IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Jeffrey R. McKee, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS, Respondent.	No. 40939-9-II UNPUBLISHED OPINION

Van Deren, J. — Jeffrey R. McKee appeals the trial court's CR 41(b) order dismissing his lawsuit against the Washington State Department of Corrections (DOC) for alleged violations of the public records act (PRA), chapter 42.56 RCW. DOC brought a CR 41(b) motion to dismiss for want of prosecution after McKee failed to note a show cause motion or to present evidence on the merits of his claim by the trial date. McKee argues that the trial court erred in dismissing his suit because it failed to explicitly consider alternative lesser sanctions to dismissal. Because the trial court failed to enter any findings of fact or conclusions of law before dismissing McKee's claim and because there is no record of proceedings for us to review in their absence, we reverse and remand for further proceedings.

FACTS

Jeffrey McKee is an offender in DOC's custody. On December 7, 2006, McKee submitted a public disclosure request to DOC.[1] McKee was dissatisfied with the responses he received[2] and, in February 2008, he filed suit against DOC for violations of the PRA.[3] The trial court set a trial date for May 14, 2010.[4]

Although McKee allowed more than two years to pass without filing any motions, he eventually filed a motion to stay proceedings that was heard on April 30, 2010. McKee had recently been transferred to a different prison facility and he sought a stay pending the delivery of his legal materials from the previous facility. By the time the hearing took place, however, McKee's motion was moot because he had already received the legal materials at issue; instead, he requested that the court convert his motion for a stay to a continuance motion. The trial court denied the motion and the following exchange took place:

> THE COURT: Well, I have not granted the continuance and I have not granted the stay, so I am assuming we are going to address the merits on May 14th.

[1] The parties agree on this fact. But the letter containing the public disclosure request is not properly before this court as it can only be found in McKee's motions that were stricken by the trial court.

[2] The facts underlying McKee's PRA claim are not properly before this court because they are contained in the abovementioned stricken motions. But regardless of the facts underlying the PRA claim, the present case turns merely on whether the suit was properly dismissed under CR 41(b); thus, we do not reach any issue about McKee's public record requests.

[3] Although McKee has not provided the complaint in the record on appeal, the parties agree that he filed the complaint at some point in February 2008, although they do not agree as to the exact date.

[4] The record does not contain an order setting the trial date, but the report of proceedings from the April 30, 2010, hearing indicates that the trial date was May 14, 2010.

> MR. McKEE: Okay. So May 14th I need to file a summary judgment motion.
>
> THE COURT: Well, summary judgment motions generally take 28 days, and we are certainly beyond that. I don't know what we are going to do.
>
> MR McKEE: Okay. So —
>
> THE COURT: So in order to have more time, did you — I don't even know if the Court can inquire, but did you want to waive your right to penalties for the duration of the continuance?
>
> MR. McKEE: No, for the simple fact that the majority of the reason why this case has dragged on for so long was because of the defendants prolonging it.
>
> THE COURT: Okay. So I am going to suggest that you need to have something filed by next Friday if we are going to have a hearing on the 14th.
>
> MR. McKEE: Okay. Whether it's a discovery motion or —
>
> THE COURT: Well, I don't know if a discovery motion would do at that point. I think you need to address the merits.
>
> MR. McKEE: Okay. All right, Your Honor. Well, then I guess I'd like to object to it because I think it prejudices me, but I will definitely work this weekend to put in some sort of motion for the Court.

Clerk's Papers (CP) at 329-31.

On May 12, 2010, McKee filed a motion for summary judgment and a motion to compel responses to his fifth set of interrogatories and requests for production.[5] The court set a hearing on his motions for June 25, but McKee failed to present evidence or note a motion to be heard by the May 14 trial date.[6] On May 21, 2010, DOC filed a motion to strike as untimely McKee's motions to compel and for summary judgment, and it also filed a motion to dismiss for want of

[5] McKee's motion to compel arose from opposing counsel's alleged delay in submitting responses to McKee's fifth set of interrogatories and requests for production and after multiple attempts by McKee to schedule a discovery conference with opposing counsel. At the April 30 hearing on McKee's motion to stay, the trial court waived the discovery conference requirement due to McKee's difficulties in accessing the telephone, and McKee's motion followed.

