



No. 292312

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

GAVIN DEFELICE,
Appellant,

v.

LAURA JONES and BRIAN JONES,
wife and husband,
Respondents.

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The court erred when it denied Appellant's motion for service by mail.
2. The court erred when it granted sanctions against Appellant's lawyer for bringing the motion for service by mail.
3. The court erred when it refused to grant Appellant's motion for reconsideration.
4. The court erred when it granted Respondents' motion for summary judgment/dismissal.
5. The court erred when it failed to automatically recuse itself from hearing Appellant's case.

Issues Pertaining to Assignments of Error

1. Did the court err when it would not grant Appellant's motion for service by mail?
2. Did the court err when it granted over \$3,100.00 in sanctions against Appellant's attorney for bringing a motion for service by mail when the Respondents' insurance company intentionally and deliberately gave a false address for Respondents to Appellant's counsel?
3. Did the court err when it denied Appellant's motion for reconsideration?

4. Did the court err when it granted Respondents' motion for summary judgment/dismissal?

5. Did the trial court err when it failed to automatically recuse itself from hearing Appellant's case in spite of the fact that Appellant's attorney had recently filed a grievance against the trial court judge with the Judicial Fitness Committee of the Washington State Supreme Court?

B. Statement of the Case

On or about August 2, 2006, Respondent Laura Jones was operating a motor vehicle which struck the vehicle of Appellant (CP 21:18-19). A summons and complaint for damages was filed on behalf of Appellant against Respondents on July 30, 2009 (CP 1-6). Appellant's insurance company was Safeco Insurance Company of Illinois, and the claims agent working with Appellant's counsel was Brandy Burns (CP 22:4-6). Shortly after the summons and complaint were filed, Brandy Burns received Appellant's request for Respondents' address (CP 22:7-9). The address given by Safeco's representative and purportedly that of Respondents was 3506 E 2nd Court, Mead, WA., 99021 (CP 22:9-11). Upon attempted service on Respondents, it was learned that the address was false (CP 22:12-17). A subpoena duces tecum was then served upon Safeco Insurance requiring that they produce the current address and telephone number of Respondents (CP 18-20). Safeco's appointed counsel, Raymond Schutts, called Appellant's counsel and acknowledged receipt of a copy of the subpoena duces tecum and stated that he would call Respondents to secure their current address (CP 24:4-6). Appellant's counsel next received a call from Safeco paralegal, Carol Meenaghan, in which she

indicated that, in her opinion, the subpoena was invalid but that she would comply with the same (CP 24:15-18). She next sent a letter to Appellant's counsel indicating that the subpoena was made out to Safeco Insurance Company rather than Safeco Insurance Company of Illinois and she would not comply with same. The letterhead on which she wrote was entitled "Safeco Insurance", and the facsimile transmission sheet that accompanied the faxed letter stated "From Safeco Insurance Company" (CP 25:4-9). Then, a Notice of Deposition on Oral Examination was served on attorney Schutt's office on September 9, 2009, requiring the appearance of Respondents (CP 25:10-12). A responsive letter arrived from attorney Schutts indicating that neither he nor Respondents would be attending the deposition (CP 25:13-17). A letter was next sent to attorney Schutts citing to CR 30(a) which states "After the summons and complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person including a party, by deposition upon oral examination" (CP 25:18-22). Next, a motion and declaration for order allowing service by mail, together with the declaration of Appellant's counsel in support (CP 54-57, 21-29) were filed and timely served upon attorney Schutts. The matter was heard by The Honorable Kathleen M. O'Connor, Superior Court Judge, on October 16, 2009, during which she denied Appellant's motion and assessed terms against Appellant's counsel (CP 164). During the hearing, it was argued that attorney Schutts merely ignored the subpoena and failed to even attempt to obtain a protection order (RP 5:3-8). As Safeco has raised the defense that one cannot serve by mail a post office box, the motion was verbally amended to that of service

by mail at the previously given false address (RP 6:10-12). Appellant's motions were denied and terms were awarded against Appellant's counsel (RP 20:18-23).

Appellant's counsel next served a new subpoena on Safeco's registered agent on October 19, 2009, in Mukilteo, WA. The subpoena demanded production of "The current street address and mailing address and telephone number of defendants Laura Jones and Brian Jones" (CP 149:6-9). Safeco's response to the subpoena was to again give the same post office box number and same address already admitted by Safeco to have been false (CP 149:10-12). It was also noted that GT Investigations submitted a statement that Respondents had not had electrical service at the submitted street address in over four years (CP 149:12-15, 152).

Appellant's counsel filed a Motion for Reconsideration (CP 146-147) together with supporting declaration (CP 184-156) with the court.

