ORAL ARGUMENT — 4/7/99
98-0623
VILLARREAL V. SAN ANTONIO TRUCK

LAWYER: This hearing today gives the court an opportunity to elaborate further upon the circumstances of when a cause may be dismissed for want of prosecution. The court has already held in cases cited by Justice Duncan in her very elaborate dissent in this case, that a hearing must be allowed when there is to be a dismissal for want of prosecution for failure to properly develop a case. And those cases are cited in the dissent: *Callahan v. Staples*; *Veterans Land Board v. Williams*; *Bevil v. Johnson*. But the issue today is a little more narrow. And that is, whether the notice that one gives whether given by the State of Texas in effect by the court is adequate to give notice that a hearing is to be on more than one issue. And that is the issue that is presented in the notice, which I will read in just a moment.

Our position today is that the TC abused its discretion in dismissing this cause, because the plaintiff appeared, announced ready, had witnesses with him, filed a motion to set, filed a motion to retain. And secondly, that the State of Texas acting through the DC denied plaintiff due process by dismissing this case after plaintiff complied with the requirements of the notice.

Now when you look at the notice that was given by the state it says, Notice of setting: Notice is given that the above cause, this cause, is set for dismissal on a day and time certain (and this is what is important), you are requested to be present and to make your announcement. If no announcement is made, this cause will be dismissed for want of prosecution.

O'NEILL: How do we know whether or not an announcement was made without a hearing transcript?

LAWYER: I am somewhat confused. I understood that there was a transcript made for Judge David Berchelmann, who heard the case. Did that not come to the SC?

O'NEILL: My understanding is there has been no transcript of any hearing filed with the court. If that is in fact the case aren't we to presume that no announcement was made unless there's a stipulation otherwise?

LAWYER: There is a procedural problem that a judgment is presumed to be supported by sufficient evidence. The problem here is that in fact Judge David Berchelmann conducted the dismissal docket. For some inexplicable reason, Judge Martha Tanner signed an order. There was no hearing. But I think that the more important issue is what is the quality of the notice that was given.

ENOCH: What's does the last sentence on that letter say?

LAWYER: The last sentence says: This is not a docket for the resetting of the cases before dismissal. This is not a notice that you are to come to court to die. And you can choose whether you want to die by fire, by stone, by bullet. Because if that were the case, this would be a notice to dismiss and your case would be dismissed. It is a notice to put a case on a docket for dismissal. It says, You are to appear and make an announcement.

Now as lawyers, we've become somewhat conditioned as to what words mean. When one makes an announcement it is either ready or not ready. When one comes to court and says, I am ready your honor, I have my witnesses here, I am prepared.

O'NEILL: Well that's what we don't know, do we? What if he had stood up and said, I'm not ready; I would like to get on the trial docket, but I'm not going to be ready for a year? We don't know what was said.

LAWYER: Then I think in the interest of justice this case has to be returned so that that determination is made, because a record was made. A record clearly was made. It was an inadequate record because Judge Berchelmann said, The case is dismissed; Do you have anything to say? And he says, I am ready your honor, I'm here, I'm prepared, I have my witnesses.

O'NEILL: How do we know that?

LAWYER: I am saying that that is a problem that this court may wish to consider. In taking this case you must have taken the case for the reasons to elaborate on an issue. And if you want to elaborate on this issue, then I feel that you have to consider that there was a record made. In the CA's opinion, it is stated that there was an appearance and an announcement was made, I believe. And certainly in the dissent I believe it says that.

But it's very clear that the plaintiff appeared. He said, I'm ready, I have my witnesses, I'm ready to proceed. The court below though said, Well that really doesn't make any difference that you appeared and said you are ready. We can dismiss because there was a failure to properly prosecute this case, and therefore, the case can be dismissed for want of prosecution for not timely prosecuting the case.

ENOCH: Since announcement is all that was required they could have come forward and say, Your honor, we announce we are not ready, and they would have avoided dismissal under your argument.

