No. 44969-2-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

ROBIN EUBANKS, ERIN GRAY, ANNA DIAMOND,
and KATHY HAYES,

Respondents

v.

KLICKITAT COUNTY and DAVID BROWN, individually and on behalf of his marital community,

Appellants

REPLY BRIEF OF APPELLANT KLICKITAT COUNTY

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ARGUMENT

Plaintiffs advance a number of arguments in their brief, none of which are persuasive. Plaintiffs assert they are free to challenge the lower court's findings of fact and conclusions of law on appeal even though they did not file any notice of cross-appeal under Rule of Appellate Procedure ("RAP") 2.4(a). Brief of Respondents ("Resp. Br.") at 45-46. Plaintiffs argue that the cross-appeal requirement is inapplicable because they are not seeking "'affirmative relief,'" but are instead proposing additional grounds for affirming the lower court's denial of Appellants' joint disqualification motion. Resp. Br. at 45 (quoting RAP 2.4(a)).

But Plaintiffs also contend that the lower court's findings of fact and conclusions of law are "superfluous" and ask this Court to remand this case to the lower court for an evidentiary hearing as an alternative to ordering the disqualification of Plaintiffs' counsel Thomas Boothe. Resp. Br. at 14-16. Remanding this case, however, constitutes "affirmative relief" because it is something other than "an alternative . . . [to] affirming the trial court." *State v. Sims*, 171 Wn.2d 436, 442, 256 P.2d 285 (2011). Plaintiffs failed to file any notice of cross-appeal; therefore, RAP 2.4(a) prohibits them from arguing that an evidentiary hearing is necessary because the lower court's findings and conclusions were "superfluous." Resp. Br. at 14.

Even if this Court holds that RAP 2.4(a) does not forbid Plaintiffs from asserting that the lower court's findings and conclusions are superfluous, this Court should reject that characterization. Plaintiffs contend that the lower court's findings and conclusions should be disregarded because (1) the parties disputed the several facts in the proceeding below, and (2) the lower court reached its findings and conclusions after considering only affidavits. Resp. Br. at 13-15, 32-33. But this argument is meritless, as it relies on an erroneous reading of several cases, namely *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 994 P.2d 911 (2000) and *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 263 P.3d 1251 (2011).

Next, Plaintiffs argue that, even if the lower court's findings and conclusions are not superfluous, this Court should affirm the lower court because, under Rule of Professional Conduct ("RPC") 1.9(a), the current action is not the "same" or "substantially related" to the legal issues surrounding Brown's candidacy for which Boothe represented Brown. Resp. Br. at 33-37. But Plaintiffs fail to convincingly respond to the County's citation to several pivotal facts. Plaintiffs instead rely on bald assertions that the two matters have no overlap.

Finally, Plaintiffs contend that this Court "cannot grant Brown and the County the relief they request: an order disqualifying Boothe." Resp.

Br. at 15. Plaintiffs' support for this contention is twofold. First, Plaintiffs argue that the lower court's findings and conclusions are superfluous and therefore cannot be relied on to support a reversal of the lower court. Resp. Br. at 15-16. As referenced above and explained fully in this brief, the lower court's findings and conclusions are not superfluous and, in any event, RAP 2.4(a) forbids Plaintiffs from making this argument. Resp. Br. at 14.

Second, Plaintiffs believe this Court is incapable of granting the relief requested by Brown and the County because reversing the lower court and ordering the disqualification of Boothe would supposedly require this Court to step outside of its province and reach its own findings of fact—namely, whether an attorney-client relationship existed between Boothe and Brown as to the sexual harassment matter. Resp. Br. at 15. But this Court can reverse the lower court and order the disqualification of Boothe without entering its own findings of fact by (1) not setting aside as superfluous the lower court's conclusion that "Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues,"[1] and (2) correcting the lower court's conclusion that Boothe need not be disqualified because the current action is not the "same" or "substantially related" to "the Hatch Act and other election law

[1] Clerk's Papers ("CP") at 435-36 (Conclusion of Law ("CL") No. 3).

issues" under RPC 1.9(a).[2] The latter step—whether the Rules of Professional Conduct require disqualification—is a legal determination that this Court is entirely authorized to make.

