Review of Division I Cause #34150-0-III
No. 94507-1

SUPREME COURT OF THE STATE OF WASHINGTON

DONNA ZINK, et vir,

v.

BENTON COUNTY, et al.

PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT

DONNA ZINK
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I. IDENTITY OF PETITIONER

Petitioner is Donna Zink, a pro se appellant in this cause of action. Zink respectfully asks this court to accept review of the Court of Appeals unpublished opinion, terminating review as designated in section II of this petition.

II. COURT OF APPEALS DECISION

Zink seeks review of *Donna Zink, et ux. v. Benton County, et al.*, No. 34150-0 (January 23, 2017), an unpublished opinion of Division III of the Court of Appeals. Pursuant to RAP 12.4, a motion for reconsideration was timely filed on April 3, 2017. The motion denying reconsideration was filed on April 11, 2017; within the last 30 days (RAP 13.4(a)). A copy of the opinion is attached to this request for review at Appendix A; pages A1 through A9.

III. ISSUES PRESENTED FOR REVIEW

1. Is the Division III opinion in conflict with established Supreme Court and published Appellate Court case law concerning dismissal of claims for failure to state a claim upon which relief can be granted pursuant to Civil Rule 12(b)(6)?
2. Is the Division III opinion in conflict with established Supreme Court and published Appellate Court case law concerning a lack of findings and conclusions to support an order for dismissal of claims pursuant to CR 52(a)(1)?
3. Does the Division III opinion violate Zink's right to due process and equal protection under the law pursuant to the United States Constitution, Amendment 14, § 1 and the Washington State Constitution Article 1, § 3?

IV. STATEMENT OF THE CASE

1. Case History

On October 6, 2015, Appellants, Zink, filed this cause of action in the Benton County Superior Court. (CP 1-55). The Benton County Superior Court established a civil case schedule by order (CP 56). The date of trial was set for October 10, 2016. Benton County did not file an answer to the complaint within twenty days as required by Court Rule (CR) 12(a)(1)(CP 121-123).

Affidavits of prejudice were filed against the Honorable Bruce Spanner (CP 62-65) and the Honorable Vic VanderSchoor (CP 101-102). The Honorable Robert Swisher permanently recused himself from cases related to the Zinks due to a past working history (CP 147).

On October 29, 2015, Benton County motioned the trial court to dismiss Zink's claims pursuant to CR 12(b)(6); failure to state a claim upon which relief could be granted (CP 66-97). Benton County's motion was scheduled to be heard on the over 10 minute civil docket on December 4, 2015 (CP 131; 133-135). The Honorable Vic VanderSchoor was the presiding judge on the civil docket for December 4, 2015 (CP 140).

On November 6, 2015, Benton County contacted the Benton County Superior Court Administrator to arrange for a special set before a different judge on December 4, 2015 (CP 140). Zink was not notified of this exchange and was not copied on the e-mail.

On November 25, 2015, Zink contacted Benton County to find out whether the hearing had been rescheduled since the presiding judge had been recused (CP 137-138). Benton County stated that the Court Administrator was working on it

(CP 151) and that no judge had been assigned to hear the motion to dismiss (CP 150). Zink requested notice when a judge was assigned to hear the motion (CP 151). With the exception of sending Zink a copy of the Court Administrators e-mail of November 6, 2015 (CP 140), Benton County never followed up to let Zink know that their motion had been placed on a special set calendar with an assigned judge.

Late in the afternoon of December 3, 2015, the Honorable Alexander Ekstrom was assigned to hear Benton County's motion to dismiss. On the morning of December 4, 2015, Benton County emailed Zink to find out if she had filed a response to the motion to dismiss (CP 156). Zink responded that the sitting judge presiding over the civil docket for that afternoon is recused and cannot hear the motion. Zink told Benton County she had not received proper notice that the hearing had been scheduled before a different judge. Zink clarified that:

> Since I never received a special set notice I never sent my response objecting to your request to dismiss. I couldn't have uploaded it as required since I had no idea who the judge would be. As I told you I'm not going to waste time on a case that won't go forward.

(CP 155). Benton County responded that notice was given and the hearing would go forward (CP 154). Zink was informed that she would need to make her argument for lack of notice to the court since he planned to argue for dismissal of the action (CP 153). Zink did not attend the hearing on the motion (CP 318).

At the hearing, Benton County argued that Zink had agreed to a December 4, 2015 hearing but then:

> Miss Zink then affidavited Judge VanderSchoor from the case, in my opinion strategically, knowing he was on the civil docket, trying to delay the matter further.

RP (December 4, 2015). 3:1-3. Benton County argued that further notice was not needed and therefore it was not provided.