LAWYER: No, not hardly, because under rule 165 if you are not ready then you need to show cause why your case should not be dismissed. When you say you are ready, then your case should not be dismissed. If you look at rule 165...

BAKER: You think the ready or not ready makes a difference on the discretion of the

TC?

LAWYER: On the issue of what the notice says. If the notice said...

BAKER: It says, You come and make an announcement for what? On why your case should not be dismissed.

LAWYER: It says if no announcement is made, the case will be dismissed. There should be a presumption that if you announce ready for trial the case will not be dismissed. Because it does not say anything at all about appearing to show cause why you have failed to prosecute your case. There is nothing in the notice to give any - there is no notice to the plaintiff that he has to come forward with any proof as to what work he has done in the case. He had already filed a motion to reinstate. But I guess we don't know that do we.

BAKER: Taking your view if there is no announcement that notice tells you you're surely going to be dismissed?

LAWYER: That's what it says.

BAKER: But it doesn't necessarily then imply if your announcement is not ready, that you may still suffer a dismissal if you don't show good cause?

LAWYER: Well as a matter of fact that's what happens.

BAKER: Well I don't know that. And we may never know that except you're telling us because there is no statement of facts.

LAWYER: That is why perhaps the case should be returned so that that can be developed.

BAKER: If there was a hearing and there was a court reporter, but it was failed to be tried, do we have any power to send back, let's do this all over again because there's no statement of facts?

LAWYER: I think in the interest of justice, the court certainly could do that.

BAKER: But you're here under an abuse of discretion standard aren't you?

LAWYER: Yes. And the abuse of discretion is that 1) if you read rule 165 and if you read the local rule, in 165 it says that a court may dismiss for failure to appear. Now the court's saying, We don't know if they failed to appear. I think from the opinion below it's clear that there was an appearance. The opinion in the CA shows that Villarreal and his witnesses and his lawyer did appear. The issue was can there be a dismissal for failure to properly have previously prosecuted

the case. Now there are a number of CA's decisions which we would like this court to adopt which say, That when counsel and the client and the witnesses appear and announce ready, that it's an abuse of discretion to dismiss.

BAKER: Everything you keep saying is something that's not in our record nor is it in the briefing.

LAWYER: Is it not in the CA's opinion?

BAKER: There's nothing in that that says counsel appeared, announced ready, and had his witnesses.

LAWYER: I thought that in the CA's dissent it was evidence...

BAKER: If you read the statement of facts you probably know that, but we don't.

LAWYER: The only statement of facts is about a 3-4 page transcript which was lost by the...

BAKER: But we don't know that either. All we know is that one was attempted to be filed late, and the CA's refused to take it. That's what our record shows.

HANKINSON: Isn't it true though that since this case has been on appeal, the parties do not dispute, and in fact, have advised the intermediate appellate court and have advised this court in its briefs that in fact he did appear with his witnesses and announced ready?

LAWYER: I thought that that was what it said.

HANKINSON: As I understand what you're saying is that you are not arguing that then what occurred during the course of the hearing is what is underpinning this particular issue.

LAWYER: What is underpinning this issue is the content of the notice, that there is a violation of due process when you expect the notice to get to where it says that you are to appear to make your announcement and it will be dismissed for want of prosecution. As the dissent pointed out, that does not give notice that there will be a hearing and there will be an attempt for proof on the issue of whether or not you properly prosecuted your case. And this court has already held that you must have notice of that and have a hearing for that. And that was not provided. There is nothing in the notice to suggest that it was provided. It would be like saying for example, Counsel gets notice to appear on a motion to compel. He appears, he responds and the court dismisses the lawsuit. You know that if you don't comply with the motion to compel that your case can be dismissed. But you don't know that the case will be dismissed.

A motion for summary judgment hearing on limitations; counsel appears, and defeats the limitations motion but the court decides that the case will be dismissed because it hadn't been prosecuted fully, that's exactly the same scenario, or on a rule 15 motion for dismissal for not complying with the discovery order. But then the court decides well even though you did comply it's taken you too long to develop the case, we are going to dismiss it. That's what you have here, and that's the issue that the court should be focusing on.

