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SUPREME COURT OF THE
STATE OF WASHINGTON

GLEND A NISSEN, an individual, Appellant,

v.

PIERCE COUNTY, a public agency; PIERCE COUNTY
PROSECUTOR'S OFFICE, a public agency, Respondent,

v.

PROSECUTOR MARK LINDQUIST, Intervenor/Respondent.

RESPONDENT'S RAP 10.1 SUPPLEMENTAL BRIEF
OR IN THE ALTERNATIVE
RAP 17.4 ANSWER TO MOTION FOR SANCTIONS

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I. STATEMENT OF FACTS

On December 23, 2012, the Honorable Judge Christine Pomeroy dismissed plaintiff Glenda Nissen's suit against defendant Pierce County. CP 258. On January 3, 2012, plaintiff filed an over-length reconsideration motion in violation of Thurston County Local Rule 10(d)(2), without its supporting declaration in violation of CR 59(c), and noted it for hearing more than 30 days after dismissal in violation of CR 59(b). *See* Reply App. "C" at 1. On January 5, 2012, plaintiff re-filed an identical over-length motion for reconsideration with an untimely supporting declaration that she again noted for a date over 30 days after dismissal. CP 374, 633.

The January 5, 2012, declaration claimed its untimeliness was due to plaintiff not obtaining records from the County until January 4, 2012. Specifically, though those records were offered to her beginning December 23, 2011, CP 378, her counsel had chosen to be "out of the office for the holiday break on December 27, 2011, when Ms. Glass' letter arrived notifying this office that the records would be made available" and counsel apparently failed to make arrangements to monitor her mail that week. CP 375. Thus, her agents did not contact the County to arrange for copying until the day her reconsideration motion was due on January 3, 2012, and the parties then mutually "arranged for the copies to [be] available ... January 4" – whereupon plaintiff waited another day until January 5, 2012, to

file them. CP 375, 378.¹ Weeks later, on January 26, 2012, plaintiff filed a shortened "Amended Motion For Reconsideration" that "relie[d] on the [earlier] Declaration ... in support of Motion for Reconsideration." CP 412. On January 31, 2012, the County opposed it arguing, *inter alia*: her "motion is defective on many grounds" – including because of her "counsel's untimely ... Declaration" of January 5, 2012. CP 684. On February 27, 2012, the Court denied plaintiff's motion for reconsideration. CP 447.

In her April 11, 2012, statement of grounds for direct review, plaintiff avoided providing the date on which she had filed her reconsideration motion and omitted any mention of, or citation to, its untimely supporting declaration. *See* Statement 6 ("Later, in a motion for reconsideration ..."). Similarly, her statement's appendix omitted both documents. Her later May 2, 2012, designation of clerk's papers and still later November 1, 2012, Appellant's Brief also avoided that she filed duplicate motions and provided and mentioned only her later "amended" reconsideration motion. *See* CP 1, 408; AB 8. Though her designation of record included her untimely reconsideration declaration, her brief only cited it in a footnote without attribution for other purposes. CP 1; AB 36 n. 8. Her clerk's papers also did not include, nor Appellant's Brief note, the County response

¹ Plaintiff omitted Ms. Glass' original December 23, 2011, letter which gave notice the records were available starting that day and stated that due to the holiday it could take a day or two to make copies after payment. *See* Glass Dec., ex. "A." When the County was contacted, plaintiff's agent suggested picking it up at 2:00 p.m. January 4, 2011. *Id.*

that the motion was "defective" due to "untimel[iness]."

By the time the County's attorney reviewed the clerk's papers and plaintiff's appellate brief for purposes of filing its Response Brief on March 4, 2013, more than a year had passed since the trial court proceedings and its procedural details were no longer fresh. *See* Hamilton Dec. at 2. In reviewing plaintiff's appellate filings, however, it was noted that neither plaintiff's designation of record contained, nor her appellate brief mentioned, her original motion for reconsideration or the date it was filed. *Id.* at 1. A review of the clerk's papers revealed her motion's supporting declaration had been signed on January 4, 2012, and untimely filed on January 5, 2012. CP 374. A search of the County's litigation file for its reconsideration opposition – that plaintiff had omitted – reminded defense counsel that one ground for the County's opposition was that "Plaintiff's motion is defective on many grounds" – including "counsel's untimely ... Declaration." *Id.* at 2. To confirm the date plaintiff filed her reconsideration motion, which she also had omitted from the clerk's papers, the County's litigation file was further searched until her motion filed on January 5, 2012, was discovered. *Id.* Due to the passage of time and plaintiff's omissions from her clerk's papers, it was not recalled she also had filed an identical motion on January 3, 2012, but without its declaration. *Id.*

Based on plaintiff's designation of clerk's papers and the County's own

supplemental designation – which corrected plaintiff's omission from the record of her actual motion for reconsideration and the County's responses thereto, CP 449, 633-703 – the Respondent Brief's "Statement of Facts" noted that on "January 5, 2012 – 13 days [after the December 23, 2011 dismissal] – plaintiff filed an untimely motion for reconsideration raising new legal arguments" RB 7. In its argument section the County then asserted under the court rules plaintiff's motion for reconsideration therefore was untimely filed and that this limited the scope of review and required affirmation of the dismissal. RB 8-9. Despite plaintiff's omission from the clerk's papers of her original reconsideration motion and the County's response, as well as her brief's avoiding mention of its filing date, her untimely declaration, or that she filed duplicate motions – her Reply now claims it is the County that "misstated certain procedural events through selective designation of Clerk's Papers and deliberate omission of others and a misstatement of the history of this case" to make a "bizarre, belated and dishonest claim" that "is sanctionable." Reply 1-5.

