

FILED

MAY 05 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 319105

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

WSU AND WASHINGTON STATE,
Respondent

v.

SANDRA BERNKLOW
Appellant

BRIEF OF RESPONDENT

Presented by:
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I. ASSIGNMENTS OF ERROR

Assignments of Error

Appellant cites three assignments of error, namely, (1) that the Court erred in not finding the doctrine of laches to apply; (2) that the Court erred in not granting Bernklow’s motion for recusal; and (3) that the Court erred in somehow not finding fault with WSU’s pleadings in the case. Respondent will address each of these three assignments of error in its argument below.

II. STATEMENT OF THE CASE

1. WSU served Bernklow with an un-filed summons and complaint on October 16, 2012. The case was then filed on November 15, 2012.
2. The complaint alleges an account past due to WSU for

educational services, but was effectively for unpaid charges due to WSU's veterinary clinic, in the principal sum of \$3,030.94.

3. Bernklow filed her answer on December 5, 2012.
4. Bernklow filed a motion for summary judgment of dismissal, which was heard on May 30, 2013. CP 3-59.
5. Judge Acey denied Bernklow's motion.
6. Bernklow then moved for Judge Acey to recuse himself, and said motion was heard on July 24, 2013. CP 127-133.
7. Judge Acey denied Bernklow's motion.
8. The case proceeded to a bench trial before Judge Acey on July 31, 2013.
9. Judge Acey found in favor of WSU and entered a Judgment accordingly.
10. This appeal follows entry of said judgment.

III. STANDARD OF REVIEW

The appellate court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court, to determine if the moving party is entitled to summary judgment as a matter of law and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22(2003); *Green v. A.P.C.*,

136 Wn.2d 87, 94, 960 P.2d 912 (1998); *Welch v. Southland Corp.*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998); *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 799, 65 P.3d 16 (2003), *review denied*, 151 Wn.2d 1037 (2004).

Under a de novo review, the factual findings of the trial court on summary judgment are not entitled to any weight. Accordingly, all facts and reasonable inferences therefrom must be viewed most favorably to the party resisting the summary judgment motion. Even if the facts are undisputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 745 P.2d 1 (1987).

IV. RESPONDENT'S ARGUMENTS

A. THE COURT PROPERLY DENIED BERNKLOW'S MOTION TO DISMISS FOR LACHES.

Bernklow appeals the court's denial of her motion to dismiss under the doctrine of laches. The trial court held a full hearing on Bernklow's motion, and considered the attached declaration of WSU's Executive Director, Terry Ely, and copies of the invoicing attached thereto for the veterinary services rendered (CP 60-70). The court denied Ms. Bernklow's motion, and it further declined her request for detailed findings as to his decision (Appellant's Brief at 24).

a. The Doctrine of Laches is Case Specific.

Generally, the doctrine of laches depends upon the particular facts and circumstances of each case. *Buell v. Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972), citing to *Schrock v. Gillingham*, 36 Wn.2d 419, 219 P.2d 92 (1950); *McKnight v. Basildes*, 19 Wn.2d 391, 143 P.2d 307 (1943).

The elements of laches are: (1) knowledge or a reasonable opportunity to discover on the part of a potential plaintiff that he or she has a cause of action against a defendant; (2) the plaintiff's unreasonable delay in commencing that cause of action; and (3) damage to the defendant resulting from the unreasonable delay. *Buell* at 522. In her original summary judgment motion, Bernklow raised a myriad of complaints, including laches. Her own supporting declaration showed that she received a demand from WSU on August 5, 2008, entitled "Final Notice". (CP 66-70). The letter indicated she would be sent to collections if the balance remained unpaid. As set forth in the declaration of WSU, the account was sent to a collection agency, Financial Assistance, Inc., for collection in 2012. (CP 66-70)

