Westlaw. For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
George ALEXANDER d/b/a Zentner's Daughter Steakhouse, Petitioner,
v.
LYNDA'S BOUTIQUE, Respondent.
No. 01-1248.

November 5, 2003.

Appearances:
Michael P. Young, Davis & Wilkerson, P.C., Austin, TX, for petitioner.
Russell J. Bowman, for respondent.

Before:

Chief Justice Thomas R. Phillips, Justices Priscilla R. Owen, Wallace B. Jefferson, Steven W. Smith, Nathan L. Hecht, Dale Wainwright, Michael H. Schneider and Craig Enoch.

CONTENTS

ORAL ARGUMENT OF MICHAEL P. YOUNG ON BEHALF OF THE PETITIONER

SPEAKER: Oyez, Oyez, Oyez. The Honorable Supreme Court of Texas. All persons having business before the Honorable Supreme Court of Texas are admonished to draw near and give their attention for the Court is now sitting. God save the State of Texas and this Honorable Court.

JUDGE PHILIPS: Thank you. Be seated.

This morning the Court has three matters on its oral submission docket. In the order of their presentation, they are as follows: George Alexander v. Lynda's Boutique from Tom Green County in the Third Appellate Judicial District; Garrow Community Hospital v. Devin Rose from Dallas County in the Fifth Appellate Judicial District. And Southwest [inaudible] v. Information Support Concept from Tarrant County in the Second Appellate Judicial District. In each matter, the Court has allotted 20 minutes for each side to present oral argument. Petitioner may reserve a portion of that time for rebuttal by advising the marshal of the court. These arguments are being taped. And you may purchase a copy of the tape of any argument for a nominal fee from our Court. We will take a brief recess in between each argument and complete these arguments before the lunch break.

The Court is ready to hear argument from Petitioner in Alexander

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

v. Lynda's.

SPEAKER: May it please the court. Mr. Mike Young will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MICHAEL P. YOUNG ON BEHALF OF THE PETITIONER

MR. YOUNG: Thank you, your Honors. It's a privilege and an honor to be here. I will briefly state what I think are the key issues that are before the Court today. The two Supreme Court opinions have considered the issues that are before the Court. Briefly stated, the opinions are the Villareal opinion and the General Electric opinion. This is a case that considers the dismissal to want of prosecution pursuant to 165 (a)1 Rules of Procedure where a party goes to attend a dismissal hearing. That was the result of this case. An order of dismissal was entered and was sent to the council. There are three particular documents in the record that I've included in my petition for review which are the key documents that need to be reviewed to determine whether there was error on the face of the record on this restricted appeal.

JUDGE OWEN: In the order setting the scheduling conference, it references an attachment or an attached list. Is that part of the record or not?

MR. YOUNG: It is part of the record. There's an attachment that had -- that lists every cases that were part of the scheduling conference, [inaudible] daughter's case was on that list. I have a copy of that, if you would like to see it [inaudible]

JUDGE PHILIPS: Is there evidence that the order setting the scheduling conference was sent --

MR. YOUNG: I don't --

JUDGE PHILIPS: -- or received?

MR. YOUNG: I don't think there's any specific evidence in the record of the mailing of it other than it is in the record. It was among the list of cases that were sent an order in setting scheduling conference. But there's no affirmative record of mailing in the record.

JUDGE OWEN: Let me ask you. The notice said -- and I'm reading it, failure to appear without excuse will result to dismissal of the case for want of prosecution or entering sanctions or other orders as the court deems appropriate. Does this case turn on whether we consider this hearing turned into a dismissal hearing or not?

MR. YOUNG: Yes, I think it's key that this is a dismissal hearing and also whether or not there was a notice and opportunity to be heard this dismissal hearing and whether or not the notice provided the court's intention to dismiss.

JUDGE OWEN: And if we were to interpret that language as not appropriately setting a dismissal hearing, then would you lose?

MR. YOUNG: Yes, I think so.

Also --

JUDGE PHILIPS: Do you know what the practice is in -- in other counties?

MR. YOUNG: I've reviewed cases that have similar types of practices. I think they vary from county to county. I think that it's -- you know, when we talk about the record, I think it's ordinarily not in the record that mailing has been affirmatively done in case. With

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

respect to dismissal hearings, I think that there's a lot of different practices. I think in the Villareal case, there's a good example of a dismissal hearing that was properly noticed. But the case considered whether or not the party's attendance at the hearing was going to allow the Court to dismiss even though they attended. In this case, it's different because even though there was the same type of notice which was a proper notice of the dismissal hearing, the opportunity was provided for dismissal hearing. But the party did not attend. And so that failure to attend is the key reason in this case that is distinguishable from the Villareal opinion.