> I don't believe there's any requirement in the Rule to special, to note on the note for motion docket. I think that's really a courtesy to the Clerk's Office and court admin, and Tiffany did not ask me to do that.

(*Id.* 6:8-24). The trial court agreed stating that a:

> Special set would imply that one had gone to court administration and asked for a particular time and been assigned a particular judge, whereas I was assigned this file late yesterday as a matter that simply couldn't be heard on the regular docket. That is our normal practice, to just simply find an available judge for whatever docket if a judge cannot hear a case.

(*Id.* 7:9-15)(emphasis added). Without any discussion concerning the merits of Zink's claims, the trial court dismissed the action under CR 12(b)(6) (*Id.* 7:22-9:2) and entered the following order:

> Based on the arguments of counsel, as well as the pleadings filed to date, the Court finds that Plaintiffs' Complaint fails to state a claim against Defendants upon which relief can be granted.
>
> Based on the above findings, It Is Ordered:
>
> 1. Defendants' motion is granted.
>
> 2. The action is dismissed without prejudice

(CP 106-107). No findings or conclusions were entered by the trial court in support of the order dismissing Zink's claims.

On December 14, 2015, Zink timely filed a motion for reconsideration (CP 108-119). Zink argued that she has a right to proper notice of the hearing and to know that a judge was assigned to hear the motion prior to the day of the hearing in order for justice to be served. Zink argued that Benton County had ample opportunity, approximately one month, to arrange a special set, provide proper notice, and assure that a judge had been assigned to hear the case (CP 115-118). The trial court denied Zink's motion on February 5, 2016 (CP 325-328), stating:

> After reviewing the briefing and submissions of the parties, in particular the e-mails between the parties, the Court is compelled to conclude that Plaintiffs, having failed to respond to the substantive motion, sought to delay the resolution of the motion by every means available (other than those that would have been proper), and voluntarily failed to appear in an attempt to further this goal. Service of the note for motion was proper pursuant to LC 7(b)(7)(A), and the Plaintiffs were not affirmatively misled by Defendants. To the contrary, Plaintiffs reveal in their filings, including but not limited to the correspondence itself, sufficient experience with court process such that a conclusion that their non-appearance on December 4, 2015 was the result of "excusable neglect" is, on this record, completely unwarranted. CR 6(b)(2). The maintenance of an action imposes obligations upon the Plaintiff which were not met in this case. Dismissal was appropriate.

(CP 327). Zink timely filed for appeal of the trial court's order dismissing her claims and the order denying reconsideration on March 2, 2016.

2. Judicial History

Zink's appeal was heard by Division III on January 30, 2017, without oral argument. The decision was filed on March 16, 2017 (Appendix A1-A9).

Division III upheld the dismissal of Zinks claims stating that Zink's appeal was purely procedural (Appendix A5). Citing to *Stanley v. Cole*, 157 Wn. App. 873, 880, 239 P.3d 611 (2010), Division III found that the trial court's reliance on only Benton County's argument was sufficient under CR 12(b)(6) and that a review of Benton County's briefing supports the trial court's ruling which is justified in both law and fact (A5-6). Division III declined to set forth any analysis of the legal authority used to make its determination; relying solely on their review of Benton County's briefing to determine the merits of the case.

Further, Division III opined that 1) Zink was treated fairly in the court; 2) a new notice of hearing is only required if the hearing is struck and rescheduled or otherwise continued; 3) Zink was notified on November 6, 2015 of the December 4, 2015, hearing date and that date never changed; 4) there is nothing in the court's local rules requiring notice before a specially set judge; and 5) assigning a judge the afternoon before a hearing had no bearing on the motion setting (A6-7).

Furthermore, Division III opined that: 1) knowing the identity of a judge assigned to hear a motion does not prevent a party from filing a response; 2) Zink was required to file her response, electronically or by delivered bench copy to the court administrator by noon the day prior to the hearing; 3) there is no procedure for submitting pleadings directly to an individual judge; and 4) Zink had no excuse for failing to comply with the rules (A7).

Finally, Division III opined that "[h]aving chosen to file a lawsuit in Benton County Superior Court, the Zinks were expected to make the effort to travel to the courthouse as necessary in order to prosecute their case (*Id.* A7-8).

Zink timely filed for reconsideration on April 3, 2017. The motion to reconsider was denied on April 11, 2017.

V. ARGUMENT WHY REVIEW SHOULD BE EXCEPTED

1. Grounds for Review

Rules of Appellate Procedure (RAP) 13.1 allow a party to petition the Supreme Court for discretionary review of a Court of Appeals decision terminating review. A petition for review will be accepted only if: 1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals; 2) a significant question of law under the Constitution of the State of Washington is involved; or 3) the petition involves an issue of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(1-4)).

