IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JAMES SCHIBEL and PATTI SCHIBEL, husband and wife, Appellants, v. LEROY W. JOHNSON, Respondent and Cross-Appellant.	)	No. 29584-2-III UNPUBLISHED OPINION

Kulik, J. — James and Patti Schibel and Leroy Johnson orally agreed to a settlement that dismissed all claims by both parties arising from a lawsuit alleging breach of commercial lease, personal injury, and unpaid rent. The Schibels notified the court of the agreement and cancelled the trial date. Neither party appeared for their November 1, 2010 trial date. Mr. Johnson reduced the agreement to writing, but the Schibels refused to sign it. The trial court then dismissed all claims by both parties for failure to appear for trial.

The Schibels now appeal the superior court's granting of their attorneys' motion to

withdraw, its denial of their motion for a continuance, and its dismissal of their claims. We review these court orders for an abuse of discretion. The court had previously granted multiple continuances between November 2007 and October 2010.

The trial court properly exercised its discretion in deciding the Schibels' motions. We affirm the court in all respects.

FACTS

On January 9, 2007, James and Patti Schibel filed suit against Leroy Johnson. The Schibels alleged that Mr. Johnson breached a commercial lease with them in 2004 and, through his negligence, injured them by exposing them to mold and dampness in the building he owned and leased to them. Mr. Johnson filed a counterclaim for back rent.

On November 1, 2007, the Schibels and Mr. Johnson jointly moved the trial court for a continuance until August to October 2008 to allow the parties to pursue mediation. Mediation failed.

On December 6, 2007, Mr. Johnson demanded a jury trial. The court set trial for August 11, 2008.

On June 27, 2008, the court denied Mr. Johnson's summary judgment motion.

Due to an illness in the Schibels' family, trial was continued to April 13, 2009, the third trial date. In late December 2009, the Schibels' original attorney notified the

Schibels of his intent to withdraw. On February 27, 2009, the attorney filed a motion to withdraw. On March 13, two attorneys filed their notice of appearance.

Over the Schibels' limited objection, the presiding judge granted the Schibels' first attorney's motion to withdraw on April 3, 2009. The trial court set the matter for trial on April 12, 2010, the fourth trial date.

Due to a conflict on the court's calendar, the trial court reset the trial for August 9, 2010. On August 7, Ms. Schibel's father died. On a motion by the Schibels, the trial court set trial for November 1, 2010, the sixth trial date in this matter.

On October 11, 2010, the Schibels' attorneys orally notified them of the attorneys' intent to withdraw. The following day, October 12, the attorneys filed their notice of intent to withdraw and a motion to continue the trial. On October 15, the trial court held a hearing on the Schibels' motions. The court deferred its decision until October 27 to allow for a full hearing.

On October 19, Mr. Johnson opposed the motion to continue. On October 20, the Schibels filed an objection to the motion to withdraw.

On October 27, the trial court heard the motions to withdraw and to continue the trial. The trial court granted the motion to withdraw and denied the Schibels' motion for a continuance. The trial court found that "[p]laintiff's counsel gave proper notice of

intent to withdraw" and that "the attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of plaintiff's counsel." Clerk's Papers (CP) at 546. The trial court told the Schibels that it would grant no further continuances and inquired as to their preparations to proceed pro se on November 1, 2010.

When the Schibels indicated that they would not be prepared, the trial court advised them that they likely would be responsible for any court costs incurred on November 1, 2010, if they appeared and were not prepared to commence the trial.

On October 29, the parties reached a settlement agreement via the telephone. The Schibels informed the trial court that "the case had been settled and not to bring in a [jury] panel for Monday." Report of Proceedings (RP) at 155. However, when Mr. Johnson's attorney e-mailed the Schibels a written memorandum of their oral agreement, they refused to sign it. Neither party appeared in court on November 1.