On December 9, 2009, Respondents' counsel filed a Notice of Presentment of Order Denying Plaintiff's Motion to Compel and For Sanctions and Awarding CR 11 Sanctions to Safeco Insurance Company of Illinois. (CP 158-159).

Respondents' counsel filed an amended notice of presentment on December 11, 2009 (CP 162-163), setting a hearing for December 18, 2009. On December 18, 2009, the court sent a letter to counsel asking Respondents' counsel to prepare an order and request a new presentment date (CP 164). The letter also indicated that Appellant's Motion for Reconsideration would not be considered until after entry of the trial court's decision orally given October 16, 2009.

A presentment date was then set for February 11, 2010 (CP 165, 166-167). Orders were signed February 11, 2010 (CP 178-181). A briefing schedule on the reconsideration motion was also entered on February 11, 2010 (CP 182).

A Notice of Hearing for Defendants' Motion for Summary Judgment/Dismissal was filed and set for April 16, 2010 (CP 203-204). An Amended Notice of Hearing was filed April 14, 2010, setting hearing for April 23, 2010 (CP 205-206). The court sent out a letter (CP 211) on April 23, 2010, resetting the dismissal motion for May 7, 2010, and indicating that the court had not ruled on Appellant's reconsideration motion "due to the delay in rendering a decision on Mr. Dahlin's pending motion (for reconsideration)" (CP 211). On May 13, 2010, the court filed an Order Denying Motion for Reconsideration (CP 214-15). Pursuant to the court's cancelling the dismissal motion, a third presentment notice was filed May 19, 2010, setting argument for June 24, 2010 (CP 216-217). Another letter went out from the court on June 18, 2010, again postponing the dismissal motion and resetting it for June 25, 2010 (CP 220). The dismissal order was entered by the court on June 25, 2010 (CP 221-222) and the instant appeal timely followed.

C. Argument

No. 1 Service by Mail

The Appellant was given false information by Safeco Insurance Company. The Appellant exercised due diligence to serve Respondents but relied upon the information given by Safeco's representatives. When Respondent's counsel and clients refused to appear for the deposition, it was obvious that Safeco and the

Respondents were trying to evade service and rely on the statute of limitations to dismiss their liability for the accident. Appellant's timely filed a Motion for Service by Mail. In Respondents' responsive brief, they argued that service by mail cannot be made to a post office box. Appellant orally amended the motion to allow for service to the false address based upon Safeco's refusal to provide that information. The court ruled that the motion was frivolous and awarded over \$3,000.00 against Appellant's counsel. A motion for reconsideration was filed, citing the fact that a new subpoena served on Safeco's registered agent resulted in giving the same address as previously provided, an address wherein Respondents had not even had electricity at the address provided by Safeco in over four years. Safeco stated that they did not have Respondents' current address. The court may take judicial notice that Safeco Insurance would not provide automobile liability insurance to an insured without their current physical address. If the contrary were true, an insured could list a post office address in Libby, Montana, when they were actually living and driving in downtown Manhattan without paying for the additional premium required for driving in such a dangerous environment. Such an assertion is patently false, and it was certainly within the province of the trial court to have made such a determination rather than, in face of the actual evidence provided by Appellant, ruling that there was no evidence that Safeco intentionally provided a false address.

CR 4(d)(4) states: "In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the

party to be served at his last known address or any other address determined by the court to be appropriate.”

In the instant case, the Motion and Declaration to Serve by Mail stated: “Service should be made by mail because the Defendants cannot be found within this state, the Defendants’ attorney refuses to give their address to Plaintiff, Defendants’ attorney refuses to comply with a Notice of Deposition previously filed and served upon him requiring Defendants’ presence, and Defendants’ insurance company, Safeco Insurance Company of Illinois, has given a false address for Defendants and also has refused to honor a subpoena previously served upon them which required that they provide Defendants’ current address and phone number (RP 55).”

Additionally, in the Declaration of Peter D. Dahlin (in Support of Motion for Reconsideration), proof was submitted that Safeco again intentionally gave a false address for Defendants (RP 149:5-20, 152, 154, 155, 156).

It was clear to the trial court that Safeco was deliberately evading issuance of properly subpoenaed information, yet the court refused to reconsider its earlier ruling. The trial court should be reversed, a new 90 day statute of limitations ordered nunc pro tunc, and service by mail should be granted to the address previously submitted by Safeco. Safeco knew exactly where Defendants lived, where they could be served, yet they refused to honor the subpoena requiring production of that information.