2. The Decision of Division III is in Conflict With Numerous Decisions of both the Supreme Court and Courts of Appeals Decisions Concerning Dismissal of an Action Under CR 12(b)(6)

This Court has established that a dismissal of a cause of action under CR 12(b)(6) is a question of law and review is de novo. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, ¶5, 233 P.3d 861 (2010). This Court has established that a plaintiff does not fail to state a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint. *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962).

Further, this Court has repeatedly opined that under a CR 12(b)(6) motion, a Plaintiff's factual allegations are assumed to be true, and can only be dismissed if the defendant can prove "beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to the requested relief." *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (quoting *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)); see also *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978); *Stangland v. Brock*, 109 Wn.2d 675, 677, 747 P.2d 464 (1987).

Here, Division III disregarded this Court's mandates concerning a CR 12(b)(6) dismissal and upheld the trial court's decision to dismiss based only on Benton County's briefing and Zink's lack of attendance at the hearing; declining to consider Zink's complaint even though it was submitted for review (CP 1-53).

> The Zinks' understanding of the superior court proceedings is incorrect. The record clearly shows the trial court relied on the authority set forth in the County's briefing and granted the motion to dismiss on the merits. This was sufficient. See *Stanley v. Cole*, 157 Wn. App. 873, 880, 239 P.3d 611 (2010) ("When a tribunal considers evidence, the resulting judgment is not a default judgment even if one party is absent."). Indeed, our review of the County's briefing in support of the dismissal motion confirms the trial court's ruling was justified in both law and fact.

(A5-6). Division III, relied on the opinion in *Stanley v. Cole*, 157 Wn. App. 873, 880, 239 P.3d 611 (2010) to determine that the trial court's dismissal was justified in both law and fact. Division III opined that:

> When a tribunal considers evidence, the resulting judgment is not a default judgment even if one party is absent."

A5-6. Division III's mandate that *Stanley* controls in this instance is contrary to the decision in *Stanley*.

The legal issue in *Stanley* was whether the Mandatory Arbitration Rules (MAR) specifically allows for the arbitrator to make an award in the absence of a party after due notice. *Stanley v. Cole*, 157 Wn. App. 873, ¶3-4, *fn.* 2-4, 239 P.3d 611 (2010). The Stanley court was not reviewing a dismissal of an action under CR 12(b)(6). That Court was reviewing a decision of a court made under MAR 5.4 which specifically gives an arbitrator the right to go forward with a hearing to make an award in the absence of one or both parties.

This case does not involve arbitration or the Mandatory Arbitration Rules. The issue here is whether the trial court properly dismissed Zink's claims pursuant to CR 12(b)(6) based solely Benton County's briefing because of Zink's nonattendance at a single hearing for which she received no notice (CP 326-27; 333-34)(Zink Opening 20).The decision in *Stanley* does not authorize a trial court to dismiss an action under CR 12(b)(6) and Division III's opinion otherwise conflicts with this Court's numerous mandates concerning dismissal of an action under CR 12(b)(6). Zink has a right to proper application of the law to her action as all other litigants are given.[1]

Division III's opinion is in conflict with other published Court of Appeals decisions, including its own, which mandate that the facts outlined in the complaint are to be considered true until proven otherwise by the moving party.

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[1] A one-sided argument is hard to lose.

> In reviewing an order granting dismissal under CR 12(b)(6), **the factual allegations of the complaint are considered true.** The motion will be granted only if it appears beyond doubt that the plaintiff can present no set of facts to support a claim for relief. Lawson v. State, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986).

Woodrome v. Benton County, 56 Wn. App. 400, 403, 783 P.2d 1102 (1989)(emphasis added). *Perry v. Rado*, 155 Wn. App. 626, ¶14, 230 P.3d 203 (2010)(review denied). Zink's 53 page complaint (CP 1-53) clearly outlines factual allegations with supporting evidence. All of these factual allegations are to be considered true. Division III declined to review Zink's complaint.

Despite the lengthy history of Supreme Court decisions construing the proper application of CR 12(b)(6) , Division III upheld the trial court's dismissal based on a decision interpreting the language in MAR 5.4. Division III's decision is in conflict with this Court's mandate that a CR 12(b)(6) motion should be granted only sparingly and with great care. *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988); *Halvorson v. Dahl*, 89 Wn.2d 673, 675, 574 P.2d 1190 (1978).