JUDGE PHILIPS: But do you know a practice whether if a lawyer's not here for trial or for a hearing of some sort, that it is automatic for the judge to go ahead and dismiss the case -- or if it's the plaintiff's lawyer -- or do you get another -- is there another hearing set? Or how does it work in various -- this is out of Tom Green County. But you practice in Travis County. I just want to see --

MR. YOUNG: Right.

JUDGE PHILIPS: -- how it works ...

MR. YOUNG: I've been up against this myself, the dismissal hearing here in Travis County. And in fact, I was in the same situation and that I did not know that it happened until after the fact. I don't believe I was actually provided notice. But the time period had elapsed for the judgment. But it was within 90 days of the plenary jurisdiction of the trial court. So, I filed a motion to reinstate the case. And we had a hearing on it. And the case was reinstated. And in this case, it's very important that the motion for reinstatement was not heard because it makes the absence of the record to show any reason for the failure to attend. And there has to be a finding in the motion of reinstatement that say they're intentional, not intentional, or not result of [inaudible] difference. And we don't have that here because there's no motion to reinstate.

JUDGE 1: Under your construction of Rule 165 (a), the Court could put that tagline that if you don't show up to -- for example, discovery hearing, a motion to compel answers to interrogatories. There could be a tagline saying if you fail to appear, your case is subject to either dismissal, sanction, or some other appropriate remedy. So under your construction, if that tagline is in any order, then the hearing becomes a dismissal hearing in every case if the person -- if the party doesn't show. Is that correct?

MR. YOUNG: Yes, I think that is correct. The rule says that any hearing -- and I think it's up to the trial court's discretion how they want to control their docket. If they want to apply it like that, that's fine. I think the ordinary practice is that they try to control their docket in scheduling conferences to maintain the flow of their cases. And so it's more ordinary to see it in this type of situation.

JUDGE 1: But in a large variety of cases then, a whole person's claim could be dismissed because of the blowout in a tire, for example, without another attempt to explain to the court why their absence was compelling for some reason. And just to go further, doesn't the rule contemplate a separate hearing that is labeled a dismissal hearing, not one for sanctions, not one for other appropriate remedies, but one that's geared specifically at dismissing the case for not prosecuting?

MR. YOUNG: To address the second point, the Court is to provide under 165 (a-1) an opportunity to be heard. And failure to appear will result in dismissal. The opportunity to then explain why you have failed to appear is provided in the motion to reinstate process which is 165 (a-3). It's redundant to require a 165 (a-1) to have an oral

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

hearing when in the rule itself it says failure to appear in a hearing would result -- could result in dismissal. And so, it's contemplating that there's not going to be an oral argument or a presentation of oral arguments.

JUDGE 1: But -- but 165 (a) says the notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent to each attorney of record. Why wouldn't a counsel -- for example, in this case, why couldn't they consider the possibility of sanctions as what the court had in mind in this scheduling order? It wasn't specifically notice to dismiss alone. It was dismissal. It was sanctions. It was other appropriate remedies. What puts the counsel in this case on notice that if they don't come, the sanction will be the death penalty [inaudible]

MR. YOUNG: Well, I think that the wording of the court's notice in this case provided counsel notice that if they didn't show at the hearing, there was a threat of dismissal. And I think that that, in and of itself, creates the intention to dismiss whether or not there is other remedies that are possible. If they want to take the risk, it's not going to be dismissed. They've been forewarned.

If I could continue, I think one of the issues here that's been raised, the Court of Appeals had specifically held that there was not a notice of a dismissal hearing and that there was not a factof dismissal hearing. There's additional issues before this Court. And I'm asking the Court to render decision on those issues that the Court of Appeals did not consider, which is the notice of the order of dismissal. There's an indication on there that it was sent to the counsel of record. There's been a contention in the response that the failure to include a mailing address is somehow making that a defective notice. But I would refer the Court to the General Electric opinion which says that the Courts do not have an affirmative duty to include the mailing information in the record. Counsel has cited a case in which there was an order, and those order of dismissal showed an incorrect address. And in addition, there were affidavits presented to the court pursuant to a motion to reinstate procedure which allowed the court that found -- that the incorrect address was an adequate notice of the order of dismissal. In this case, we don't have that situation because it is error on the face of the record that we're looking at. There are no affidavits to consider because there is no motion to reinstate. The General Electric case should govern this case.