On November 12, Mr. Johnson filed a motion to enforce the October 29 settlement agreement and dismiss the Schibels' claims. The trial court heard the motion on November 24, 2010.

At this hearing, Mr. Schibel confirmed to the trial court that "[w]e had agreed to and made an oral agreement with [Mr. Johnson's attorney]." RP at 150. Mr. Schibel repeated that "[w]e had agreed to the oral agreement." RP at 150.

The trial court informed the parties that "[i]f [they] could not get a written agreement, the Court expected counsel and Mr. and Mrs. Schibel to be here [on November 1]." RP at 155. Thus, the trial court dismissed all claims of both parties for failure to appear for the November 1, 2010 trial date.

The Schibels appeal the trial court's granting of the motion to withdraw, the court's denial of the October 12 motion to continue, and the court's dismissal of their claims. For the limited purpose of preserving his counterclaim in the event this court remands the Schibels' claims to the trial court, Mr. Johnson cross-appeals the trial court's dismissal of his counterclaim.

FACTS

Motion to Withdraw as Counsel. "Withdrawal is a matter addressed to the discretion of the trial court," and an appellate court will review the trial court's discretion for abuse. *Kingdom v. Jackson*, 78 Wn. App. 154, 158, 896 P.2d 101 (1995). A trial court abuses its discretion only when it exercises its discretion in a manner that is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

"'A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on

untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.'" *Ryan v. State*, 112 Wn. App. 896, 899-900, 51 P.3d 175 (2002) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). "A decision based on a misapplication of law rests on untenable grounds." *Id.* at 900.

Whether discretion is abused "depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other." *Junker*, 79 Wn.2d at 26. Finally, "[w]hen withdrawal is sought by a retained attorney in a civil case, it generally should be allowed." *Kingdom*, 78 Wn. App. at 160. However, withdrawal "can be denied if specific articulable circumstances warrant that result." *Id*.

When retained counsel in a civil case seeks to withdraw, he or she must abide by the requirements outlined in CR 71(c). CR 71(c) requires a withdrawing attorney to provide proper notice to clients, all other parties, and the court. Although CR 71 provides detailed procedural guidance to a withdrawing attorney, "[n]othing in [CR 71] defines the circumstances under which a withdrawal might be denied by the court." CR 71(a). For that, we turn to case law.

When a trial court determines whether to allow withdrawal, it "should consider all pertinent factors." *Kingdom*, 78 Wn. App. at 158. *Kingdom* listed nine nonexclusive factors and referred to RPC 1.16[1] for additional guidance. *Kingdom*, 78 Wn. App. at 158-60.

RPC 1.16 addresses the circumstances under which an attorney can or must decline or terminate representation. It provides that a lawyer may withdraw from representing a client if:

> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
> (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
> (7) other good cause for withdrawal exists.

RPC 1.16(b). The rule is phrased in the disjunctive. Thus, an attorney may ethically withdraw if any of the seven criteria are met. Comment 3 to RPC 1.16 recognizes that

[1] The *Kingdom* court refers to RPC *1.15*. The rule has been renumbered as RPC 1.16 and restyled for clarity. The changes affect neither *Kingdom*'s holding nor the court's reasoning.

"[t]he court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation." When this situation arises, "[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." RPC 1.16, cmt. 3.

The Schibels assert that the court abused its discretion when it allowed withdrawal despite the material adverse effect such a withdrawal would have on the Schibels. This claim fails for several reasons. First, RPC 1.16(b) governs attorney conduct, not judicial discretion. A trial court could deny withdrawal of an attorney who has good cause under RPC 1.16(b) without abusing its discretion if the court found that other legitimate factors weighed against allowing withdrawal. RPC 1.16(c) recognizes that a court may order a lawyer to "continue representation notwithstanding good cause for terminating the representation" and requires a lawyer to comply with such an order.