Bernklow appears to be arguing that, in order to avoid laches, a creditor must sue on an unpaid claim as soon as it becomes due, or risk losing its position. But this is why the doctrine of laches is applied on a

case by case bases. Specifically, creditors may hold on to claims prior to filing suit for a myriad of reasons, including not wanting to file suit against every customer who leaves without paying a balance due. Other considerations may be whether or not the client/debtor has assets sufficient to warrant the cost of suit, delay in identifying facts to determine if it is worthwhile to proceed on a claim, given the amount(s) in controversy, bankruptcy or other such considerations, etc., etc. Here, Bernklow relies upon the period of time that passed between the dates of service and the commencement of the action. Yet it was her burden to establish that the delay in this case was somehow unreasonable. As she herself cites, public policy is and should be a consideration in a laches case. In the present matter, one consideration need be whether WSU, as a state entity, is entitled to recoup funds for services rendered by its facility. The very reason RCW 19.16.500 exists, is to compensate the state for instances of having to turn matters over to collection agencies. As such, the harm of non-payment is to the taxpayers of the State of Washington.

Bernklow relies upon *Hogan v. Kyle*, 7 Wash. 595, 35 P. 399 (1894). *Hogan* is factually distinguishable. At issue was not an account receivable, as here, but a written contract for land. Hogan expressly found that there is a distinction between cases where “time was of the essence” and those where it was not. Moreover, the delay appeared to result in

changes in the value of the real estate at issue. *Id.* In the present case, the value of the claims of the parties was fixed and liquidated. Time was of the essence.

b. Bernklow fails to establish the third element of laches.

Bernklow does not establish that there has been any damage to her resulting from any delay herein. As Bernklow herself cites, “a defendant cannot be said to be damaged simply by having to do now that which was legally obligated to do years ago, so long as the parties are in the same position.” *Crodle v. Dodge*, 99 Wash 121,131 (1917).

As *Crodle* sets forth, [l]aches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state...” *Crodle* at 131. Bernklow makes no showing of any prejudice in defending WSU’s claim against her.

Bernklow alleges, without support to the record, that she has somehow been prejudiced by the alleged delay. There is no evidence of any prejudice. At no point has Bernklow denied incurring the obligation

that is the subject of the original action. Rather she predicates her argument based solely upon the passage of time, which, if taken to its logical conclusion, would make every claim filed by a creditor subject to a laches defense if not brought immediately upon default.

Bernklow cites to hearsay that somehow WSU delayed moving on the claim to allow for the passage of the statute of limitations for a negligence claim. Bernklow has never provided any authority to support this allegation. Moreover, even if true, nothing would prevent Bernklow from raising negligence as an affirmative defense in this underlying action, which she expressly did not do.

**B. BERNKLOW ASSERTS BIAS BY JUDGE ACEY,
WITHOUT BASIS IN LAW OR FACT.**

Bernklow's claim of error due to the court refusing to recuse itself, lacks a basis in law or fact. She cites to no authority and simply refers to her motion for recusal, which simply asserts that Judge Acey was somehow biased against her because he denied her motion to dismiss. Her initial motion for recusal cited no standard and no legal principal which would have required Judge Acey's recusal after having already ruled on a substantive motion in the case. Bernklow similarly raises no standard, precedent or even fact which would have warranted Judge Acey's recusal for trial.

C. BERNKLOW'S CLAIMS OF LEGAL DEFECT IN THE PLEADINGS ARE WITHOUT MERIT.

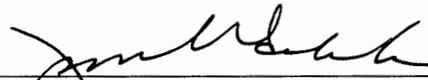
Bernklow's third assignment of error is that there was somehow a defect in the pleadings filed by WSU. Again, there is no specific citation of authority as to what, if anything, is being complained of. The original Complaint in the case makes no reference to any exhibit or attachment.

Moreover, this assignment of error ignores the fact that this matter went to a bench trial, with all evidence before the court being properly admitted by the Court, and to which no error is cited.

VI. CONCLUSION

For the foregoing reasons, WSU respectfully requests that this Court affirm the lower court's decision in favor of WSU and allow the judgment entered therein to stand.

Respectfully submitted this 2nd day of May, 2016



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