And if there are any other questions that the Court would like to entertain, I'd be happy to address them. Otherwise, I'm finished.

JUDGE 1: The rule seems to provide that there is -- there are two steps: one is the hearing or trial and the other is the dismissal hearing. And here, those two were combined into one. You don't see any problem with that combination?

MR. YOUNG: I'm sorry?

JUDGE 1: The order seems to say -- in the first instance it says that a case may be dismissed for want of prosecution on failure of the party to seeking affirmative relief to appear for any hearing or trial which the party had notice. So here the hearing had to do with scheduling -- the scheduling conference. And then the rule later says notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent to each attorney of record. It seems to me that that contemplates two hearings in effect: One, the hearing on whatever the matter was discovery, scheduling, et cetera and then a second hearing to consider dismissing the case for want of prosecution, two separate hearings. This case -- those two were

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

combined in one. You don't see any problem with combining those two?

MR. YOUNG: I don't see a problem with combining the two. I think that is a construction of this language that the court could consider. However, it does -- as you read it, it seems to indicate that the dismissal period that they're referring to is mentioned right before this language about failing to attend at a -- any hearing could result in dismissal. I think that's saying that that hearing is the dismissal hearing. If you failed to attend and you were told that it's going to be dismissed then you failed to attend, that is the dismissal hearing.

JUDGE PHILIPS: Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Russell Bowman now to -- present argument for the respondent.

ORAL ARGUMENT OF RUSSELL J. BOWMAN ON BEHALF OF THE RESPONDENT

MR. BOWMAN: Thank you, your Honors. As opposing counsel, it is a pleasure to be here. It's the first time that I've had the chance to be before the Court. I wish it were under different circumstances. But be that as it may, as far as the issues that were raised by this particular case, the way I see it, it's twofold. One, it be in a restricted appeal that the key and really salient point that's been in dispute between parties as whether there is error apparent on the face of the record so as to justify reinstating the case and reversing the trial court's dismissal, the case want of the prosecution. In that regard, I believe the Court of Appeal's opinion showed, there's two different aspects that that I believe would make the trial court's dismissal improper. One is the failure to give adequate notice of the court's intention to dismiss the lawsuit

JUDGE OWEN: Let me ask you about that one. You don't dispute that the hearing could be more than one type of hearing, [inaudible] you can have a scheduling conference and a dismissal hearing all in one.

MR. BOWMAN: I suppose you could, your Honor. I've never seen it. But I believe what the rule is contemplating is if a party fails to appear for a particular hearing or trial, and then the rule is set up so as to satisfy due process to have a separate hearing to determine the good cause -- whether good cause exists for not appearing --

JUDGE OWEN: [inaudible] say due process would require a separate notice?

MR. BOWMAN: Yes, your Honor --

JUDGE OWEN: -- not necessarily [inaudible].

MR. BOWMAN: I believe it would require both, your Honor. As an example, I've seen some -- I believe Dallas County still does it this way, issues of trial setting this case. And in their typical standard trial notice it would say the failure to appear could result in your lawsuit being dismissed or a default judgment being rendered against you, whether the plaintiff defendant. And--

JUDGE OWEN: There's [naudible]

MR. BOWMAN: -- you know, is an example. Say it's a case in Dallas. Seems it's happening more and more. When you're on your way to work and you're either in an accident or stuck in a freeway behind [inaudible] blocked in traffic. Seeing that scenario, you don't make it there. 9 o'clock comes. You don't show up so the trial judge dismisses your lawsuit. Well, the accident, for example a hypothetical, may have given

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

you the good cause to show why you didn't appear, which is why it would be --

JUDGE OWEN: But that seems to me a separate question. What if the notice of this case had said if you don't appear, your case could be dismissed and if you don't appear at 9 o'clock this will turn into a dismissed hearing under 165-a. Do you think that would satisfy the notice of hearing [inaudible]?

