Supreme Court No. 99478-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DONNA ZINK,
Petitioner,

v.

JOHN DOE AA, et al.,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable John P. Erlick, Judge

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner moves this Court to remand the moot issue of Respondents' identities in a dismissed case where they were granted the right to proceed in pseudonym and which was dismissed as of right pursuant to Civil Rule 41. Petitioner's request should be denied.

II. BACKGROUND FACTS

On February 3, 2016, John Does[1] filed a lawsuit seeking to enjoin the release of their Special Sex Offender Sentencing Alternative (SSOSA) evaluations pursuant to a Public Records Act (PRA) request from Zink. John Does argued that release of SSOSA records was barred under the PRA as "[h]ealth care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests" and requested an injunction barring disclosure. RCW 70.02.005(1). In support of their request for a preliminary injunction, John Does submitted uncontested evidence showing the potential for physical and psychological harm, stigmatization, and loss of employment and other opportunities if their identities were revealed. CP 43-54. The John Does were allowed to proceed using pseudonyms because

[1] To avoid confusion, throughout this brief, Respondents will be referred to as "John Does" and Petitioner will be referred to as "Zink." No disrespect is intended.

disclosure of their identities would have obviated the relief they sought. The Superior Court, based on the law at that time, did not hold an *Ishikawa* hearing but, based on the evidence before it, determined that proceeding in pseudonym was appropriate. Subsequently, the Supreme Court, in *Doe G. v. Dep't of Corrections,* in a substantially similar matter, provided new guidance that an *Ishikawa* analysis is required for use of pseudonyms. 190 Wn.2d 185, 216-18, 410 P.3d 1156 (2018).

On March 10, 2016, the same day the Superior Court granted John Does' request to proceed in pseudonym, it issued a preliminary injunction enjoining the release of the SSOSA records and granted class certification. CP 111. On March 17, 2016, in an order identifying a number of cases proceeding through the appellate courts with the same issues, the Superior Court stayed the Superior Court proceeding in *John Doe AA* "until further order from the Supreme Court of the State of Washington, Court of Appeals, or this Court." CP at 151.

Doe G. v. Dep't of Corrections, raised the same legal questions regarding whether SSOSA records were non-disclosable under the PRA and whether proceeding in pseudonym—without an *Ishikawa* hearing—to protect SSOSA records from disclosure was appropriate. For judicial economy reasons, while *Doe G.* proceeded through the appellate courts, *John Doe AA* was stayed. CP 151.

On February 22, 2018, the Washington Supreme Court held that SSOSAs are not medical records exempt from disclosure under the PRA. The Supreme Court also held that a superior court erred when it allowed plaintiffs to proceed in pseudonym without directly addressing the requirements of General Rule 15 and *Ishikawa* hearings and remanded accordingly. *Doe G.*, 190 Wn.2d at 202. The Supreme Court did not rule on whether the plaintiffs in that matter could succeed in an *Ishikawa* hearing. *Id.* In March 2019, the superior court lifted the stay and ordered the parties to show cause why no action had been taken. CP 153-54.

As all legal questions raised by *John Doe AA* were answered by the Supreme Court in *Doe G.*—rendering *John Doe AA* moot—John Does moved to dismiss their claims as of right under Civil Rule (Rule) 41. Rule 41 requires the superior court to dismiss a matter "[u]pon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case." CR 41(a)(1)(B). Such a dismissal is mandatory and the superior court has no discretion to refuse a requested dismissal. *Id.* On March 19, 2019, following Rule 41's directive, the Superior Court dismissed Zink's claims with prejudice and struck the preliminary injunction. CP 123-24. Zink moved for reconsideration. On April 19, 2019, the Superior Court denied the request. CP 191.

On June 7, 2019, Zink filed a Statement of Grounds for Direct Review by the Supreme Court. On August 7, 2019, a Special Department of the Supreme Court transferred the petition to Division I of the Court of Appeals. The Court of Appeals affirmed the trial court's ruling.

III. ARGUMENT

A. Review Should Be Denied

Under Rule of Appellate Procedure 13.4 "[a] petition for review will be accepted by the Supreme Court" if one of the following four prerequisites are met:

1. The Court of Appeals decision is in conflict with a decision of the Supreme Court;
2. The Court of Appeals decision is conflict with a published decision of the Court of Appeals;
3. There is a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
4. The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Zink is unable to show that any of these factors are met in this instance.

1. The Court of Appeals decision is consistent with Supreme Court and Court of Appeal precedent

The Superior Court correctly dismissed John Does' claims under Rule 41 and the Court of Appeals correctly affirmed. Washington courts have long recognized the rights of plaintiffs to voluntarily non-suit their claims as a matter of right any time before the plaintiff rests at the

conclusion of their opening case. *See In re Archer's Estate*, 36 Wn.2d 505, 507-08, 219 P.2d 112 (1950) (assessing ability of plaintiffs to voluntarily dismiss claims under a predecessor to Rule 41). Indeed, the *In re Archer's Estate* Court held that the right to voluntarily dismissal is "absolute and involves no element of discretion on the part of the trial court." *Id.*

The right to a voluntary dismissal is a right that John Does appropriately invoked. *See* CR 41(a)(1)(B). Rule 41 requires a court to dismiss plaintiffs' claims on their motion if such a request is made "any time before plaintiff rests at the conclusion of his opening case." CR 41(a)(1)(B). A "plaintiff's right to a voluntary nonsuit must be measured by the posture of the case at the precise time [the] motion was made[.]" *Paulson v. Wahl*, 10 Wn. App. 53, 57, 516 P.2d 514 (1973) (affirming that plaintiffs have a right to dismiss until their claims have been submitted for adjudication). However, until a matter has been submitted to a court for final adjudication the plaintiff does not lose their right to voluntarily nonsuit. *See Gutierrez v. Icicle Seafoods, Inc.*, 198 Wn. App. 549, 555, 394 P.3d 413 (2017). Instead, until such a submission for final adjudication, plaintiffs have "an absolute right to voluntary nonsuit." *Id.* And "the effect of a voluntary dismissal 'is to render the proceedings a nullity and leave the parties as if the action had never been brought.'" *Wachovia SBA Lending v.*

Kraft, 138 Wn. App. 854, 861, 158 P.3d 854 (2007). *See also Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890 (1999).