Plaintiff's charge of "selective designation of Clerk's Papers" or "deliberate omission" by the County is disproved by the facts of record, while the law refutes her accusation it is "bizarre, belated and dishonest" to note that her reconsideration motion was untimely and affects her appeal. As demonstrated below, plaintiff's request for sanctions is baseless.

II. ARGUMENT

A. RECORD REFUTES ANY CLAIM OF "SELECTIVE DESIGNATION" OR "DELIBERATE OMISSION" BY THE COUNTY

Though plaintiff accuses the County of "selective designation ... and deliberate omission," Reply 1, she nowhere explains why she selected only her "Amended Motion For Reconsideration" for her Clerk's Papers and omitted both the supposedly timely January 3, 2012, motion as well as her untimely January 5, 2012, motion. Indeed, it is the party seeking review that has the burden of perfecting the appellate record. *See St. Hilaire v. Food Services of America, Inc.*, 82 Wn.App. 343, 352, 917 P.2d 1114 (1996); *Allemeier v. University of Washington*, 42 Wn.App. 465, 472, 712 P.2d 306 (1985). Likewise, plaintiff nowhere explains her appellate briefing's prior consistent avoidance of: 1) the filing date she claims for her reconsideration motion; 2) her filing duplicate motions on January 3 and 5, 2012; and 3) her untimely filing of her supporting declaration on January 5, 2012. *Compare id. with* Statement of Grounds For Rev. 6; Statement Appendix "G;" CP 1, 408; AB 8. Thus, plaintiff's own sanction motion standard would indicate that she "selective[ly] designat[ed] ... Clerk's Papers and deliberate[ly] omi[tte]d ... others" to "hide[]" from this Court" that her January 3, 2012, motion was filed without its declaration in violation of CR 59(c) and thus was untimely. *See also discussion infra.* at 8.

Whatever the explanation for plaintiff's selection and omission of clerk's papers and her brief's evasion of the record, that the County did not identify and correct all her omissions from the Clerk's Papers – specifically her exclusion of the January 3, 2012, motion – was unknowing and inadvertent by the County. *See* Hamilton Dec. Though plaintiff now blames her legal messenger and the trial court for "erroneously" refiled and separately docketing her duplicate reconsideration motion on January 5, 2012, *see* Reply 2, the record nevertheless confirms the County was correct when it noted that a motion for reconsideration was filed on that date and that its supporting declaration was not filed until its untimely submission by plaintiff on January 5, 2012. *See* CP 374, 633.

Though plaintiff requests the County "be sanctioned pursuant to CR 11 and RAP 18.9," *see* Reply 5, as a matter of law CR 11 "is intended for use in superior court, not in the appellate court" because "sanctions on appeal" are available "only under RAP 18.9." *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn.App. 720, 750, 218 P.3d 196 (2009) (emphasis added). In turn, RAP 18.9 states only that a party "who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules" may be ordered "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." Assuming *arguendo* that her Reply

Brief's request for sanctions constitutes a "motion" as required by RAP 18.9, plaintiff nowhere claims the County's failure to detect and correct all her omissions from the record was "for purposes of delay" or that it filed "a frivolous appeal." Instead, plaintiff apparently argues the County "fails to comply with these rules" and that she "has been harmed by ... the failure to comply" She, however, does not and cannot demonstrate this.

Plaintiff cites no appellate rule allegedly violated by the County, *see Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn.App. 590, 594 n. 1, 849 P.2d 669 (1993) (no terms for cost of response where opponent "violated no rule on appeal"), she provides no argument how any rule was violated, *see* RAP 17.3(a) (motions must contain "supporting argument"), and the record disproves any violation. *See generally* Reply 1-5; discussion *supra*. at 1-7; Hamilton Declaration. *See also Earnheart v. Carlson*, 47 Wn.App. 670, 676, 736 P.2d 1106 (1987) (denying sanctions under RAP 18.9 because "allegedly misleading statements regarding the record in his brief ... if misleading at all, are not so egregious as to justify sanctions"). Her Reply Brief does allege harm by claiming – without cited support – "Appellate Counsel for Nissen has been forced to spend several hours investigating the alleged facts and addressing the meritless argument raised by the County." Reply 5. *See also Barnes v. Washington Natural Gas Co.*, 22 Wn.App. 576, 577, 591 P.2d 461 (1979) (though RAPs violated, sanctions

were denied because opponent had "not demonstrated that it incurred added expense or was prejudiced"). However, Nissen's counsel's "investigating the alleged facts" should have been done before filing her incomplete designation of clerk's papers or submitting her consistently evasive Appellant's Brief. *See* CP 1-3; AB 8, 36 n. 8. Further, as shown below, the untimeliness "argument raised by the County" is far from "meritless."