ENOCH: You take the position that - the last line says that this is not a hearing for resetting. This is a hearing for dismissal. So you make a distinction between someone who reports and says, I'm ready for trial, set me for trial, as opposed to someone who says, I'm ready for trial now reset me for trial and you say that sentence means something different?

LAWYER: I think it's very clearly different when you read the opinions in the court below and what happened in the CA.

ENOCH: Your issue is that announcement has a term of art. It means something to the practitioner that I'm announcing that I am ready to go to trial. And once I do that, then I'm no longer in fear of dismissal?

LAWYER: Based upon the language in the notice of the hearing of notice of the setting which says that you are to appear, you are to announce, and you are not to make an announcement in effect that I want to reset the case for some time later. You have to be ready. That's the gist of what the notice is.

ENOCH: The argument that is made in response to that essentially by the respondent is that the practice of the bar in Bexar county is to understand announcement, this notice to be that you are in trouble with the court, you are to come forward with the court with your basis for why your case should not be dismissed. Announcement, whatever that means, has a meaning in the practicing bar in Bexar county that you have been called to the court to discuss why your case should not be dismissed.

LAWYER: That is not what the notice says. That is completely outside the record, if you will. And unfortunately we don't have Justice Cornyn and Spector to tell us what the trial practice in Bexar county is. But that is not what the notice says, that is not what the practice is because some cases are retained, some cases are dismissed. But here's a situation where as Justice Hankinson pointed out from the court below, the party appeared, he said he was ready, he has his witnesses, and the case was dismissed. There was no explanation as to why the case was dismissed. He was not provided a due process hearing on the issue of failure to develop his case, to prosecute his case. And that's what this court has previously held in the three cases that I cited to you is required. And that's what the court should be writing upon I would think that the notice must give notice to the litigants as to what the nature of the hearing really is. And that's what I think the real issue is.

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RESPONDENT

HENRY: I think the issue here for all of us is, Did the notice sufficiently tell the plaintiff in this case that you better show up, you better explain why your case sat and nobody did anything about it for almost 2 years.

HECHT: Because you don't contest that the plaintiff did show up and make an announcement?

HENRY: Subject to killing myself, that's true. He did show up.

HECHT: You make that statement on page 1 of your brief.

HENRY: I've been through this case from day one. He showed up with the plaintiff is what happened. We were actually in front of David Berchelmann. We were then sent to Martha Tanner, which is why the order is signed by Martha Tanner. Martha Tanner heard the evidence on a want of prosecution and then decided the case. And that's why the order is signed by Martha Tanner. That portion of the record didn't make it here because the late filing of the transcript didn't get to the CCA, so it didn't get here.

For purposes of this hearing, I will admit to all of those facts that he did show up with his plaintiff at that point.

PHILLIPS: And announced that he was ready for trial?

HENRY: Yes, did announce he was ready. Attempting to actually set the case for trial the day of the hearing or the day before. Well what we have to remember here is this notice was received by all of us in August setting this case for dismissal on October 22. What he does is show up October 21, files a motion to set this case on the jury docket. Bexar county internal rules basically says, Once your case is on the dismissal docket you can't set it. So they just won't accept a setting if you try to file it.

OWEN: The notice did say, If no announcement is made this case will be dismissed for want of prosecution. Isn't the fair reading of that is that if you announce ready for trial it will not be dismissed?

HENRY: Again, then the argument would be if you make any announcement it shouldn't be dismissed, not just ready. If you just show up and say, Judge, I am here, isn't that an announcement. I think the notice goes further than that. In the last line it says, You are reminded this is not for resetting this case. This is for the dismissal. And then when you take this notice in connection with rule 165(a) that says, When a case comes up at the dismissal hearing the court shall

dismiss for want of prosecution unless there is good cause for this case to be maintained on the docket.