As mandated by this Court, the order dismissing Zink's action pursuant to CR 12(b)(6) required the court to find that Benton County had proven beyond a doubt that no set of facts entitle the Zinks to their requested relief. The trial court's oral decision and written order does not include any language indicating that the court made these findings. Division III's decision that "the trial court's ruling was justified in both law and fact is in conflict with well-established case law.

3. **The Decision of Division III is in Conflict With Supreme Court and Appellate Court Decisions Concerning the Lack of Reviewable Facts or Conclusions Supporting a Trial Court's Order Pursuant to Civil Rule 52(a)(1)**

The trial court did not enter any reviewable findings or conclusions supporting its order on dismissal. Despite the lack of findings and conclusions, Division III opined that Zink was not entitled to her requested relief since she did not brief the merits of her claims. Division III's opinion is in conflict with well-established court rules and case law outlining the mandatory requirements courts must follow in entering findings or conclusions to support an order of dismissal.

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and **any dismissal not provided for in this rule**, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, **operates as an adjudication upon the merits**.

CR 41(b)(3)(emphasis added). As previously argued, the dismissal of Zink's claims were required to be determined on the facts submitted in the complaint. Further, under CR 52(a)(1) the trial court was required to submit written findings and conclusion in support of its order of dismissal.

> In all actions tried upon the facts without a jury or with an advisory jury, **the court shall find the facts specially and state separately its conclusions of law**. Judgment shall be entered pursuant to rule 58 and may be entered at the same time as the entry of the findings of fact and the conclusions of law.

CR 52(a)(1)(emphasis added). This Court has interpreted CR 52(a)(1) to mandate that clear and separate findings and conclusions must be entered to support an order of dismissal.

> CR 52(a) requires that facts be found "specially" and conclusions stated "separately." CR 52(a)(4) provides for a "written opinion or memorandum of decision" which includes findings of fact and conclusions of law. ... Separate written findings of facts and conclusions signed by the judge were required.

DGHI Enterprises. v. Pacicif Cities, Inc., 137 Wn.2d 933, 951, 977 P.2d 1231 (1999). In this case the trial court did not enter any findings or conclusions to support its order of dismissal allowing for review. Rather he trial court merely stated that:

> Based on the arguments of counsel, as well as the pleadings filed to date, the Court finds that Plaintiffs' Complaint fails to state a claim against Defendants upon which relief can be granted.
>
> Based on the above findings, It Is Ordered:
>
> 1. Defendants' motion is granted.
>
> 2. The action is dismissed without prejudice

(CP 106-107). The trial court did not set forth any findings or conclusion upon which Zink could request review of.

> We require findings and conclusions in part to allow appellate scrutiny of the trial court's decision in uncontested cases. CR 55(b)(2). **This protects the integrity of the justice system because it allows the reviewing court (and others) to evaluate the factual and legal basis for the trial court's decision.** "Judges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role for the trial court ..." Lenzi, 140 Wn.2d at 281.

Little v. King, 160 Wn.2d 696, ¶25, 161 P.3d 345 (2007). The only legal reasons given by the trial court for dismissing Zink's claims are found in the transcript of

the hearing held on December 4, 2015 (RP (December 4, 2015) 1-10) and in the trial court's order denying reconsideration (CP 325-28).

In both of these court records, the trial court bases its decision to dismiss on Zink's failure to attend a single hearing held on December 4, 2017 and did not address the issue of whether Benton County proved beyond doubt that Zink could prove no set of facts, consistent with her complaint, for which she was entitled to relief.

> **[I]t is the policy of the law that controversies be determined on the merits rather than by default**.'" Griggs v. Averback Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (alteration in original) (quoting Dlouhy, 55 Wn.2d at 721). But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules. See Griggs, 92 Wn.2d at 581. **The fundamental principle when balancing these competing policies is "'whether or not justice is being done.**'" Id. at 582 (quoting Widicus v. Sw. Elec. Coop., Inc., 26 Ill. App. 2d 102, 109, 167 N.E.2d 799 (1960)). **This system is flexible because "'[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.**'" Griggs, 92 Wn.2d at 582 (quoting Widicus, 26 Ill. App. 2d at 109).

Little v. King, 160 Wn.2d 696, ¶16, 161 P.3d 345 (2007)(emphasis added). The trial court did not set forth any facts and dismissed Zink's claims based on a default judgment; failure to attend a hearing.

Division III's determination that Zink failed to properly brief her claims, when the record clearly shows that the trial court did not allow for such a review, is in conflict with well-established case law and violates Zink's right to due process.

