismissal for want of prosecution.

- b) Director Scott Did Not Violate The Language Of The October 10, 2008 Order Even Under CR 41(b)(2)(D).

In DSHS's reply, they argued Director Scott failed to follow the trial court's October 10, 2008 order. WMPS has already shown that this was a new issue improperly raised in the reply to Appellant's response. But even under this new theory, DSHS' argument fails miserably because the order fails to both set a date certain for paying the sanction and it fails to state with specificity who must pay the sanction.

It is a given that before a party is sanctioned they must be provided notice of what they violated. As our courts have said, "[a] court cannot hold an entity in contempt for disobeying an order unless it has clearly violated the order. *Johnston v. Beneficial Mgmt. Corp.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982) (citing *State v. Int'l Typographical Union*,

57 Wn.2d 151, 158, 356 P.2d 6 (1960)). This is precisely what happened below.

The October 10, 2008 order gave no specific period by which Director Scott would have to pay the sanction. This is a direct violation of our jurisprudence. See *Will v. Frontier Contractors, Inc.* 121 Wn. App. 119, 130 (2004). In *Will*, the trial court granted Will the right to amend his complaint after he had filed a proposed amended complaint. *Id.* at 122. After Frontier asked four times for a copy of the amended complaint, Will faxed the previously filed proposed amended complaint. Frontier informed Will the complaint did not comply with the present status of the case including appropriate parties. Will did not respond and Frontier moved for dismissal which the trial court granted. *Id.* at 123.

The *Will* court agreed that service was improper under CR 5 and 15 but ruled the dismissal of the entire case was “inappropriate.” *Will*, 121 Wn. App. at 128. Like this case, Frontier argued that the complaint was unclear and the faxed copy of the complaint violated the trial court’s order. However, because the rules did not set forth a time period for filing an amended complaint, the *Will* court ruled there was no violation. *Id.* at 129. As the Court said, “Will’s situation is distinguishable. The order granting Will leave to amend contained no time deadlines or requirement

by the court that Will proceed in a particular way.” *Id.* at 130. This is exactly the situation here. Director Scott and WMPS were given no time deadline in the order nor were they provided direction to provide payment in a particular way. There is simply no legal justification for dismissal because of any particular language in the trial court’s order and thus the trial court abused its discretion.

Furthermore, not accepting the monies paid into the court registry was also an abuse of discretion because there was no prohibition against a third party paying the sanction on the order. There was no specifying language and thus the trial court abused its discretion.

Dismissal was also improper because the trial court’s analysis under CR 41(b)(3)(D) was legally flawed. The *Will* court made it clear that a dismissal is appropriate only when “(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.” *Will*, 121 Wn. App. at 129 (citing *Rivers*, 145 Wn.2d at 686 (citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997))). Dismissal is the last resort in Washington Courts and requests for dismissal are treated with great care. *Will*, 121 Wn. App. at 129 (citing

Woodhead v. Disc. Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995)).

Here, the trial court did not find with particularity that the violation was willful, that it impeded the ability of DSHS to prepare for trial or consider whether the violation merited a lesser sanction.⁸ The trial court's failure considering the three factor test when dismissing with prejudice is an abuse of discretion.

4. WMPS IS ENTITLED TO ATTORNEY FEES AND COSTS IF IT PREVAILS ON THIS APPEAL.

- a) The Prevailing Party Against A Governmental Entity Is Entitled To Reasonable Attorney's Fees And Costs In Accordance With RAP 18.1 And The PRA.

RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. Under the Public Records Act, individual who prevails against the agency is entitled to all costs, including reasonable attorney's fees. RCW 42.56.550(4). This Court has determined the PRA authorizes attorney fees and costs on appeal. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690,

⁸With the trial date eight months away and with a Public Record non-jury case, it is hard to see how the Defendant would have been prejudiced by waiting a little longer.

790 P.2d 604 (1990). If this Court overturns the trial ruling, WMPS asks that attorneys fees and cost be granted.

b) Courts May Also Consider Equitable Considerations When Considering Granting Attorneys Fees And Costs On Appeal.

Our courts have also granted costs and attorney's fees based on equitable considerations. See *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998). As the Supreme Court has said, "[t]he applicable equitable rule is that attorney fees may be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order. *Id.* at 758 (citing *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154, 943 P.2d 1358 (1997), *cert. denied*, 118 S. Ct. 856 (1998); *Seattle Fire Fighters Union, Local 27 v. Hollister*, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987)).

The rationale for this equitable remedy lies with the issue of damages.

Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction, the case comes within the rule that a reasonable attorney's fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued represents damages.

Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1996). This award can include costs and fees at appeal. *Seattle Fire Fighters v. Hollister*, 48 Wn. App. at 138. WMPS has had to argue that the Motion to Dismiss was fatally flawed and that the trial court abused its discretion. Because WMPS is asking that the order granting the motion to dismiss be reversed, if it prevails it is entitled to equitable attorney fees and costs.

- c) If This Court Determines The Motion To Dismiss Was Frivolous Then WMPS Is Entitled To Attorneys Fees And Costs.

WMPS has previously argued that the motion to dismiss failed to contain citations to authority as required by CR 11(a). It has also argued that it is quite possible this Court will determine that the original motion to dismiss was frivolous. Because of the order based upon DSHS' motion at the trial court level, WMPS has had to appeal the dismissal of its case. If this Court finds the original motion to dismiss was frivolous, attorneys fees and costs for this appeal should be awarded WMPS in accordance with CR 11(a).

E. CONCLUSION

For the reasons set forth above, appellant WMPS respectfully asks this Court to reverse the trial court's granting of the motion to dismiss with prejudice and remand back to the trial court with orders to accept the

payment of the \$500.00 in the court registry as payment in full for the sanction imposed October 10, 2008. WMPS also asks that upon remand, that reasonable attorney's fees and costs be ordered.

DATED this 28th day of May, 2009.

Respectfully submitted,


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Attorney for Appellant WMPS

I certify under the penalty of perjury under the laws of the State of Washington that on May 28, 2009, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
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Date: 5/28/09