[6] The record does not reveal what, if anything, took place on the date of trial. The only indication about what may have occurred can be found in a letter from McKee to opposing counsel stating, "I understand the court canceled the hearing for May 14, 2010. I assume this was to give you enough time to respond." CP at 359. The record on appeal also does not contain reports of proceedings after April 30, thus, we are unable to examine the record to review the parties' arguments or the trial court's oral ruling for the basis of the dismissal.

prosecution under CR 41(b). The trial court granted the motions to strike[7] and the motion to dismiss on June 4 but did not enter a written order until September 2, 2010. The September 2 order does not include findings of fact or conclusions of law.

ANALYSIS

I. Standard of Review

"We review an order of dismissal under CR 41(b) for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons." *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 128, 89 P.3d 242 (2004) (citation omitted).

II. CR 41(b) Dismissal

McKee argues that the trial court abused its discretion when it dismissed his case without first considering less severe alternative sanctions. Because Washington courts clearly require such a finding prior to dismissal of an action under CR 41(b), we agree.

CR 41(b) allows a defendant to move for involuntary dismissal of an action "[f]or failure of the plaintiff to prosecute or to comply with the[civil] rules or any order of the court."[8]

---

[7] McKee does not challenge these rulings in this appeal.

[8] McKee also argues that the trial court improperly dismissed his suit under CR 41(b)(1). The rule provides:

> (1) *Want of Prosecution on Motion of Party*. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff . . . neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined[.] . . . If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

CR 41(b)(1). McKee appears to argue that because his suit was noted for trial and/or because his summary judgment motion was to be heard before the hearing on DOC's motion to dismiss, dismissal under CR 41(b)(1) was improper. DOC's motion to dismiss does not request dismissal under CR 41(b)(1); rather, it cites the more general CR 41(b). The order of dismissal does not specify under which rule the court dismissed. Regardless of which section of the rule applies, we

"Dismissal is an appropriate remedy where the record indicates that '(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 (alteration in original) (quoting *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002)). To satisfy the *Rivers* requirements, "the trial court must clearly indicate on the record that it has considered less harsh sanctions[.] . . . Its failure to do so constitutes an abuse of discretion."[9, 10] *Rivers*, 145 Wn.2d at 696.

Here, the trial court did not enter any factual findings in its dismissal order. We generally consider the absence of a factual finding against the party with the burden of proof, but the rule does not apply where "there is ample evidence to support the missing finding, and the findings entered by the court, viewed as a whole, demonstrate that the absence of the specific finding was not intentional." *Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 682, 828 P.2d 565 (1992). But the trial court, here, failed to enter any factual findings and there is

---

reverse because the trial court must make specific findings of fact as a prerequisite to dismissal under CR 41(b), and it failed to do so.

[9] Division One of this court has affirmed a CR 41(b) dismissal even where the trial court failed to make explicit findings regarding lesser sanctions. *See Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 131-32, 896 P.2d 66 (1995). But *Woodhead* is distinguishable because in that case the court found that dismissal was proper because the court did make the required findings on the first two factors and the third could be inferred from the record; whereas, here, we have no record of the trial court's findings and the written order of dismissal has no findings. *See* 78 Wn. App. at 132.

[10] McKee assigns error only to the trial court's failure to make findings about the availability of alternative lesser sanctions. Because we hold that failure to make findings regarding lesser sanctions alone is an abuse of discretion, the presence or absence of findings about the other two factors is immaterial.

nothing in the record as to the arguments made or the evidence presented at the hearing on the CR 41(b) motion to dismiss; nor is there an oral ruling we may review. Accordingly, we hold that the trial court abused its discretion by dismissing McKee's suit without entering findings of fact and we reverse and remand to the trial court for further proceedings.

IV. Attorney Fees

McKee requests attorney fees and costs on appeal under RAP 18.1 and RCW 42.56.550(4). RCW 42.56.550(4) provides:

> Judicial review of agency actions.
>
> . . . .
>
> (4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

(Boldface omitted.)

The statute also applies to attorney fees incurred on appeal. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 271, 884 P.2d 592 (1994). But where we make no determination about whether the state agency violated the PRA and merely remand to the trial court for further fact finding, an award of attorney fees on appeal is improper. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 152, 240 P.3d 1149 (2010). Because we do not reach the merits of

McKee's PRA claim, we deny McKee's request for attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Worswick, C.J.