Second, the Schibels misread RPC 1.16(b). According to the Schibels, the first paragraph of RPC 1.16(b) reads:

> Except as stated in section (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

Appellant's Br. at 12. The Schibels' version of the rule then lists six factors, ending with

"[o]ther good cause." Appellant's Br. at 12.

In fact, the rule begins:

> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client.

RPC 1.16. The rule then shifts its focus to client conduct that justifies withdrawal. RPC 1.16(b)(2)-(6). Finally, the rule allows withdrawal for "other good cause." RPC 1.16(b)(7).

The rule as written provides that an attorney may withdraw if the client will not be hurt, if the client exhibits any of five specific behaviors, or if other good cause exists. The lack of adverse effect is simply one of several reasons for which an attorney may withdraw.

The Schibels next claim that the trial court abused its discretion because "there are no facts in the record supporting the reasons given by [their attorneys] to withdraw on the eve of trial." Appellant's Br. at 15. Mr. Johnson claims that the record is "substantial and unchallenged." Resp't's Br. at 14.

The trial court found that "the attorney-client relationship in its current status requires said withdrawal due to the ethical obligations of plaintiff's counsel." CP at 546. The record contains numerous filings related to this issue. The record cited "the

breakdown in communication, trust and confidence in the attorney-client relationship." CP at 510. After reviewing the Schibels' and counsel's declarations and the record, we conclude the trial court's finding that good cause existed for withdrawal was not manifestly unreasonable. The trial court properly exercised its discretion when it granted the Schibels' attorneys' motion to withdraw.

Motion to Continue. "[A] party does not have an absolute right to a continuance, and the granting or denial of a motion for a continuance is reversible error only if the ruling was a manifest abuse of discretion." *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 785, 727 P.2d 687 (1986). "A manifest abuse of discretion occurs where the ruling is manifestly unreasonable or is based on untenable grounds or done for untenable reasons." *Id*.

The decision to "grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Trial courts may consider (1) the necessity of reasonably prompt disposition of litigation; (2) the needs of the moving party; (3) the possible prejudice to the adverse party; (4) the prior history of the litigation, including prior continuances granted the moving party; (5) any conditions imposed in the continuances previously granted; and (6) any other matters that have a material bearing on the court's exercise of discretion.

Balandzich v. Demeroto, 10 Wn. App. 718, 720, 519 P.2d 994 (1974); *see Downing*, 151 Wn.2d at 273 (courts may consider surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure).

The withdrawal of an attorney in a civil case does not give the party an absolute right to a continuance. *Jankelson v. Cisel*, 3 Wn. App. 139, 141, 473 P.2d 202 (1970). "The rationale for this rule is that if a contrary rule should prevail, all a party desiring a continuance, under such circumstances, would have to do would be to discharge his counsel or induce him to file a notice of withdrawal." *Id.* Because of this, the decision whether to grant a continuance "rests in the discretion of the court" and "the exercise of that discretion will not be disturbed except for manifest abuse of discretion." *Id.*

The Schibels claim that they needed a continuance to locate and retain substitute counsel. They argue that the trial court was more concerned with its "'stats'" than with justice, and that this is an untenable reason to deny their motion for a continuance. Appellant's Br. at 17 (quoting RP at 122). The record does not support this contention.

On October 27, 2010, the trial court told the Schibels that it was disinclined to grant the continuance, but wanted to hear from them regarding their ability to retain substitute counsel before making a decision. The Schibels confirmed that they had no time line for the continuance and no reasonable prospect of finding substitute counsel for

a continued trial date.

The trial court in this case balanced the Schibels' interests against those of Mr. Johnson and its own need to control its docket and ensure the availability of the courts to other parties.

The conduct at issue in this case took place in 2004. The suit itself was filed in January 2007. The trial court had granted several continuances over Mr. Johnson's objection. Mr. Johnson was 79 years old in 2010.