MR. BOWMAN: I don't believe it would, your Honor, 'cause, again I believe it's important, and I believe that's why the rule is phrased like it is. To have that separate second hearing is basically you're going to be getting your case dismissed for not appearing for that initial hearing that was set up [inaudible]

JUDGE OWEN: But under your construction rule, you really have to have three separate hearings. Under your construction, you had to have the hearing that was missed, then you have to have a separate hearing to discuss whether it should be dismissed. And then you would also have to have a reinstatement hearing because the rule says that if you file a motion to reinstate, the trial court shall set it for hearing. It's not optional so that you -- before the trial court could dismiss the case you'd have to have three separate hearings.

MR. BOWMAN: Well, you could, your Honor. But there's a -- and I don't have the actual case cite. But I know there's several cases that say if you're able to have the motion to reinstate which again has the same evidentiary burden, that that would satisfy the due process that the notice of the intent to dismiss in having a hearing on that issue deals with the rule.

JUDGE OWEN: If I understand the way you construe, the rule the trial court can't dismiss at the first 165-a hearing. They have to -- all right. You didn't show up. Then they have to have a separate hearing on whether you're going to be dismissed or not. And then they have to have a third hearing if you file a motion to reinstate. It seems to me that that's a lot of overkill in the way you read the rules.

MR. BOWMAN: Well, I think in that, your Honor, the reason the rules' set up that way I believe under that scenario would require that is cases ought to be decided on the merits, not because of some -- what may be an excuse or reason why a party or their attorney failed to appear for a particular hearing. I think that is why--

JUDGE OWEN: Why do we need two hearings on that same issue? Because under your construction of the rule, the second hearing would redetermine why didn't you show up at the hearing or should I dismiss or not. And then the motion to reinstate I would assume would cover exactly the same ground. So ...

MR. BOWMAN: I believe it probably would cover the same grounds, your Honor. But as far as having that additional hearing, the way the rule is written, it just would have to be done. And I think the reason why the rule shows that the Second hearing would be required is: There's been some decisions from this Court dealing with the section of Rule 30 -- I'm sorry -- dealing with the Section under Rule 165 requiring a hearing on the motion for reinstatement. That part of the Rule it reads that if a motion's filed, the Court shall set that motion for hearing and send notice out to the parties of the date and place for the hearing on that motion. In these -- in this Court's decisions of [inaudible] 815 Southwestern [inaudible] and Gulf Coast Investment Corporation 754 Southwestern [inaudible] 152, this Court held that that part of the rule and that language requires that a hearing be had if the motion for reinstatement was filed and that the failure to have

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

such a hearing on that motion would require that any denial of it be reversed and remanded. And if you look at the part of Rule 165 dealing in the first paragraph with dismissing a lawsuit, it's again you got the same language dealing with the court shall send notice to the parties of a date and place for the dismissal hearing. Again used in the same typed language which this court is bound requires that you have a hearing on that. So I think based on that, if a party fails to appear at a trial or a hearing, the Rule and this court's decision Villareal requires that there'd be a separate hearing to give the party a chance to show good cause why they failed to appear at a particular hearing.

JUDGE OWEN: Let me ask you about your affidavit. It seems to me that you're very careful not to say that there wasn't notice of this hearing in your file. From what I take it, from reading between the lines that there was a notice of the hearing in your file once you found the file.

MR. BOWMAN: I didn't have one in my file, your Honor. But I couldn't state under oath that one wasn't sent because the only attorney of record on the case was Frank Webb. I, myself was never copied on any notice so I couldn't find one in the file so I could not say with, you know, certain required that one was actually sent and received. I just couldn't find one in my particular file. So, I'm not saying one wasn't sent. I just didn't have [inaudible]. But even that aside, your Honor, the notice would not be adequate notice of the court's intent to dismiss because what it's advising of is the possibility of the dismissal because it mentions the case may be dismissed for the failure to appear or there may be sanctions or other orders which the court may deem appropriate. And as this Court noted in Villareal, the dismissal notice in that case the Court found it didn't give adequate notice of the intent to dismiss because it was merely informing the parties of a possible dismissal which is the same thing with this order, your Honor. So ...

JUDGE 2: You're from Dallas County?

MR. BOWMAN: Yes, your Honor.

JUDGE 2: And you alluded earlier to the common practice there of including in notices -- trial notices for example -- a statement that if you don't show up the case will either be dismissed or default may take. And it's your experience that that's routine in the courts of Dallas County or not?