4. **Division III's Opinion Involves a Significant Question of Law Under the Constitution of Washington State and the United States Constitution**

Division III's opinion and mandate upholding the dismissal of Zink's claims without justification and adherence to mandatory court rules violates Zink's constitutional right to equal protection and due process under the United States Constitution, Amendment 14, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

(*Id.*)(emphasis added). As this is a tort claim for damages, Division III's opinion also violates our Washington State Constitution.

> No person shall be deprived of life, liberty, or property, without due process of law.

Washington State Constitution, Article 1, § 3. Division III opined that there are no court rules requiring Benton County to notify Zink of the hearing or secure a judge to hear the motion prior to the late afternoon one day prior to the scheduled hearing (A6-7). While it may be a case of first impression as to whether a judge can be assigned at the last minute to hear a motion to dismiss,[2] clearly Benton

[2] It is illogical to interpret this Court's mandate that dismissal under CR 12(b)(6) should be granted only sparingly and with great care (*Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) to allow a trial judge to be assigned at the last minute to hear a motion to dismiss (RP (December 4, 2015) 7:12-15).

County Superior Court's Local Civil Rules (LCR) do mandate that litigants receive proper notice of a hearing and a special set hearings not heard on the regular civil docket.

Principles of statutory construction apply to the interpretation and application of court rules. Statutory construction does not allow an interpretation that creates a conflict among rules or renders a rule superfluous. Rather, interpretation of court rules is required to be rational and sensible where no word, sentence or clause or sentence is superfluous or rendered void or insignificant. *State v. Thomas*, 121 Wn.2d 504, 512, 851 P.2d 673 (1993). The language in local court rules must be given its plain meaning according to English grammar usage and, when a rule is clear, cannot be construed contrary to its plain declaration. *State v. Bernhard*, 45 Wash. App. 590, 598, 726 P.2d 991 (1986), review denied, 107 Wash. 2d 1023 (1987); *State v. Raper*, 47 Wash. App. 530, 536, 736 P.2d 680, review denied, 108 Wn. 2d 1023 (1987).

Under Benton County LCR a party motioning the court is required to note the motion for a hearing on the civil court docket no less than five days prior to the day the attorney desires it to be heard. LCR 7(b)(7)(A).[3] Benton County's notice of hearing was submitted to the clerk for an over 10 minute hearing to be placed on the motion docket for December 4, 2015 (CP 133). Benton County's motion was set on the "regular motion docket" for December 4, 2015.

Pursuant to LCR, if the matter is stricken from the motion docket, the moving party is required to submit a new note for motion docket, which must be filed with

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[3] Appendix C

the Clerk and the nonmoving party. LCR 7(b)(7)(F)(iv). The judge assigned to the motion docket for December 4, 2015 was recused (CP 101-02). Because the judge presiding on the motion docket for December 4, 2015, could not hear Benton County's motion, the motion was stricken from the motion docket and Benton County was required to provide the nonmoving party, Zink, with a new notice setting the motion on a special set calendar (CP 147).

Pursuant to LCR, Zink was entitled to notice, no later than five days before the scheduled hearing of a special set once Benton County's motion was stricken from the regular civil docket. To read the requirements of LCR 7(b) to mean that Benton County had met it's obligation in early November when the motion could not be heard by the presiding judge, is omitting clear language spelled out in the court rules.

Division III opined that Zink had proper notice of the hearing in early November and no further notification was needed (A6). Pursuant to LCR 7(b)(7)(B), Benton County's notice specified that they were requesting over 10 minutes for their motion to dismiss. LCR 7(b)(7)(C)(iii) only allows the court clerk to schedule three hearings over ten minutes in length on any motion docket.

> **The clerk shall not allow more than a total of** three (3) summary judgment and **three (3) over-ten-minute hearings** to be confirmed for any one date.

(*Id.*)(emphasis added). Because the clerk may only schedule three over-ten-minutes hearings on any one docket, Benton County was required to confirm that it's motion was scheduled no later than three days before the date of the hearing.[4]

> The moving party shall confirm with the clerk that summary judgment and over-ten-minute hearings will be heard on the date set during the following time periods:
>
> i. Summary judgment and over-ten-minute hearings shall be confirmed in Benton County no sooner than Monday at 8:00 am and no later than Tuesday noon of the week in which the motion is noted for hearing.

LCR 7(b)(7)(C)(i)(emphasis added). Benton County was required to contact the court clerk no earlier than 8:00 a.m. on November 30, 2015, and no later than noon on December 1, 2015, to confirm that the hearing was not stricken. This assures that the parties have adequate notice the hearing is going forward on the regular motion docket. Division III misinterprets the Benton County Local Court Rules and Benton County's motion to dismiss could not have been confirmed in early November.