In *Martonik v. Durkan*, Division One of this court held that "the long delay in prosecution of this cause, earlier continuances, and the interests of the defendant preclude us from holding those courts' exercise of discretion to be 'upon a ground, or to an extent, clearly untenable or manifestly unreasonable.'" *Martonik v. Durkan*, 23 Wn. App. 47, 51, 596 P.2d 1054 (1979) (quoting *Friedlander v. Friedlander*, 80 Wn.2d 293, 298, 494 P.2d 208 (1972)). For the same reasons, the trial court here did not abuse its discretion when it denied the Schibels' motion for a continuance.

Dismissal of Claims. "In its discretion a trial court may dismiss a case because of a plaintiff's failure to appear for trial." *Alexander v. Food Servs. of Am., Inc.*, 76 Wn. App. 425, 429, 886 P.2d 231 (1994).

The Schibels, by their own admission, reached an oral agreement with Mr.

Johnson's counsel on October 29, 2010. The Schibels advised the trial court that the parties had settled and that the trial court need not empanel a jury on November 1, 2010.

No disagreement exists as to the terms of the oral agreement. The Schibels described the terms of the agreement: "During a telephone conversation on Friday, October 29, 2010, [Mr. Johnson's attorney] and I reached an oral settlement agreement wherein defense offered a settlement amount of zero, no costs, no fees and release of counterclaim in exchange for release of my wife's and my claim against the defendant, Mr. Johnson." CP at 693.

Mr. Johnson, through counsel, characterized the agreement as "a release of the Schibels[']s claims against Mr. Johnson and Mr. Johnson's counterclaim against the Schibels," with the effect "that there would be no costs to either party." RP at 144.

At the November 24, 2010, hearing, the Schibels agreed with Mr. Johnson, "the terms he has stated correctly"[2] and admitted to the trial court that they agreed to the oral agreement.

"When a case is set and called for trial, it shall be tried or dismissed." CR 40(d). RCW 4.56.120(7) provides that a trial court may dismiss an action "[u]pon its own motion, for disobedience of the plaintiff to an order of the court concerning the

[2] RP at 150.

proceedings in the action."

On October 29, 2010, the Schibels knew that the trial court had refused to continue their November 1 trial date. The Court of Appeals had denied discretionary review. As the afternoon advanced toward the 4:00 p.m. deadline imposed by the trial court, the Schibels agreed to release their claims against Mr. Johnson in exchange for the release of his counterclaim against them. They notified the trial court of a settlement and avoided a November 1 trial.

Within minutes of notifying the trial court, they received the first of two e-mails that purported to memorialize their oral agreement. They knew immediately that they "did not agree to all of the terms . . . reiterated in the [4:04 p.m.] email." CP at 693. An hour passed, and the Schibels received the Settlement Agreement and Release of All Claims that "contained even more terms to which [the Schibels] did not agree." CP at 693.

At this point, the Schibels did not contact Mr. Johnson to "indicate by reply e-mail as soon as possible" that they objected to the written terms. CP at 682. They did not notify the trial court that their settlement had fallen through. They did nothing. Finally, on November 2, 2010, the day after their scheduled trial, the Schibels notified Mr. Johnson, via e-mail that "I received it, am having it looked at and will get back to you."

CP at 690. They had no further contact with Mr. Johnson or the trial court until November 22, 2010, when they responded to Mr. Johnson's motion to enforce the settlement agreement.

The trial court properly exercised its discretion to dismiss the case when the Schibels failed to notify the trial court that settlement talks had failed or appear for their trial on November 1, 2010. The Schibels' claim, that the trial court abused its discretion when it dismissed their claims, is unpersuasive.

The trial court properly exercised its discretion when it allowed the Schibels' counsel to withdraw, denied their motion to continue, and dismissed their claims and Mr. Johnson's counterclaim when the parties failed to appear for their November 1, 2010 trial.

We affirm.

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

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Kulik, J.

WE CONCUR:

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Sweeney, J. Siddoway, A.C.J.