I. PLAINTIFFS SEEK "AFFIRMATIVE RELIEF" UNDER RULE OF APPELLATE PROCEDURE 2.4(a)

Plaintiffs argue that RAP 2.4(a) does not require them to cross-appeal the lower court's findings of fact or conclusions of law, including the conclusion that Brown and Boothe formed an attorney-client relationship regarding "the Hatch Act and other election law issues." Clerk's Papers ("CP") at 435 (Conclusion of Law ("CL") No. 3). Plaintiffs contend that the cross-appeal requirement of RAP 2.4(a) does not apply because Plaintiffs seek "no affirmative relief." Resp. Br. at 26. This argument is mistaken.

As Plaintiffs point out, affirmative relief "normally mean[s] a change in the final result at trial." 2A Karl B. Tegland, Washington Practice: Rules Practice (Rules of Appellate Procedure 2.4), cmt. 3 at 174 (6th ed. 2004). No trial has taken place in this case. But nothing in the language of RAP 2.4(a) restricts its application to post-trial appeals. Thus, affirmative relief should be considered to be anything other than "an alternative argument for affirming the [lower] court." *Sims*, 171 Wn.2d at 442.

Plaintiffs claim that this Court should set aside the lower court's findings and conclusions as superfluous and remand for an evidentiary

[2] CP at 436 (CL No. 3).

hearing to resolve factual disputes. Resp. Br. at 14-16. Yet Plaintiffs contend that such a remedy is not "affirmative relief" under RAP 2.4(a). Resp. Br. at 45-46. This position is unsustainable because discounting the lower court's findings and conclusions and remanding for further proceedings is, by definition, not a ground for affirmance.

The County acknowledges that RAP 2.4(a) would most likely not prohibit Plaintiffs from (1) assuming *arguendo* that the lower court's act of entering of findings and conclusions was appropriate, and (2) arguing that this Court should nevertheless affirm the lower court's denial of Appellants' joint disqualification motion. Indeed, Plaintiffs appear to advance a semblance of this argument at points throughout their brief. *See, e.g.*, Resp. Br. at 33-37. But RAP 2.4(a) *does not* allow Plaintiffs to argue that the lower court's findings and conclusions were superfluous and that an evidentiary hearing is required on remand. This remedy is something other than "an alternative argument for affirming the trial court," *Sims*, 171 Wn.2d at 442, and Plaintiffs never filed the necessary notice of cross-appeal under RAP 2.4(a).

II. THE LOWER COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW ARE NOT "SUPERFLUOUS"

Even if this Court holds that RAP 2.4(a) does not prohibit Plaintiffs from arguing that the lower court's findings and conclusions are superfluous, this Court should reject this argument because it is premised on a flawed reading of several cases, namely *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 994 P.2d 911 (2000) and *Westberry v. Interstate*

Distributor Co., 164 Wn. App. 196, 263 P.3d 1251 (2011). Relying on *Brinkerhoff*, Plaintiffs contend that this Court should review the lower court's order as a summary judgment order. Plaintiffs then cite *Westberry* and assert that, because this Court should treat the lower court's order as a summary judgment motion, the lower court's findings and conclusion are superfluous. As demonstrated below, this analysis is incorrect.

A. On Appeal, an Appellate Court Should Not Review a Lower Court's Order as a Summary Judgment Order Simply Because the Lower Court Was Decided it on Affidavits Alone

Plaintiffs cite *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 994 P.2d 911 (2000) and argue that all trial court orders decided "solely on affidavits" should be "reviewed as if [they] were summary judgment order[s]." Resp. Br. at 13. But *Brinkerhoff* involved an order enforcing a settlement agreement. *Brinkerhoff*, 99 Wn. App. at 695. With only one exception, every published opinion citing *Brinkerhoff* involves a review of an order enforcing a settlement agreement.[3] Thus, Plaintiffs seek to

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[3] *Condon v. Condon*, 177 Wn.2d 150, 157, 298 P.3d 86 (2013); *Veith v. Xterra Wetsuits, LLC*, 144 Wn. App. 362, 367, 183 P.3d 334 (2008) (Sweeney, J., dissenting); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 176 P.3d 510 (2008); *In re Firestorm 1991*, 106 Wn. App. 217, 225, 22 P.3d 849 (2001); *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). Indeed, in *In re Firestorm 1991*, Division Three stated, "On the other hand, [appellant] relies heavily upon *Brinkerhoff* . . . . However, *Brinkerhoff* is inapposite because its *holding* applies to a settlement between individuals, not class members." *Firestorm*, 106 Wn. App. at 225 (emphasis added).