MR. BOWMAN: Yes, your Honor. What I typically get in the cases I get in Dallas County there's separate trial which usually a letter addressed to the attorney saying the trial date. And it's usually got two little brackets: one, jury trial or non jury trial [inaudible]. It has the date in there. And then it'll have a standard form paragraph down towards the end that says something to the effect that if failure to appear will result in the dismissal of the case if you're the plaintiff or the possibility the default judgment if you're the defendant [inaudible] language [inaudible]

JUDGE 2: And is it your experience also that if you're the plaintiff and you don't show up that's what the judge does, he goes in and dismisses the case or does he have another hearing?

MR. BOWMAN: Fortunately, your Honor --

JUDGE 2: [inaudible]

MR. BOWMAN: -- I never had to experience that to be able to tell you firsthand.

About the closest I've seen is -- it was when Judge Gottleib was on the court there in the 160th. He would typically set up a scheduling

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

conference. He picked, I think a certain day of the week that he'd do that. And he'd have the lawyers see if they have an agreed set of dates to submit. And, you know, there'd probably be 20 cases set on his docket that morning to do that. I've seen some where one of the lawyers hadn't showed up for whatever reason. And if my memory's correct, I think basically what he would do is have them be put on the dismissal docket, send out some notes. And I've seen similar things happen in federal court cases, your Honor, where say a lawyer wouldn't appear for a case meant for conference date or failed to submit a joint report about scheds and deadlines or something like that. Typically, what the federal court would do is just send an order out to that setting a rule to show cause hearing why, you know, the plaintiff's case shouldn't be dismissed or if you're the defendant, why you shouldn't have your pleadings struck or something to that effect. I think that's exactly what Rule 165 in this court's ruling in [inaudible] are trying to accomplish is to give the party the chance to [inaudible] some good case why the party failed to appear.

JUDGE 2: And you say ordinarily or it's possible for that to be done at the hearing on the motion to reinstate. But it really should be done at a hearing under Rule 165-a.

MR. BOWMAN: Yes, your Honor. And another reason for that to the motion for -- to reinstate would create if one is filed and set for hearing a second hearing on the matter. But again I think that's to help satisfy due process requirements to make sure that party's rights to have his day in court and which is guaranteed to us on the constitution, protected and honored to hopefully get a case to be decided on its merits --

JUDGE 2: Mr. Bowman.

MR. BOWMAN: Yes, your Honor?

JUDGE 2: In your experience in Dallas County, how many notices do the courts actually prepare and send out? In other words, isn't it the case that a large majority of notices of hearings are sent by the parties and the courts only send notices for very important hearings like the scheduling conference and the trial setting?

MR. BOWMAN: Yes. In Dallas County, your Honor, typically, you'll get perhaps a notice of scheduling conference, notice of the trial setting and then a notice of your case being on the business docket on a particular day.

JUDGE 2: So this dismissal language is only on notices the court prepares for these very important settings?

MR. BOWMAN: At least in Dallas County, the only one I've seen that is on a notice of trial setting.

JUDGE 2: Under your theory, other than hearings set specifically for dismissal under 165-a, could a trial judge ever dismiss a case for failure of counsel to appear?

MR. BOWMAN: I believe just based on a party's simple failure to appear that no, he couldn't dismiss it at that point.

JUDGE 2: Does it matter how specific or how strict the notice that was received, the language in that notice is?

MR. BOWMAN: I believe not, your Honor, because of the requirement in the Rule about the court having to send notice of a specific date and place for a dismissal hearing [inaudible]

JUDGE 1: What I can't understand that if a party intentionally does not appear at a hearing, you're saying that the court can't then set a dismissal hearing for want of prosecution under Rule 165-a?

MR. BOWMAN: By that, you're talking about intentionally, your Honor?

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

JUDGE 1: Yes, the party doesn't appear, has no good excuse. Can the Court at that point set a dismissal hearing with notice under 165-a to dismiss for want of prosecution?

MR. BOWMAN: Yes --

JUDGE 1: So the Court can dismiss if the party has not appeared when ordered to do so, if there is a separate 165-a dismissal hearing.

MR. BOWMAN: Yes, your Honor. Under that scenario that you gave, [inaudible] the party failed to appear. It was intentional as you say. The court sets the hearing. The party's attorney shows up and has no excuse, it just comes out as intentional. At that point, I think the Court can properly dismiss the case under Rule 165 or its inherent authority to be able to dismiss the case. And under that scenario, you've also satisfied due process concerns because you've given the party a chance to explain why they failed to appear. They didn't show good cause so their lawsuit can and should be properly dismissed.