Division III opined that pursuant to LCR 7(b)(1)(B) and LCR 5(c)[5] Zink was required to file and serve a response to Benton County's motion to dismiss (A7) no later than noon the day prior to the scheduled hearing. While at the same time acknowledging that the hearing was not scheduled before a judge until the late afternoon the day prior to the scheduled hearing (A7; RP (December 4, 2015)

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[4] The Benton County Civil Motion Docket is held on Fridays at 1:30 p.m..

[5] Appendix B

7:12-13). While Division III is correct that Benton County's notice had nothing to do with the assignment of a judge to hear their motion, the significance of Zink's argument was that the judge was not assigned until after Zink's response was due.

Benton County uses an electronic bench copy submission system. All bench copies are required to be uploaded by the parties absent access to a computer (LCR 5(c)). Briefs filed for the motion docket on a given day go to the presiding judge who will be hearing the motion on the motion docket. If another judge is assigned to hear a motion on a different docket (special set), the party uploading the required bench copy must specify that the briefing is for a special set docket and not set for the regular motion docket in order for the judge hearing the motion to receive the bench copy. Here, the only option available to Zink was to upload her response to the regular motion docket since no judge was assigned to hear Benton County's motion at the time the response was due; by noon on December 3, 2015 (A7).

Benton County's motion was stricken from the motion docket on November 5, 2015, when Zink filed an affidavit of prejudice (CP 101-02). Pursuant to LCR 7(b)(7)(F)(iv), Benton County was required to provide Zink with notice that the hearing was rescheduled to allow time to prepare. If Benton County wanted their motion heard after it was stricken from the motion docket, Benton County had an obligation to note their hearing pursuant to Benton County Superior Court rules; including verification that a judge had been assigned to hear the motion with adequate time for review prior to the hearing.

Division III's opinion that the rules established by Benton County do not apply to Zink is erroneous and a violation of Zink's due process rights to equal justice in the judicial system.

VI. CONCLUSION

Division III's opinion conflicts with numerous Supreme Court and published Appellate Court decisions and violates Zink's right to equal treatment in our judicial system. These issues are of great public interest. Litigants should be assured that the rules of the court apply equally to all and they will receive the same treatment as all others. Here, Division III has reviewed the requirements of CR 12(b)(6) to allow a trial court to dismiss a cause of action for failure to attend a hearing under MAR 5.4. Although Division III's opinion is unpublished, I could still affect future cases as parties have the ability to request publication in the future. All four of the requirements of RAP 13.4(b)(1-4) necessary to obtain review by this Court are met and this issue is of substantial public importance, Zink respectfully requests this Court to take review, reverse the Court of Appeals and remand this case back to the trial court for proper application of CR 12(b)(6) based on the facts as outlined in Zink's complaint at a hearing where proper notice has been given.

RESPECTFULLY SUBMITTED this 11th day of May 2017.

By Donna K Zink
Donna Zink
Pro se

VII. CERTIFICATE OF MAILING

I, Donna Zink, declare that on May 11, 2017, I did send a true and correct copy of Appellant Zink's request for "*Petition for Discretionary Review to Supreme Court*" to the following parties via e-mail to the following e-mail Service Addresses:

- RYAN LUKSON
  WSBA #43377
  Benton County Prosecuting Attorney
  7122 W. Okanogan Place, Bldg. A
  Kennewick, Washington 99336
  Phone: 509-735-3591/Fax: 509-222-3705
  E-mail: Ryan.Lukson@co.benton.wa.us.

Dated this 11th day of May, 2017.

By _____
Donna Zink
Pro Se

Appendix A

FILED
MARCH 16, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DONNA ZINK and JEFF ZINK, wife and husband, and the marital community composed thereof, Appellants, v. BENTON COUNTY, a Washington Municipal Corporation; ANDREW K. MILLER, in his capacity as Benton County Prosecutor; RYAN BROWN, in his capacity as Benton County Chief Deputy Prosecuting Attorney; RYAN LUKSON, in his capacity as Benton County Deputy Prosecuting Attorney; SANDI MAINE-DELEPIERRE, in her capacity as Benton County Prosecutor's Department Public Records Officer; STEVEN KEANE, in his capacity as Benton County Sheriff; BOBBI ROMINE, in her capacity as Records Sergeant Benton County Sheriff's Department, Respondents.	)	No. 34150-0-III UNPUBLISHED OPINION

PENNELL, J. — Donna and Jeff Zink appeal the trial court's dismissal of their claims against Benton County and several of its officials and employees (collectively "the County"). We affirm.