HECHT: Your understanding of the rules in Bexar county is that after you get the notice or after the notice is sent out, you can't request a setting on the trial docket?

HENRY: You can try. You can file your motion to set but nobody is going to accept it is the way it works. Because we have basically a dismissal docket clerk, so the flash goes on the computer, you take the jury setting clerk down in the district clerk's office, they punch up a number, it flashes dismissal docket case, and so you have to go to the dismissal docket clerk, the clerk won't take it unless you bring an order from the judge saying this case is off the dismissal docket and set off.

ABBOTT: You've been kind in conceding that the opposing side showed up and announced ready despite the fact that we don't have anything from below. Do we have presented to the court here all of the documents that would support your position such as the fact that absolutely nothing had been done in the case by the plaintiff for 24 months?

HENRY: Yes.

ABBOTT: Are those materials here before the court, or was that stricken along with the materials...

HENRY: No. The only thing that didn't make it up, as far as I know, is just the transcript of the actual hearing in front of Martha Tanner. Other than that, I think everything is here.

OWEN: What is sufficient activity? Would just asking for a trial setting do it?

HENRY: From my standpoint, your rules say, Once we file a case we better get that thing to trial within 18 months. That's one issue we've got here. You may be dismissed for want of prosecution just on the SC rules that say on a jury case, a DC, 18 months from the time it's filed. I think if there is anything done in the file indicating that the plaintiff is continuing this case and not just dropped it, which the appearance from this case is they filed their case, they sent interrogatories, we sent interrogatories and that was it, and then the case stopped. No depositions requested, no medical records ever proved up, nothing. And then the case hit the dismissal docket...

OWEN: Well if this is a level 1 case under our new rules sometimes there may not be very much discovery.

HENRY: That's true. I agree. But you should set it for trial.

OWEN: What would be sufficient? Would a request for a setting?

HENRY: Just a trial setting. I mean that's easy. That takes it out of the dismissal docket's jurisdiction down in Bexar county. If you set the case for trial it won't even get to the dismissal clerk, because what they do is they go through the files on a regular basis and anything that's been sitting "x" amount of time they put on the dismissal docket. That's how it operates as far as I understand. So if a case has been set for trial and has a trial setting it won't come up on their screen as something nobody's done anything for whatever period of time they choose. And I'm not sure what it is. My guess is it's about 2 years.

I think for notice purposes, Rule 165(a), the notice of setting from the district clerk and then our own local rules gave the plaintiff more than enough notice that you better show up at this hearing, not only announce ready but you better show up at this hearing and show why you prosecuted this case with due diligence. And if you haven't, you will be dismissed for want of prosecution. And that's what happened in this case. And that's what happened in cases prior to this. We've got case after case and even if we go just to the few cases, *State v. Rotello*, the SC case, basically that was dismissed just on a local rule, like a Bexar county rule. But the local rule for that county was if you case is set so long, we're going to put on the dismissal docket and we are going to dismiss it. Y'all affirmed the dismissal for want of prosecution, which basically in my reading of this, I'm not even sure the court even sent him notice that it was going to be dismissed.

OWEN: But isn't that their complaint, that even if they had sent no notice would be one thing, but this notice was misleading because it said, If no announcement is made it will be dismissed, which implies that if you announced ready it will go.

HENRY: But you have to read the entire notice. You're taking out of context like they want you to and say, If I make any announcement. You wouldn't have to announce ready. Mr. _____ says, Well if I announce not ready, then it can be dismissed. According to the theory all you have to do is make an announcement: Judge, I am here; that's it; that's an announcement; It can't be dismissed. I think the announcement of ready is not sufficient to be honest with you. And I've known that for the 23 years I've practiced in Bexar county. Judge Reverra in the old days used to throw them out. Judge Curry used to throw them out on a regular basis. The appeals cases we have in *Ozuna* and *Goff v. Branch*, the two that they say conflict aren't really conflicting if you read them out of the 4th CA. Because in *Goff* they said, No, you can't dismiss it because they were present at the hearing and they did a motion to reinstate.