John Does moved the Superior Court to dismiss their claims as of right under Rule 41. John Does made their request before resting their opening case and moved for dismissal before any request to adjudicate the final merits of their claims was presented to the superior court. Indeed, as the matter was stayed early during the litigation, no motions for summary judgment were pending and certainly no trial had commenced. As there was no final adjudication pending on their claims and John Does had not presented or rested their substantive case for adjudication, John Does' request to dismiss was mandatory—under Rule 41—and the Superior Court dismissed their claims accordingly. It rightfully did so, and the Court of Appeals correctly affirmed.

a. Zink's constitutional arguments that the trial court should have performed a second *Ishikawa* analysis before granting John Does' motion to voluntarily dismiss their claim fail—and there is no conflict between courts on this issue

Zink argues that the trial court's decision not to duplicatively perform an *Ishikawa* analysis when it granted John Does' motion to dismiss with prejudice somehow is in conflict with *John Doe G.* Zink is incorrect. Division I of the Court of Appeals rejected Zink's argument "[b]ecause the trial court considered the *Ishikawa* factors and made unchallenged findings

that adequately support[ed]" its decision to allow plaintiffs to proceed in pseudonym. Order at 1 (citing the trial court order identifying the *Ishikawa* basis for granting John Does the right to proceed in pseudonym). The Court of Appeals also rejected Zink's argument that the trial court should have repeated the *Ishikawa* analysis when allowing John Does to voluntarily dismiss without disclosing their names noting that Zink "cites no authority for the proposition[,]" finding the argument unpersuasive, finding that "the open administration of justice" does not require an *Ishikawa* analysis before entry of a dismissal order under the facts of the case, and finding the experience and logic test of Article I, section 10 met. *Id.* at 7-8. The Court of Appeals further held that "[a] party who dismisses their action because they could not litigate anonymously should not be forced to reveal what they sought to conceal" and requiring such "would obviate the relief they seek." Order at 10 (citing *State v. McEnroe*, 174 Wn.2d 795, 795, 279 P.3d 861 (2012)). "A contrary result would make most efforts to proceed anonymously pointless and chill historically protected parties, like abuse victims, from pursuing litigation for fear that if a court denies their request to proceed pseudonymously, their identities will be revealed." Order at 10.

b. There is no legal basis for Zink's argument that allowing dismissal without disclosure of John Does' identities is the destruction of court records—and there is no conflict between courts on this issue

The Court of Appeals also rejected Zink's argument that allowing John Does to voluntarily dismiss their suit without revealing their identities somehow destroyed court records.

General Rule 15 defines "destroy" in a very narrow, and deliberate way that cannot reasonably be expanded to include court documents wherein a party is identified by pseudonym. "[D]estroy" for purposes of GR 15 "means to obliterate a court record or file in such a way as to make it permanently irretrievable." GR 15(b)(3). The rule then further identifies what types of motions would result in the destruction of documents governed by GR 15(b)(3)—none of which are motions to proceed in pseudonym. *See* GR 15(b)(3) (defining motions resulting in the destruction of documents as motions or orders for expungement as motions or orders to destroy).

The *John Doe AA* court records have not been destroyed and the public has access to the entire court file. Indeed, court records for a dismissed case where the Superior Court—correctly at the time—allowed for Plaintiffs to proceed in pseudonym are not obliterated or permanently irretrievable. Anyone searching for court records in *John Doe AA* can find

them by searching either the case name or the case number. The availability of these records is evidenced by the fact that the records Zink argues are "destroyed" are available from King County Superior Court, attached to the proceedings before the Court, and are part of the record at the Supreme Court relating to Zink's first failed request for direct review. Further, Zink's claim that these records are "destroyed" because they are not searchable, in JIS and SCOMIS, the way Zink would prefer, does not mean that such documents are destroyed for purposes of GR 15(b)(3). The entire court file remains open to the public with only the John Does' true names withheld. This satisfies the principles behind Article 1, section 10 of the Washington Constitution, which is "to maintain public confidence in the fairness and honesty of the judicial branch." *See Allied Daily Newspapers of Washington v. Elkenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The Court of Appeals did not address the above reasons why Zink's argument fails. Instead, it rejected her arguments because they were forwarded entirely without a legal basis or meaningful persuasive argument. Order at 11.

2. Zink's petition does not concern a matter of substantial public interest

Zink's request for the identities of plaintiffs who voluntarily non-suited their case well-before any final adjudication of their claims, is not a

matter of substantial public interest. Zink provides no meaningful argument or information for why or how this issue triggers public interest. Instead, Zink simply argues that there is a public interest in knowing the names of the clients because they were represented by public defenders. Zink cites no policy or principles that support the argument that the public interest overcomes the trial court's reasoned *Ishikawa* analysis that was the basis for the plaintiffs being allowed to proceed in pseudonym. As such, Zink's baseless argument that there is substantial public interest in knowing the names of all clients of public defenders fails to make a sufficient showing to support this petition for review.

IV. CONCLUSION

For the foregoing reasons Zink's petition for review should be denied.

DATED this 8th day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, I served by email one copy of the foregoing pleading on the following:

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