BACKGROUND

Donna Zink and her husband Jeff Zink sued the County after notification was sent to various sex offenders that Ms. Zink had submitted a public records request seeking level one sex offender registration forms and information. The notification had included a copy of Ms. Zink's public records request, which contained her name and e-mail address. The Zinks' complaint against the County alleged various civil rights violations, violations of the Public Records Act, chapter 42.56 RCW, harassment, infliction of emotional distress, and loss of consortium.

The Zinks filed their lawsuit on October 6, 2015. On October 13, the County e-mailed Ms. Zink asking if she would agree to electronic service of pleadings in the case. Ms. Zink agreed. On October 29, the County noted a motion to dismiss the Zinks' complaint and concurrently filed an affidavit of prejudice against Judge Bruce Spanner. A hearing on the County's motion was set for November 6. But on October 20, Ms. Zink e-mailed the counsel for the County stating she was not available on November 6, and a number of other days, because of previously scheduled plans. The County's counsel agreed to continue the hearing date to accommodate Ms. Zink's schedule, and the hearing was reset to December 4 at 1:30 p.m. The Zinks confirmed their availability for the December 4 hearing and an amended notice of hearing confirming the new hearing date

was served and filed on November 2.[1] Shortly thereafter the Zinks filed an affidavit of prejudice against Judge Vic VanderSchoor.

Judge VanderSchoor was scheduled to serve as civil presiding judge during the months of October, November and December 2015. In light of the Zinks' affidavit of prejudice, on November 6 counsel for the County e-mailed court administration to ask whether the motion to dismiss could still be heard on December 4. An assistant court administrator responded by instructing the County's counsel to keep the hearing scheduled for December 4 at 1:30 p.m., and she would "assign [it to] a judge, other than Spanner, VanderSchoor, and Swisher." Clerk's Papers (CP) at 140.

On November 25, Ms. Zink e-mailed the County's counsel, inquiring as to whether the December 4 hearing date could be retained given Judge VanderSchoor's status as civil presiding judge. The County's counsel responded that he had already anticipated the issue and had confirmed with court administration that a different judge would be available for the hearing. Ms. Zink responded asking which judge had been assigned to the case, and also asserted her belief the County had "more access to the court" than the Zinks did. CP at 288. Counsel for the County replied he was not aware who the hearing

[1] The amended note for hearing does not specify which superior court judge would preside over the December 4 hearing.

judge would be and provided Ms. Zink with a copy of the e-mail exchange with court administration. This was the last contact between the parties until the morning of December 4.

Counsel for the County contacted Ms. Zink on the morning of December 4 to ask if Ms. Zink had filed a response to the dismissal motion. Ms. Zink replied via e-mail asserting that since she never received notice the hearing was specially set, she did not know who the judge was and could not electronically upload her response. Ms. Zink then stated she was "not going to waste time on a case that won't go forward," and suggested the County reset the hearing to accommodate her or wait until a different judge is available. CP at 290. The County's counsel replied that he intended to go forward with the hearing that afternoon and provided a second copy of the amended notice setting the hearing for December 4 at 1:30 p.m. Ms. Zink responded that she was entitled to notice of a special setting and the lack of notice required the hearing to be reset again. The County's counsel replied by recommending Ms. Zink appear at the hearing to make her argument about lack of notice to the judge. Ms. Zink rejected the suggestion and stated she would not be at the hearing. She asserted the long drive to the courthouse was overly burdensome and there was no need for the hearing since it was obvious she had not been given the required notice. There were no further e-mails between the parties.

The Zinks did not appear at the December 4 hearing, which was held before Judge Alexander Ekstrom. Counsel for the County explained to the court why the Zinks were not present and provided it with a copy of the e-mail exchanges with Ms. Zink. Having reviewed the County's motion and memorandum in support thereof, Judge Ekstrom did not take oral argument on the merits of the County's motion and granted it based on the arguments in the briefing. An order dismissing the case was entered the same day. The Zinks filed a motion for reconsideration asserting procedural irregularities denied them a fair hearing, and the court erred in dismissing the claim pursuant to CR 12(b)(6). The motion was denied. The Zinks appeal.

ANALYSIS

The arguments on appeal are purely procedural. The Zinks have never submitted any legal authority opposing the merits of the county's dismissal motion, either in this court or the trial court. Instead, the Zinks focus on their nonappearance at the December 4 hearing and claim the trial court dismissed their complaint solely on this basis.