ABBOTT: What happens if you have a lawyer from Dallas who is a plaintiff lawyer in a case who's never had a case in San Antonio before get's that statement. What is that Dallas lawyer supposed to understand from that notice?

HENRY: That his case could be dismissed for want of prosecution by the statement at the bottom and the reading of rule 165(a) and the local rules, and by calling any local counsel and saying what does it mean if I get a dismissal docket notice? Does that mean I have to show up and just announce ready or does that mean I have to show up and be ready to go to trial or show them

that I've been ready to go to trial, or what do I have to be. If I got a dismissal docket notice out of Dallas, that's exactly what I would do. I would call up the district clerk and say what are your local rules, and then call local counsel if I can't find what I know, then look in the ATLA book or whatever else book I have and find one and talk to them and get an idea of what I'm running into.

PHILLIPS: Would you finish addressing the *Goff* case?

HENRY: The *Goff* case basically ended up saying they were present at the hearing. This was a motion to reinstate appeal basically. And what they say is 165(a)(3) on a motion to reinstate all you have to show is that you did not appear at the hearing for negligence or you just didn't show up for your own excuse. And in this opinion they said, The motion to reinstate should have been granted. And then they went further and looked at the case on a dismissal for want of prosecution issue whether it was prosecuted diligently. And answered that, Yes. Also saying, We don't care which way you go this case is going to be reversed because 1) they did show up at the dismissal docket hearing, so on the motion to reinstate you should have granted that because the only issue before you is were they there or not and if they weren't there was it a conscious indifference and all that kind of stuff. So the court said, We are going to reverse on that. And then they said, We'll further look at the case. In *Goff v. Branch* they had 100's and 100's of pages of transcript plus they were trying to get a doctor's deposition out of Hawaii that was a big problem and delayed things and the court rulings and the court said, This plaintiff had prosecuted his case.

PHILLIPS: I'm confused by the notion that there's a different standard - if you go ahead and let it get dismissed and then you come in and file a motion for reinstatement than there is for the...

HENRY: I agree with you. The way I am reading the cases is you would probably be better off not showing up at the dismissal docket hearing, filing the motion to reinstate and just show them it wasn't _____ a conscious indifference, and you're back on the docket because the limitations of 165(a)(3) is that it limits that issue, which in all these cases on motions to reinstate say that's all they have to show. But many of these cases further say that the court has inherent powers to dismiss for want of prosecution at any time it wants outside, then that of course is part of 165(a)(4). This rule is cumulative of all the other rules and the inherent court power to dismiss a case for want of prosecution. This case was not prosecuted. It's obvious from the record. How long does the defendant have to sit and wait for plaintiff to do something: witnesses go away; we lose the power to do things. Granted I can set it for trial but it's not my duty. And I think in this case it was obviously not prosecuted within the SC time limits. It sat for 24 months. I think in this case there's an obvious lack of diligence in prosecuting this case.

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REBUTTAL

LAWYER: I think there is some confusion and I think that Justice Abbott's question was

an excellent one. Certainly a lawyer from one county would look at the local rules in the other county. And if you look at the local rules, the local rules for Bexar county talk about failure to prosecute but it also talks about requiring a hearing on that point. Then you have to have notice of that hearing. We never had notice of that hearing. The only notice of hearing you have is the hearing notice that is before the court that identifies what we said earlier. It says nothing about a hearing on failure to prosecute the case.

I would like for you though to just look at what it says in rule 165(a). 165(a)(1) talks about failure to appear, that it may be dismissed on the failure of any party seeking affirmative relief to appear at a hearing or trial. It is that section that talks about good cause. At the dismissal hearing where you did not appear, on failure to appear, that's what the section is, you have to show good cause. It talks about noncompliance with time standards being placed on a dismissal docket. It does not say that the case shall be dismissed. It's on a dismissal docket. And then it talks about reinstatement: that you may seek to reinstate the case if it's dismissed for any reason at all and you then show that it was not due to - it's just really to me it's a default judgment standard that it was not due to conscious indifference.

