

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**WASHINGTON STATE COURT OF APPEALS  
DIVISION III**

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No. 32615-2-III

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JAMES T. MORROW and DAWN M. MORROW,

Appellants,

v.

VICKI A. TOMSHA,

Respondent

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APPELLANTS' OPENING BRIEF

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**Washington Court Rules**

CR 41 .....6, 7, 8

A. ASSIGNMENTS OF ERROR AND ISSUES RAISED

ASSIGNMENTS OF ERROR

1. Dismissal of the plaintiffs' lawsuit constituted an abuse of discretion, in that there is no evidence supporting the trial court's finding that the case was "inactive," nor did the conduct of plaintiffs' counsel merit the harsh sanction of dismissal of plaintiffs' case.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the trial court's finding that the case was "inactive" supported by substantial evidence? (Assignment of Error No. 1)

2. Did the trial court's dismissal of plaintiffs' lawsuit as a sanction against plaintiffs' counsel constitute an abuse of discretion, in that such action was contrary to the judicial principle that lawsuits should be resolved on the merits? (Assignment of Error No. 1)

3. Was the trial court's dismissal of plaintiffs' lawsuit as a sanction against plaintiffs' counsel an abuse of discretion in that (a) the lawsuit had been filed only 108 days before dismissal, (b) defense counsel had entered a notice of appearance less than two weeks before dismissal, (c) defendants had not been prejudiced by the plaintiffs' counsel missing the two proceedings, and (d) the trial court did not state on the record whether any sanction less than dismissal of the lawsuit had been considered? (Assignment of Error No. 1)

4. Was the trial court's dismissal of plaintiffs' lawsuit as a sanction against plaintiffs' counsel and abuse of discretion in that it was not proportional to wrong committed by plaintiffs' counsel and therefore excessive? (Assignment of Error No. 1)

B. INTRODUCTION — SUMMARY OF ARGUMENT

Plaintiffs' counsel failed to appear at the initial case status conference May 23, 2014 and the resulting show cause hearing set by the trial court for June 6, 2014. As a sanction against plaintiffs' attorney, the trial court dismissed the action, and denied plaintiffs' motion for reconsideration.

Plaintiffs' counsel acknowledges the initial case status conference was not calendared, as is normally done in his office. The show cause hearing was calendared but, apparently, in the rush of addressing matters related to other cases the morning of June 6, plaintiff's counsel overlooked the show cause hearing and it did not come to mind again until after he returned to his office. His conduct was inattentive, but was not willful.

It is most respectfully submitted, however, that the sanction of dismissal is excessive and contrary to principles repeatedly expressed by our Supreme Court stating that cases should be resolved on the merits of the case, that the sanction of dismissal is harsh and should be reserved for egregious violations of court rules and procedures, that trial courts may

impose dismissal as a sanction only after considering on the record less onerous and harsh sanctions and, finally, dismissal under the present circumstance is contrary to the admonition of CR 1 that “[the rules] shall be construed to secure the *just*, speedy, and inexpensive determination of every action.” [Emphasis added.]

C. STATEMENT OF THE CASE

This case arises from a motor vehicle collision that occurred in Spokane County on February 18, 2011, when defendant driver Vicki Tomsha collided with a vehicle occupied by driver James Morrow and passenger Dawn Morrow, his wife. CP 4-5.

Attorney John A. Bardelli filed a complaint February 18, 2014 on behalf Mr. and Mrs. Morrow, alleging that Ms. Tomsha’s negligence caused the collision, resulting in significant injury to Mr. and Mrs. Morrow. CP 4-5.

At the time of filing, a Case Assignment Notice and Order was issued by the clerk’s office stating that the case was assigned to the Honorable Michael P. Price, and the initial Case Status Conference would be held before Judge Price on May 23, 2014. CP 8. Mr. Bardelli states that, for some unknown reason, the Case Assignment Notice and Order was not placed in his office file. CP 18, ¶ 11.

The normal procedure in Mr. Bardelli's office would have been to calendar any notice of hearing in the file. CP 18, ¶ 12. Because a Case Assignment Notice was not placed in the office file for this case, the Case Status Conference for May 23, 2014 was not calendared and, consequently, Mr. Bardelli was unaware of the conference.

