

COA No. 29584-2-III

FILED

JAN 09 2012

COURT OF APPEALS
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JAMES SCHIBEL and PATTI SCHIBEL, husband and wife,

Appellants,

v.

LEROY W. JOHNSON,

Respondent.

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

1. This appeal is not moot as there was no settlement.

Contrary to Mr. Johnson's contention, the Schibels' appeal of the dismissal is not moot because the case was never settled.

Although the Schibels thought it was, they did not agree with the written terms of the agreement as drafted by Mr. Johnson's attorneys, did not sign it, and did not settle the case. (CP 690, 698-704; RP 149-153). Mr. Johnson filed a motion to enforce the settlement agreement. (CP 620). Although entertaining argument on it, the court did not decide the motion. (See RP 144-153; 155-56). The court stated:

. . . [T]he case was still set to go out on November 1st. If you could not get a written agreement, the Court expected counsel and Mr. and Mrs. Schibel to be here. (RP 155).

It is undisputed that there was no written agreement. The record clearly shows the court did not decide the motion to enforce settlement agreement. Rather, the court *sua sponte* ordered dismissal with prejudice because the case had not settled and no one showed up for trial:

This case was set for trial. I informed counsel on October 27th there would be no continuances, and if the parties did not reach an agreement, they must be here on . . . November 1st ready for trial.

The court was here at that date and time, and no one appeared, and at that time, the judicial assistant contacted the attorney to get the dismissals entered because the Court doesn't usually do the orders of dismissal.

At this time, the court is on its own motion dismissing this. This is November 24th. It's been some three weeks since the trial date came and went, and if the parties had not settled it and in writing and finished it, they were to appear.

Since at that time no one appeared, the Court is moving to dismiss it on its own motion with prejudice. So all claims are now dismissed at this time. (RP 155-56).

The premise relied on by Mr. Johnson, *i.e.*, the case was settled, is false. The Schibels' appeal is not moot as this Court can, and should, provide effective relief by remanding for trial so justice can be done. *Brown v. Vail*, 169 Wn.2d 318, 337, 237 P.3d 263 (2010). The Schibels deserve their day in court to have their claims considered on the merits.

To have the case thrown out by the court on its own motion for a failure to appear is neither fair nor just nor reasoned. The record bears sad witness to the court's unprincipled decision to dismiss the case for the sake of making its stats look better. (See RP 122, 134, 155). Indeed, the court had 13 cases set for trial on November 1 and nothing in the record shows that the Schibels'

case was even called for trial that day. See CR 40(d). This Court should correct the wrong and reverse the dismissal of the Schibels' claims.

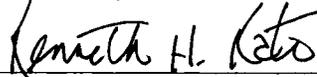
2. Mr. Johnson's counterclaim remains.

When the Schibels' case is remanded for trial, Mr. Johnson's counterclaim survives as well.

3. With respect to the other arguments made by Mr. Johnson, the Schibels rest on their opening brief.

DATED this 9th day of January, 2012.

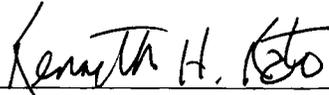
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 9, 2012, I caused a true and correct copy of the Reply Brief of Appellants to be served by first class mail, postage prepaid, on Curt H. Feig, Attorney at Law, 1325 Fourth Ave., Ste 150, Seattle, WA 98101.



Kenneth H. Kato