The only exception is *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002), in which the lower court dismissed plaintiff's complaint "after reviewing evidence consisting entirely of affidavits." *Eugster*, 110 Wn. App. at 221. On appeal, Division Three held that its review of the lower court's dismissal was "analogous to a summary judgment." *Id.* at 221-22 (citing *Brinkerhoff*, 99 Wn. App. at 696). *Eugster* appears to be an isolated aberration from *Brinkerhoff* being cited in cases involving an order enforcing a settlement agreement. Moreover, Division Three did not need to

radically broaden the application of *Brinkerhoff* by claiming that appellate courts should review *all* orders—not just orders enforcing settlement agreements—as if they were summary judgment orders.

This expansion is not defensible. *Brinkerhoff* relies on *In re Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993), which explained that appellate courts should review orders to enforce settlement agreements and summary judgment orders in the same fashion because "summary judgment procedures are routinely applied to most agreements when the issue is whether a genuine dispute of fact exists." *Ferree*, 71 Wn. App. at 43. In proceedings for both summary judgment and enforcement of a settlement agreement, lower courts deny the motions if a genuine dispute of fact exists; thus, *Ferree* analogized the appellate review of summary judgment orders with the appellate review of orders to enforce settlement agreements. *Id.*

But a lower court may grant a disqualification motion even if the parties dispute the facts, provided that the lower court resolves the disputed facts below, as the lower court did in this case. *See, e.g., Teja v. Saran*, 68 Wn. App. 793, 794, 800, 846 P.2d 1375 (1993) (holding that the lower court "erred by not granting the motion to disqualify," despite the parties "disagree[ing] as to the length and substance of the conversation"

"analog[ize]" its review to summary judgment because the dismissal of a complaint actually *was* summary judgment. *See* Civil Rule ("CR") 56. Thus, this Court should not follow *Eugster*. *See Benchmark v. City of Battle Ground*, 94 Wn. App. 537, 547, 972 P.2d 944 (1999) (declining to follow opinion of sister division because lack of persuasive reasoning).

that led to the conflict of interest).[4] CP at 434-36. Because lower courts may grant disqualification motions even on disputed facts, the appellate review of disqualification orders is not analogous to the appellate review of summary judgment orders and orders to enforce settlement agreement under *Brinkerhoff* and *Ferree*.

Plaintiffs disagree and contend that a lower court can grant a disqualification motion only if the "facts are undisputed." Resp. Br. at 32. In support, Plaintiffs cite to *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611, 616 (1997). But Plaintiffs' reliance on *Dietz* is misplaced. First, although *Dietz* held that the "determination of whether an attorney-client relationship exists is a question of fact," nowhere does *Dietz* say that the facts must be undisputed before a lower court may grant a disqualification motion. *Id.* at 844. Second, although the Supreme Court in *Dietz* declined to decide whether an attorney-client relationship existed, the Supreme Court did so because there was no factual record whatsoever. *Id.* at 844 ("[T]here are no facts in the record to support a finding that Doe is Ritchie's client . . . We have only Ritchie's word for the existence of the relationship.") Thus, *Dietz* does not stand for the proposition that a lower court may grant a disqualification motion only if the "facts are undisputed." Resp. Br. at 32.

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[4] In *Teja*, even though the lower court erred by refusing to disqualify counsel, the *Teja* court did not reverse because there was no showing of actual prejudice, which is required when the motion to disqualify is made after judgment is entered. *Id.*, 68 Wn. App. at 800-01. When the motion is made pre-judgment, however—as it is here, prejudice is presumed and disqualification is automatic. *Id.*; *State v. White*, 80 Wn. App. 406, 415, 907 P.2d 310 (1995).

Furthermore, a disqualification order is not analogous to a summary judgment order for purposes of appellate review simply because the former was decided "summarily," *i.e.*, on affidavits alone. Resp. Br. at 14. Summary judgment is a distinct procedure under Civil Rule 56 for parties who "seek to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment." CR 56(a). The parties may choose to submit supporting affidavits. CR 56(b). But disqualification proceedings do not automatically become analogous to CR 56 proceedings under cases such as *Brinkerhoff* and *Ferree* merely because the disqualification proceedings are supported by affidavits. Thus, this Court should reject Plaintiffs' argument that appellate courts must review disqualification orders in the same manner as summary judgment orders and orders to enforce settlement agreements.