On May 23, 2014, neither counsel for the plaintiffs nor defendant appeared before Judge Price for the status conference. CP 25, ¶ 3. Consequently, an order to show cause was issued, directing counsel to appear on Friday, June 6, 2014 at 8:30 a.m. to "show cause why this case should not be dismissed." The order specified that "If the plaintiff and defendant, or an attorney on their behalf, does not appear before this court on said date, this matter will be dismissed." CP 9. Additionally, the order stated that "FAILURE TO COMPLY WITH THIS ORDER WILL RESULT IN DISMISSAL WITH PREJUDICE." CP 10; CP 25, ¶ 4.

On May 27, 2013, Mr. Bardelli received the Order to Show Cause. CP 18, ¶ 13. On May 29, 2014, defense counsel Alina Polyak entered a notice of appearance. CP 11.

On June 6, 2014, Mr. Bardelli had three proceedings scheduled in Superior Court, including (1) the show cause hearing before Judge Price at 8:30 a.m., (2) a scheduling conference at 8:30 a.m. before Judge O'Connor, and (3) a contested motion before Judge Moreno noted for 9:00

a.m., which commenced at approximately 9:20 a.m. and concluded shortly before 10:00 a.m. CP 18, ¶¶ 14, 15.

Upon returning to the office, Mr. Bardelli realized he had missed the show cause hearing, and attempted to call Judge Price's judicial assistant, Shannon Collins, to explain the scheduling conflicts. He was unable to reach Ms. Collins, and left a recorded message regarding the scheduling conflicts. CP 19, ¶ 16.

On Monday, June 9, Mr. Bardelli went to Judge Price's courtroom and spoke to Ms. Collins, and was informed that "no one showed for either side and an Order of Dismissal was entered." CP 19, ¶ 17. Mr. Bardelli asked for and received a date for hearing for an anticipated Motion for Reconsideration, October 1, 2014, at 11:00 a.m. CP 19, ¶ 18; CP 21.

Later on June 9, 2014, Mr. Bardelli received in the mail Judge Price's Order of Dismissal. CP 19, ¶ 19; CP 14. As the "Basis" for dismissal, the order stated: "Upon failure of the parties to respond to a request by the court to inform the court of this case's status at status conference on May 23, 2014, and show cause on June 6, 2014, this case is *inactive*." [Emphasis added.] The "Findings" stated: "After reviewing the case to date, the court finds that the case is, in fact, *inactive* and good cause exists for dismissal. Parties have failed to appear." [Emphasis

added.] CP 14. Because the order twice uses the word “inactive,” it appears that dismissal was, at least in part, based on CR 41(b)(1).

On June 13, 2014, Mr. Bardelli filed a Motion for Reconsideration, which included his supporting affidavit. CP 16-20.

On June 17, 2014, the trial court ruled on Mr. Bardelli’s Motion for Reconsideration, entering nine findings of fact, seven conclusions of law, and denying the motion. CP 24-27. Judge Price’s findings of fact related the substance of the Case Assignment Notice and Order, the procedure to be followed by legal counsel, and the fact that Mr. Bardelli did not appear for the status conference.

The court expressed what appears to be its fundamental reasons for dismissing the lawsuit in Finding of Fact 9: “Plaintiffs’ counsel... does not explain why he did not contact this department until after the show cause hearing had already taken place and instead indicates that he had conflicts on his schedule before the Honorable Kathleen O’Connor at the same time. Further, counsel does not explain how a regularly scheduled case scheduling order... was completely overlooked.” CP 25, ¶ 9.

Mr. Bardelli acknowledges that somehow the “scheduling order was completely overlooked,” and that the press of attending a contested hearing before Judge Moreno and the status conference before O’Connor on the morning of June 6 resulted in overlooking the show cause hearing.

Follow the trial court's denial of plaintiffs' motion for reconsideration, a notice of appeal was timely filed. CP 28.

D. ARGUMENT

(1) Standard of Review

The trial court did not cite any specific rule as authority to dismiss the Morrrows' lawsuit, but did enter a finding in the order of dismissal that the case was "inactive." CP 14. This finding is inconsistent with the court file, which reflects that defense council entered a notice of appearance a mere one week before. CP 11.