BAKER: But that step was not taken in this case.

LAWYER: That is correct, but it was not necessary to be taken because as the rule says, if a motion to reinstate is timely filed by any party, the TC regardless of whether an appeal has been perfected has plenary power to reinstate the case in 30 days, and so on, and so forth. So it's very clear that your rules do not require that there be a motion for reinstatement.

In the *Goff* case it's clear that the CA there was dealing with a dismissal for failure to appear. The court stated, that we recognize that a court has inherent power to dismiss for want of prosecution provided proper notice is given to the party whose cause is to be dismissed. We can find no authority for a court to invoke for the first time without proper notice its inherent powers to dismiss for want of prosecution in a reinstatement hearing clearly involving only the review of a dismissal order under 165(a). If that is true, if you cannot dismiss for another reason when you're having a reinstatement hearing for failure to appear, so to the first time one cannot reasonably dismiss for failure to prosecute the case where the only purpose of the hearing for which you have notice is on whether or not you're going to appear and make an announcement. And I think that the problem is with the notice and I believe that what we would hope for is for the court to clarify that if there is going to be a dismissal for a failure to prosecute, then counsel must be given notice that they have to appear and show cause why the case should not be dismissed. You either appear and announce ready and then be assigned to trial or you announce why your case isn't ready.

The second point that I wish to make is language that is found in *Olin Corporation v. Coastal Waters Authority*, 849 S.W.2d 852, and it's on this same subject. It says, Finally we view this case mindful of the mandate of civil rules of civil procedure 1. Rule 1 provides that the purpose of the rules of procedure is to obtain a fair, just and equitable adjudication of rights

under established principles of substantive law. The tension between the objective of rule 1, and the inherent power of a trial judge to control the court's docket may be impossible to resolve with absolute precision, but a just resolution of cases prefers trials over dismissals. And so there is certainly a purpose to try the case rather than dismiss.

I would point out to the court by analogy this court's opinion cited in *Goff*, which is *Transamerican National Gas v. Powell*, because there the court held that as to discovery sanctions which the late Justice . Chapa in deciding the *Goff* case relied upon, that the sanction must be directed against the abuse towards remedying the prejudice causing innocent party. There is no evidence of any prejudice to the defendant at all.

The sanctions should be visited upon the offender. If the offender in this case was the counsel because he didn't sit the case for trial sooner, and that is a malady that many lawyers representing individuals who have lots and lots of clients face. They some times let cases slip between the cracks or through the cracks and they don't set them for trial, they let them languish. Perhaps we can infer that that's what happened here. But if anyone is to be blamed it certainly is not the plaintiff to have his case dismissed. If there is a sanction to be imposed it could be imposed upon the one that caused it, not the plaintiff himself. And that would be consistent with this court's reasoning. And then the punishment must fit the crime. Here the case was prepared to whatever extent the plaintiff's lawyer and the plaintiff decided it would be.

OWEN: If the notice had said, Come forward, show cause why this should not be dismissed for want of prosecution, would the court have the power to dismiss at that hearing?

LAWYER: I don't think that any cause should be dismissed for want of prosecution if a plaintiff is ready for trial. The plaintiff and his lawyer will suffer if they haven't prepared their case. It should not be as pointed out in the *Olin* case, if you're going to balance rule 1 with the inherent power of the court to dismiss, that the purpose should be to allow the trial, and that there should be just cause for a dismissal. But just because someone has not been spending a lot of money and a lot of time filing a lot of pleadings does not mean that a case should be dismissed. The question is: Are you ready for trial? If you are not ready for trial, if you are not ready to go forward, then you've got to show cause or should show cause why the case should not be dismissed if that's the purpose of the hearing. And I think that that's what this court can do is to define for litigants and for the bar exactly what a notice for a dismissal should contain. That's what I would certainly hope this court does.