B. An Appellate Court's Treatment of a Lower Court's Findings and Conclusions as Superfluous is Limited to Reviews of Summary Judgment Orders

After unsuccessfully attempting to analogize the lower court's order to a summary judgment order for the purpose of appellate review, Plaintiffs argue that the lower court's findings and conclusions are superfluous. Plaintiffs cite to *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 263 P.3d 1251 (2011), which, in turn, quotes *Donald v. City of Vancouver*, 43 Wn. App. 880, 719 P.2d 966 (1986) for the proposition that "'[f]indings of fact . . . are not necessary on summary judgment . . . and, if made, are superfluous and will not be considered by

the appellate court.'" *Westberry*, 164 Wn. App. at 209 (quoting *Donald*, 43 Wn. App. at 883).

A careful examination of *Donald* and related cases, however, establishes that the instruction to appellate courts to treat findings of fact and conclusions of law as superfluous is limited to reviews of summary judgment orders under CR 56:

> Although [respondents] rely heavily upon the trial court's findings of fact and conclusions of law to support the summary judgment, this reliance is misplaced. The function of a summary judgment proceeding is to *determine whether a genuine issue of material fact exists*. It is *not*, as appears to have happened here, *to resolve issues of fact or to arrive at conclusions based thereon.*

Duckworth v. Bonney Lake, 91 Wn.2d 19, 21, 586 P.2d 860 (1979) (emphasis in original) (cited in *Donald*, 43 Wn. App. at 883). Thus, *Westberry*, *Donald*, and *Duckworth* specifically limit the "superfluous" designation to a lower court's findings and conclusion made on summary judgment under CR 56.

Moreover, *Duckworth* held that a lower court's findings and conclusions on summary judgment are superfluous because the function of a summary judgment proceeding is "*not . . . to resolve issues of fact or to arrive at conclusions based thereon.*" *Duckworth*, 91 Wn.2d at 21 (emphasis in original). Here, in contrast, the function of the disqualification proceeding *was* to resolve issues of fact and to arrive at conclusions of law, namely whether the Rules of Professional Conduct prohibit Boothe from representing Plaintiffs in this matter. Just as

Plaintiffs attempted to radically expand the application of *Brinkerhoff* and *Ferree* beyond orders enforcing settlement agreements, Plaintiffs also try to dramatically enlarge the scope of *Westberry*, *Donald*, and *Duckworth*. Precedent does not countenance either of these expansions.

Plaintiffs failed to file a notice of cross-appeal under RAP 2.4(a) that would allow them to challenge the lower court's findings and conclusions as superfluous. But even if they are permitted to advance this argument, it is not convincing because it depends on the unwarranted expansions of case law detailed above.

III. PLAINTIFFS FAIL TO ESTABLISH THAT THE CURRENT ACTION IS NOT "SUBSTANTIALLY RELATED" TO THE LEGAL ISSUES SURROUNDING BROWN'S CAMPAIGN ON WHICH BOOTHE REPRESENTED BROWN

Plaintiffs then argue that, even if this Court does not disregard the lower court's findings and conclusions as superfluous, the lower court properly determined that the current action is not, under RAP 2.4(a), "substantially related" to the legal issues surrounding Brown's campaign on which Boothe represented Brown.[5] Resp. Br. at 33-37. Plaintiffs support this argument with the assertion that "[t]here is no factual overlap between the Hatch Act representation and the sexual harassment issues

[5] Plaintiffs couch their argument in a disclaimer that "[e]ven assuming *arguendo*, that the record establishes an attorney-client relationship between Boothe and Brown regarding the Hatch Act matter . . . ." Resp. Br. at 34. Again, Plaintiffs did not file a notice of cross-appeal challenging the lower court's conclusion that Brown and Boothe formed an attorney-client relationship regarding "the Hatch Act and other election law issues." CP at 435 (CL No. 3). Therefore, Plaintiffs cannot now ask this Court to disregard this conclusion as superfluous (and, in any event, the lower court's findings and conclusions were not superfluous).

later raised by the harassed women, other than the fact that they both involve Brown." Resp. Br. at 36.