B. LAW AND FACT DEMONSTRATE UNTIMELINESS ISSUE IS VALID NOT "BIZZARRE, BELATED AND DISHONEST"

CR 59(b) dictates that a motion "for reconsideration shall be filed not later than 10 days after the entry of the judgment," while CR 59(c) provides that when such a motion "is based on affidavits, they shall be filed with the motion." *See Awana v. Port of Seattle*, 121 Wn.App. 429, 432-33, 89 P.3d 291 (2004) ("the rule governing submissions in connection with a motion for reconsideration" is "CR 59(c)"). Plaintiff told the trial court her reconsideration motion "relies on the Declaration ... in support of Motion for Reconsideration," CP 412, yet her declaration was not "filed with the motion" as required but filed more "than 10 days after the entry of judgment." CP 374. Thus, her January 3 motion violated CR 59 by being defective when filed, while her January 5 motion was untimely.

Just as she baselessly blames others for the "erroneous" January 5, 2012, filing of her duplicate motion for reconsideration, *see* Reply 2,

plaintiff now also blames the County for her untimely filing of her supporting declaration by baselessly claiming "Pierce County refused to provide certain essential records needed for the supporting declaration until January 4, 2012" *Id.* In fact, the record instead demonstrates the documents she sought were made available by the County back on December 23, 2011, CP 378; Glass Dec. 1-2, Ex. "A," but plaintiff did not obtain them for over a week thereafter because she decided the next week to be "out of the office for the holiday break on December 27, 2011, when Ms. Glass' letter arrived notifying this office that the records would be made available" and did not arrange to have her mail monitored while absent. *See* CP 375. Further, even when plaintiff's agent finally called to arrange for copying on the date her declaration was due, the time for its production was agreed upon by the parties. *See* Glass Dec. Thus, the County did not "refuse[] to provide essential records" and plaintiff's own dilatory conduct does not allow her to blame others – much less excuse her violation of CR 59. *See e.g.* CR 6(b) (no time extension for motions under rule "59(b)").

Plaintiff alternatively argues her untimeliness was waived because supposedly "Respondents failed to raise the issue at any point below including when responding to the motion for reconsideration, and failed to raise it in their Response to the Statement of Grounds, and ... the trial

court ordered that an amended motion be filed by an extended date and actually ruled upon the motion for reconsideration, defeating the County's argument." Reply 5. In fact: 1) in "responding to the motion for reconsideration" the County expressly argued it was "defective" because of her "counsel's untimely ... Declaration," CP 684; 2) no known authority holds an issue is waived unless raised in response to a "Statement of Grounds;" 3) the trial court neither excused her untimeliness nor could it, *see Schaeferco, Inc. v. Columbia River Gorge Commission*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) ("court may not extend the time period for filing a motion for reconsideration"); 4) the trial court denied reconsideration which supports not "defeat[s] the County's argument," CP 447; and 5) courts "affirm on any ground the record supports, even if the trial court did not consider the argument." *State v. Williams*, 148 Wn.App. 678, 201 P.3d 371 (2009) (affirmed though "State did not raise this argument").

III. CONCLUSION

For the above reasons, plaintiff's sanction request should be denied.

DATED this 15th day of April, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing RESPONDENT'S RAP 10.1 SUPPLEMENTAL BRIEF OR IN THE ALTERNATIVE RAP 17.4 ANSWER TO MOTION FOR SANCTIONS was delivered this 15th day of April, 2013, by electronic mail pursuant to the agreement of the parties as follows:

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Subject: Nissen v. Pierce County - 871876 - Respondent's Corrected Brief

Clerk of the Court,

You will please find attached for filing the following documents:

1. Respondent Pierce County's RAP 10.1 Motion for Leave to File Supplemental Brief on Sanctions or in the Alternative RAP 17.4 Motion to Answer Appellant's Motion for Sanctions
 - a. Declaration of Public Records Officer Joyce Glass in Support of RAP 17.4 Answer to Appellant's Motion for Sanctions
 - b. Declaration of Defense Counsel in Support of RAP 17.4 Answer to Appellant's Motion for Sanctions
 - c. Respondent's RAP 10.1 Supplement Brief or in the Alternative RAP 17.4 Answer to Motion for Sanctions

And:

2. Respondent Pierce County's RAP 10.7 Motion to Order Reply Brief Returned for Replacement or Stricken With Leave to Refile New Brief

All parties of record have been cc'd in this email pursuant to GR 30.

Thank you.

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