This case had only been filed 108 days prior to dismissal, and therefore could not have met the one-year criteria of CR 41(b)(1) in that no answer been filed and, thus, no "issue of law or fact has been joined." CR 41(b)(2) did not apply, in that the one-year criteria could not be met regarding a clerk's motion.

In sum, the court's order of dismissal, and circumstances surrounding the dismissal, most closely fall within that portion of CR 41 pertaining to "failure of the plaintiff ... to comply with these rules." It is therefore assumed for purposes of this appeal that the trial court's dismissal was *sua sponte*, pursuant to its inherent authority invoked upon the "failure of the plaintiff ... to comply with these rules."

Trial courts have inherent authority to control and manage their calendars, proceedings, and parties. *Cowles Pub'g Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981).

The imposition of a sanction by a trial court is reviewed for abuse of discretion. *Business Services of America II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 274 P.3d 1025 (2012): (when court's inherent power to dismiss for want of prosecution is at issue the trial court's decision is reviewed under the abuse of discretion standard); see also, *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

(2) Lawsuits Should Be Decided On The Merits

As noted above, a trial court has inherent authority to manage and control their calendars, proceedings and the parties before it. Dismissal of this case was based on CR 41(b), that is, the failure of plaintiffs' counsel to attend scheduled court proceedings. With respect to the show cause hearing, both plaintiffs' and defense counsel failed to appear, yet only plaintiffs' counsel was sanctioned.

Our courts have long stated that lawsuits should be decided on their merits. *Lane v. Brown & Haley*, 81 Wn.App. 102, 912 P.2d 1040 (1996); *Sacotte Constr., Inc. v. Nat'l Fire & Marine Ins., Co.*, 143 Wn.App. 410, 414, 177 P.3d 1147 (2008).

The present case was dismissed with prejudice, 108 days after it was filed, and one week after defense counsel filed a notice of appearance, and before defense counsel filed an answer. CP 1; CP 11. The complaint alleged a defendant driver was negligent, that the plaintiffs were injured, and that such injury was a proximate result of the defendant's negligence. CP 4-6. These issues should be decided by a trier of fact, sooner than later. There has been no failure to prosecute this case, and it should be allowed to go forward on the merits.

(3) Proportionality of Sanction

It is respectfully submitted that dismissal of the Morrows' lawsuit was excessive and unnecessary, in that there is no evidence in the record demonstrating that the case was "inactive," nor that the conduct of plaintiffs' counsel merited the sanction of dismissal.

While both parties failed to appear at the proceedings, only one party was sanctioned — much to the benefit of the defendant. CR 1 provides that our court rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." The trial court's dismissal of the present action is contrary to CR 1, inasmuch as it was disproportionate to the nature of the underlying conduct, failed to address the defense counsel's failure to appear, and therefore was unjust.

In *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, at 130, 896 P.2d 66 (1995), a case involving dismissal for failure to comply with scheduling order requirements regarding service of process, the court stated as follows:

... it is the general policy of Washington courts not to resort to dismissal lightly. *Anderson v. Mohundro*, 24 Wn. App. 569, 575, 604 P.2d 181 (1979) (because dismissal is the most severe sanction which a court may apply, its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited), *review denied*, 93 Wn.2d 1013 (1980). Where, however, a court has found that a party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice and has prejudiced the other side by doing so, dismissal has been upheld as justified.

In *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, at 686, 41 P.3d 1175 (2002), plaintiff Rivers' case was dismissed as a sanction for failing to comply with a court order directing her to follow a discovery order and case event schedule deadlines. In reversing the dismissal, the Court stated as follows:

Dismissal of a complaint or answer is an extreme sanction not available merely to encourage compliance with a case schedule. Such a sanction is reserved for discovery violations which are willful or deliberate, when the violation substantially prejudices the opponent, and a lesser sanction would not suffice. *See Burnet v. Spokane*

*Ambulance*, 131 Wn.2d 484, 497, 933 P.2d 1036 (1997).

*Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497, 933 P.2d 1036 (1997), plaintiffs' claims were dismissed with prejudice based on discovery abuses. The case was not set to go to trial for approximately a year and a half. In reversing the trial court's dismissal, our Supreme Court discussed the matters that should be considered before imposing dismissal as a sanction:

In any case, we are satisfied that it was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony on the credentialing issue without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of discovery and yet compensated Sacred Heart for the effects of the Burnets' discovery failings. See *Fisons*, 122 Wn.2d at 355-56, 858 P.2d 1054. Furthermore, even if the trial court had considered other options before imposing the sanction that it did, we would be forced to conclude that the sanction imposed in this case was too severe in light of the length of time to trial, the undisputedly severe injury to Tristen, and the absence of a finding that the Burnets willfully disregarded an order of the trial court. See *Lane v. Brown & Haley*, 81 Wn. App. 102, 106, 912 P.2d 1040 ("[T]he law favors resolution of cases on their merits."), review denied, 129 Wn.2d 1028, 922 P.2d 98 (1996).

In the present case the trial court imposed a severe sanction, and whether a sanction is dismissal, as in *Rivers*, or restricting evidence as the result of a discovery abuse, as in *Burnet*, the above-cited cases inform that a trial court is obligated to consider the circumstances and the nature of

any misconduct before imposing a sanction — addressing, at the very least, the following matters: (1) the party's refusal to obey the discovery 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. *Marina Condominium Homeowner's Ass'n v. Stratford at Marina, LLC*, 161 Wn. App. 249, 254 P.3d 827 (2011).

Neither the trial court's Order of Dismissal nor its Findings, Conclusions and Order denying reconsideration, found there was willful and deliberate misconduct on the part of Mr. Bardelli, nor prejudice to any party resulting from the missed proceedings. Nor did the trial court consider whether a lesser sanction would have sufficed. At least three core points support reversal of the trial court's dismissal of the Morrrows' lawsuit.

First, it is apparent from the trial court's ruling on reconsideration that it viewed Mr. Bardelli's failure to calendar the events and/or appear at the scheduled proceedings to be matters he had "overlooked," and not willfully disregarded. CP 26. Additionally, Mr. Bardelli states in his declaration that on June 6, 2014, he had three proceedings scheduled, one of which was a contested motion before Judge Moreno. While this

situation appears to have been one of inattention on Mr. Bardelli's part, it was certainly not willful and deliberate and, again, the trial court made no such finding.

Second, there is no evidence in the record or finding by the court that Mr. Bardelli's actions prejudiced the defendant in any manner whatsoever. In that regard, the case had been filed only 108 days prior to the order of dismissal, and the defendant entered a notice of appearance merely one week before the dismissal. CP 1; CP 11. Similarly, any case scheduling order that might have been established by the court at the status conference would have provided a trial date approximately one year in the future.

Third, the trial court did not make any record of having considered some lesser sanction. For example, a monetary penalty of \$250.00 imposed on each attorney for failure to appear at the show cause hearing would have adequately put counsel on notice of the trial court's concern about maintaining scheduling obligations, while at the same time served purposes of coercive and/or punitive measures.

Here, the trial court sanctioned only plaintiffs' counsel and, in so doing, deprived the plaintiffs of their cause of action and greatly rewarded the defendant. The sanction imposed by the trial court was out of all

proportion when compared to the nature of the conduct being sanctioned. Such an outcome is truly inconsistent with letter and spirit of CR 1 regarding the “just” interpretation and application our court rules.

E. CONCLUSION

It is respectfully submitted that the trial court’s dismissal of the present action constituted an abuse of discretion and should therefore be reversed and the case remanded for trial.

DATED this 18<sup>th</sup> day of March, 2015.

Respectfully submitted,

  
DENNIS W. CLAYTON, WSBA #7464  
Attorney for Appellants Morrow

**DECLARATION OF SERVICE**

Dennis W. Clayton declares as follows, under penalty of perjury of the State of Washington:

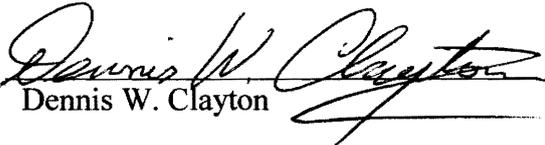
1. I am over the age of 18 years, competent to testify herein, and do so based upon personal knowledge of the matters stated.

2. On March 18, 2015, I personally served a copy of the Appellant's Opening Brief by mailing a copy to counsel, postage prepaid, at the following addresses:

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DATED this 18<sup>th</sup> day of March, 2015.

  
Dennis W. Clayton