JUDGE OWEN: But then you have to have a third hearing or a motion to reinstate?

MR. BOWMAN: If they file a motion to reinstate. I would imagine under that scenario, your Honor, that ought to be [inaudible] --

JUDGE 2: [inaudible] pretty short hearing ...

MR. BOWMAN: -- fairly short hearing.

JUDGE 1: But Counsel, explain problems with the scenario whereby a 165-a hearing could be part of a scheduled and conference hearing, if the notice so provides. In other words, it says something like what the orders here said attendance is mandatory in all caps, bold, failure to appear without excuse will result in dismissal, or sanctions, or other orders. And it says you're coming for purposes of setting a schedule. The party doesn't show up. The case is dismissed. Can the due process concerns you're talking about be addressed in the motion to reinstate? Of course the scenario I've set out for you to comment on hypothetically is a scenario were the notice can satisfy both purposes and the hearing can satisfy both purposes. What's wrong with having the due process concerns addressed in the motion to reinstate?

MR. BOWMAN: As far as addressing the due process is concerned, there are none provided the party can have the opportunity to file a motion to reinstate which I think is another reason why the Rule is written like it is, your Honor, is that it gives that party basically a second and separate opportunity to be able to set forth and show good cause why they failed to appear at an initial hearing or trial that prompted the dismissal order to be entered.

JUDGE 2: Apart from this hearing, is this a case in which there's no prosecution of the laws? In other words had the case been progressing, discovery, answer exist?

MR. BOWMAN: Yes, your Honor. As far as what the appeal record will show, it'll show an amended petition was filed. And as far as written discovery even though that's not part of the record, interrogatories, request for production had been exchanged, and answers. So this wasn't like what you might see on some cases where a petition's filed, an answer's filed, you don't see anything going on with the lawsuit for fifteen months with no activity. This was simply all centered on the scheduling conference that was held on March 6, 2000.

JUDGE 1: What's your response to the argument that the motion to reinstate cures any problem about due process?

MR. BOWMAN: Well, if a party's able to file and argue and have a hearing on a motion to reinstate, there are cases that say even though the trial court didn't have the dismissal hearing that that satisfies the due process concerns. In this case, the problem is there was no

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

motion to reinstate because the parties or the plaintiff didn't learn the [inaudible] of the lawsuit until after the time when it expired to file motion to reinstate. And on that point, your Honor, opposing counsel had mentioned in his argument about how a motion to reinstate could've been filed on this case? Rule 306-a does give a party an extended time in which to file either a notice of appeal or a motion to reinstate provided that the party doesn't receive notice of the judgment more than 90 days from the day of the [inaudible]. Once that happens, even if he find out about it on the 92nd day for example he can't file a motion to reinstate anymore. And that's this court's opinion and Levit v Adams Southwestern [inaudible] 469. So as a result of that motion to reinstate, the remedy was simply not available.

JUDGE 1: Was there a record [inaudible] jury request on the record [inaudible]

MR. BOWMAN: I tried to be prepared for everything I possibly could today, your Honor. I believe a jury was requested. But I'd have to look at the original petition to tell you. I believe it was ...

JUDGE OWEN: Let me just make sure I understand your position. You would say that never can a dismissal notice be included in the scheduling order?

MR. BOWMAN: I believe that's correct, your Honor, because of the way the rule is structured, so it should require a separate hearing on that issue.

JUDGE OWEN: Well, I don't see separate in the rule. It just says there has to be notice of intent to dismiss and at the dismissal hearing. And nowhere does it say they have to be separate things. In other words, if the scheduling conference notice said if you don't show up it could be dismissed and we're going to put you on the dismissal docket if you don't show up an hour later, under your theory, the notice at the [inaudible] would be defective because it's a notice of two different things in one notice.

MR. BOWMAN: Well, I believe again, your Honor, I think it would require something separate because basically you'll be getting your case dismissed right then and there for failing to appear at that particular hearing or trial that is causing the dismiss to be entered. And it simply won't be giving you the opportunity to show good cause to the trial court before your case gets dismissed why you failed to appear. So I think, in response to your question, yes, it would require I believe in all cases a separate hearing so as to give a party a chance to show good cause for failure to appear before their lawsuit gets dismissed. Thank you.