2. The court erred when it granted over \$3,100.00 in financial sanctions against Appellant’s attorney. That act accompanied the court’s refusal to grant an order allowing service by mail, and was not stricken when the

Appellant showed actual proof of Safeco's intransigency and intentional refusal to provide the actual address of Respondents.

The judiciary will only review the actions of an administrative agency to determine if its conclusions may be said to be, as matter of law, arbitrary, capricious, or contrary to law. Helland v. King Cy. Civil Serv. Comm'n, 84 Wn.2d 858, 862, 529 P.2d 1058 (1975). The long-standing definition of arbitrary and capricious action is: "Willful and unreasonable action, in disregard of facts and circumstances. Action is not arbitrary and capricious when exercised honestly and upon due consideration of the facts and circumstances." Northern Pac. Transp. Co. v. State Utils. & Tranp. Comm'n, 69 Wn.2d 472, 478, 418 P.2d 735 (1966). The trial court's refusal to grant Appellant's motion for service by mail, coupled with the refusal to grant Appellant's motion for reconsideration was the result of willful and unreasonable action, in disregard of facts and circumstances. The court's award of fees against Appellant's counsel was arbitrary and capricious under the facts and circumstances of the case and evidence presented. The award of sanctions was designed to punish Appellant's attorney, and the entire handling of the case by the trial court punished the Appellant. When a judicial officer grants unreasonable sanctions against a party or attorney, that action creates a chilling effect upon future reasonable motions or cases by the sanctioned party or attorney. The award of sanctions should be reversed.

3. The court erred when it refused to grant Appellant's motion for reconsideration based upon the previously stated argument and abundance of facts

supporting Safeco's bad faith and intentional disbursal of knowingly false information. The court's refusal to grant the motion for reconsideration should be reversed as set forth.

4. The court erred when it granted Respondents' dismissal motion also based upon previously submitted argument and abundance of facts. The action was intended to punish Appellant's counsel for previous acts and had no grounding in the facts or evidence presented in this case. The trial court should be reversed and the case remanded for further proceedings.

5. The court committed error when it failed to automatically recuse itself from hearing Appellant's case because of the history of animosity and arbitrary and capricious rulings handed down by the trial court judge towards Appellant's counsel.

The appearance of fairness doctrine provides that a "judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." State v. Ladenburg, 67 Wn.App. 749, 754-55, 840 P.2d 228, (1992); State v. Brenner, 53 Wn.App. 367, 374, 768 P.2d 509, review denied, 112 Wn.2d 1020 (1989).

Canon 3(D)(1) of the Code of Judicial Conduct states: "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning a party." In the instant case, the trial judge was aware of the fact that the previous two cases tried by Appellant's counsel in that

court had gone to Division III which overturned the trial judge including a then recent case which Division III overturned three hours after counsel filed an emergency stay motion. The trial judge intentionally, arbitrarily and capriciously made a ruling in direct contravention of the law, court rules, and the previous appellate decisions, placing the client in potential criminal liability. The trial judge received a letter from counsel during the same case asking the judge to recuse herself based upon previous rulings that were not only erroneous but were prima facie proof of her extreme personal prejudice toward Appellant's counsel. The judge having then refused to even read the letter requesting recusal. The judge was also aware of the fact that Appellant's counsel had previously filed a grievance with the Judicial Fitness Committee of the Washington State Supreme Court against her. (CP 150:5-20). The very fact that the judge was aware of the previously filed grievance against her was prima facie evidence of partiality and prejudice by her against Appellant's counsel, yet again she refused to recuse herself, and then again ruled arbitrarily and capriciously against Appellant's counsel. The trial judge should be overturned for failure to recuse herself, and the case remanded for further proceedings before another trial judge.

D. Conclusion.

This case should never have been allowed to proceed beyond the statute of limitations. Safeco intentionally supplied false and misleading information about the whereabouts of its clients. The trial judge refused to grant Appellant's motion allowing service by mail. The trial judge sanctioned Appellant's counsel for bringing that motion. The trial judge refused to grant Appellant's reconsideration

motion in spite of the overwhelming evidence that Safeco had acted in bad faith. The trial judge acted arbitrarily and capriciously in refusing to automatically disqualify herself from presiding over Appellant's case based upon her previous actions against Appellant's counsel. The mere fact that counsel had previously filed a judicial grievance against the judge was prima facie evidence that she should have recused herself and that her ruling(s) were inappropriate under the circumstances. The Appellate Court should overturn the judge's ruling and remand the case for further proceedings with a different trial judge.

Dated: February 16, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter D. Dahlin', written over a horizontal line.

PETER D. DAHLIN, WSBA 19221
Attorney for Appellant