Not so. Plaintiffs overlook two critical facts raised by the County: (1) the County's Personnel Manager advised Brown that Plaintiffs Eubanks and Gray came forward with their formal sexual harassment grievance "when they realized [Brown] would be running for office and could become their boss," CP at 371, and (2) Brown called Boothe six days after the Personnel Manager issued her findings related to the sexual harassment grievance and Boothe "commented that these types of allegations could be expected in an election." CP at 435. These facts establish that Boothe's representation of Brown on the legal issues surrounding Brown's campaign are "'relevantly interconnected'" to Boothe's representation of Plaintiffs in this matter. *Sanders v. Woods*, 121 Wn. App. 593, 599, 89 P.3d 312 (2004) (quoting *State v. Hunsaker*, 74 Wn. App. 38, 44, 873 P.2d 540 (1994)).

Plaintiffs' only attempt to refute these facts is an assertion that the Personnel Manager's statement about the connection between Brown's campaign and the sexual harassment allegations "makes no sense" because Plaintiffs Eubanks and Gray "did not file their complaint until December 2011" but "Brown lost his bid for election in 2010." Resp. Br. at 34 n.13. This is misleading. Although Plaintiffs Eubanks and Gray did not file their lawsuit until December 2011, they filed their formal grievance—which formed the basis for their complaint—on May 28, 2010, which was shortly after Brown first disclosed his intention to the Pierce County

Prosecuting Attorney's Office. CP at 4, 382. Thus, the temporal nexus between the two matters is much closer than Plaintiffs would have it.

In sum, Plaintiffs fail to cogently explain why the two matters are not "substantially related" under RPC 1.9(a), and this Court should reverse the lower court's conclusion on this point.

IV. THIS COURT HAS THE AUTHORITY TO REVERSE THE LOWER COURT AND TO ORDER TO DISQUALIFY BOOTHE

Plaintiffs also argue that this Court "cannot grant Brown and the County the relief they request: an order disqualifying Boothe." Resp. Br. at 15. Plaintiffs' argument has two parts. First, Plaintiffs contend that the lower court's findings and conclusions are superfluous and, as such, this Court cannot rely on them to support a reversal of the lower court. Resp. Br. at 15-16. As demonstrated in Section II of this brief, however, the lower court's findings and conclusion are not superfluous. Moreover, RAP 2.4(a) bars Plaintiffs from arguing that the lower court's findings and conclusions are superfluous and that an evidentiary hearing is necessary on remand.

Second, Plaintiffs aver that, in order to reverse the lower court and order the disqualification of Boothe, this Court would need to reach its own findings of fact—*i.e.*, whether an attorney-client relationship existed between Boothe and Brown as to the sexual harassment matter—which is not within the appellate courts' domain. Resp. Br. at 15. Plaintiffs are mistaken. This Court can reverse the lower court and order the

disqualification of Boothe without entering its own findings of fact by (1) refusing to disregard as superfluous the lower court's conclusion that "Brown formed an attorney/client relationship with Boothe on the Hatch Act and other election law issues,"[6] and (2) reversing the lower court's determination that Boothe should not be disqualified because the current action is not the "same" or "substantially related" to "the Hatch Act and other election law issues" under RPC 1.9(a).[7] The latter step—whether the Rules of Professional Conduct require disqualification—falls under this Court's writ. *Teja*, 68 Wn. App. at 796 ("The determination of whether an attorney has violated the Rules of Professional Conduct is a question of law and reviewed de novo.")

Plaintiffs present a false choice between affirming the lower court and remanding this case for an evidentiary hearing. The remedy of reversing the lower court and ordering the disqualification of Boothe is not only fully within the scope of this Court's authority, it is also factually and legally warranted in this case.

[6] CP at 435-36 (CL No. 3).
[7] CP at 436 (CL No. 3).

CONCLUSION

For the reasons set forth above and in the County's opening brief, the County respectfully asks this Court (1) to reverse the lower court's denial of the disqualification motion and (2) to order the lower court to disqualify Boothe as to Plaintiffs' claims against Brown and the County. The County adopts the balance of the arguments in Brown's opening and reply briefs. RAP 10.1(g).

January 16, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 16th day of January, 2014, I caused to be served a true and correct copy of the foregoing to be served

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