JUDGE: Any other questions?

MR. BOWMAN: Thank you.

JUDGE 2: One other question: The rules uses, requires that notice be given of a place for the dismissal hearing. That's kind of unusual. Where is it going to be except in a courthouse?

MR. BOWMAN: Well, I guess, the judge can order us to appear wherever he wanted. But it is rather strange. But that same language is used further in the rule, your Honor, dealing with the hearing on the motion for reinstatement. And basically, the decisions from this Court that I mentioned earlier just interpret that language as requiring a separate hearing on that particular matter.

JUDGE: Thanks.

MR. BOWMAN: Thank you.

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

REBUTTAL ARGUMENT OF MICHAEL P. YOUNG ON BEHALF OF THE PETITIONER

MR. YOUNG: This is my rebuttal time. I don't have, really any additional arguments to present to the Court. I would encourage the Court to take a rather straightforward reading of the rules which allow the trial court to control its dockets, its scheduling conferences to require the attendants of attorney's by threatening to dismiss the case. And then if there's some problem with that, the attorneys should have a hearing on a motion to reinstate to discuss why -- if they have an excuse for not showing up.

JUDGE PHILIPS: Mr. Young, I assume your interpretation of Rule 165-a is correct that a notice can serve two purposes and a hearing can serve two purposes, one [inaudible] dismissal, in this case with no evidence that the notice setting the scheduling conference from the court was sent in an affidavit disputing that is was received. Assuming that through [inaudible] appearing on the face of record in a restricted appeal, assuming that requirement applies, is it necessary that there be some evidence that the notice was sent or received in order for you to be successful? If so why? And if not, why not?

MR. YOUNG: I think no, that doesn't have to be a permanent proof in the record -- in the trial court record that a notice was sent. I think General Electric v. Falcon Ridge addresses that issue well. It is not an ordinary practice of trial courts to provide that type of information in the record ...

JUDGE PHILIPS: And that may be so. I won't dispute with you on that point at this point. But if there's affirmative evidence that it was not received for there to be error apparent on the face of the record, should there be some evidence that it was at least sent?

MR. YOUNG: But, your Honor, there is no evidence in the face of the record that it was not received. That's my first point. If there's an affidavit before this court it was not in the trial court record. It was not before the trial court. And I think on that basis, there is no evidence on the record that it was not received.

JUDGE PHILIPS: So the affidavit was signed February 5th, was that -- it was never brought to the trial court's attention or the Court of Appeals?

MR. YOUNG: Correct.

JUDGE PHILIPS: So there's no evidence that the notice was sent in the record, no evidence that it was received in the record, and no evidence disputing that the notice was received in the record. No evidence that any of that in this court's record is your understanding.

MR. YOUNG: Correct. And that's the same situation in General Electric.

JUDGE 1: You agree I take it that, or maybe you don't, that if the case had been dismissed and there has been no hearing, if you want a hearing and you ask for a hearing you're entitled to a hearing, not just because of the rule, but would that be a requirement of due process or it's just a requirement rule?

MR. YOUNG: If I understand your question I think that the motion to reinstate is not a request for a hearing --

JUDGE 1: -- Right.

MR. YOUNG: -- on the merits of the dismissal and the failure to attend.

JUDGE 2: Was there a hearing?

MR. YOUNG: Was there a motion to reinstate hearing?

JUDGE 2: No. But just was there a hearing?

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE

MR. YOUNG: There was a hearing in that the court had all the cases before it, had a docket call where they considered the scheduling of the cases and what party didn't attend then the result in the [inaudible]

JUDGE 2: That's right. The record shows that the scheduled event occurred that day, but no indication [inaudible] hearing?

MR. YOUNG: Correct. Yes.

JUDGE 2: There's no indication.

MR. YOUNG: There's an indication that the docket controlled, I mean the docket sheet that the March 6 scheduling conference did occur. And at that time it was noted on the docket sheet that there was no failure to attend and that resulted to a dismissal ...

JUDGE 2: But there was a hearing?

MR. YOUNG: Right.

JUDGE PHILIPS: Any other questions?

Thank you, counsel.

JUDGE 1: That concludes the argument in the first cause. We'll take a brief recess.

SPEAKER: All rise.

2003 WL 25767201 (Tex.)

© 2008 Thomson Reuters/West. No Claim to Orig. US Gov. Works.
NOT FOR COMMERCIAL RE-USE