The Zinks' understanding of the superior court proceedings is incorrect. The record clearly shows the trial court relied on the authority set forth in the County's briefing and granted the motion to dismiss on the merits. This was sufficient. *See Stanley v. Cole*, 157 Wn. App. 873, 880, 239 P.3d 611 (2010) ("When a tribunal considers

evidence, the resulting judgment is not a default judgment even if one party is absent."). Indeed, our review of the County's briefing in support of the dismissal motion confirms the trial court's ruling was justified in both law and fact.[2]

The Zinks' arguments with respect to the trial court's ruling on their motion for reconsideration meet a similar fate. We review the trial court's denial of a motion for reconsideration for abuse of discretion. *Kleyer v. Harborview Med. Ctr. of the Univ. of Wash.*, 76 Wn. App. 542, 545, 887 P.2d 468 (1995). There was no abuse of discretion in this case.

In their motion for reconsideration, the Zinks argued that procedural irregularities prevented them from participating in the court process and receiving a fair hearing. The record shows otherwise. The Zinks had ample notice of the December 4 hearing date. Under the local rules, a new notice of hearing is only required if a hearing is struck and rescheduled or otherwise continued. *See* Benton/Franklin Superior Court Local Court Rule (LCR) 7(b)(7)(F). That is not what happened. The December 4 hearing date was confirmed in early November and it remained unchanged after that point. Nothing in the court's local rules required notice that the scheduled hearing would take place before a

[2] Because the Zinks have not briefed the merits of their legal claims, we decline to set forth a detailed written analysis in this opinion.

specially set judge. While Judge Ekstrom did not receive his assignment to the Zinks' case until the day before the December 4 hearing, the assignment process had no bearing on the motion setting.

The fact that the Zinks did not know the identity of the assigned motion judge did not prevent them from filing a response to the County's dismissal motion. Under LCR 7(b)(1)(B) and 5(c), the Zinks were required to serve and file their response to the County's motion, and either electronically submit or otherwise deliver a bench copy of it to court administration, by noon at least one day prior to argument. LCR 5(c) provides one court-wide address for electronic submission of bench briefs. There is no procedure for submitting pleadings related to motions directly to an individual judge. Accordingly, the Zinks had no excuse for failing to comply with the rules.

We are unpersuaded by the Zinks' complaint that Judge Ekstrom should have been assigned to hear the motion to dismiss prior to December 3. Had the Zinks believed more time was necessary to review the merits of their complaint, they could have appeared at the December 4 hearing and requested a continuance. Instead, the Zinks deliberately decided not to attend the hearing. The fact the Zinks lived 30-40 minutes from the courthouse did not excuse their absence. Having chosen to file a lawsuit in Benton County Superior Court, the Zinks were expected to make the effort to travel to the

courthouse as necessary in order to prosecute their case.

The Zinks' final claim is that they were denied equal access to the courts in violation of the appearance of fairness doctrine and the equal protection clause.[3] Neither contention has been adequately preserved for review. A claim under the appearance of fairness doctrine must be raised promptly with the trial court as soon as a basis for recusal is known. *State v. Blizzard*, 195 Wn. App. 717, 725, 381 P.3d 1241 (2016), *review denied*, 187 Wn.2d 1012 (2017). This was not done. The Zinks were aware of the County's communications with court administration prior to the December 4 hearing.[4] Yet no action was taken. Even when the Zinks filed their motion for reconsideration, they did not seek recusal or relief under the appearance of fairness doctrine. Given these circumstances, review on appeal is unwarranted. *Id.* at 725-26. With respect to the equal protection claim, the Zinks' contentions are not accompanied by any supporting legal authorities or argument. We therefore decline to address this aspect of their appeal. *See Litho Color, Inc. v. Pacific Emp'rs Ins. Co.*, 98 Wn. App. 286, 297, 991 P.2d 638 (1999) (an argument will not be considered if it is inadequately briefed); *see also* RAP 10.3(a)(6).

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[3] U.S. CONST. amend. XIV, § 1.

[4] Our decision should not be read to suggest that the County's e-mails to court administration regarding scheduling was improper.

ATTORNEY FEES AND COSTS

Because the Zinks have not prevailed on appeal, their request for attorney fees and costs is denied.

CONCLUSION

The trial court's order of dismissal is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Korsmo, J.

Appendix B

Benton/Franklin Superior Court

Local Civil Rule 5
BRIEFS, PROPOSED ORDERS, AND ELECTRONIC SERVICE

(a) Electronic Service. The Court and Clerk may transmit to all attorneys or documents electronically, via e-mail or other process. Unless an attorney provides the Court and Clerk will send documents to the electronic mailbox address shown on Association online Attorney Directory. The Court or Clerk may electronically trans other documents to a party who has filed electronically or has agreed to accept ele Court, and has provided the Clerk the address of the party's electronic mailbox. I all attorneys and the filing or agreeing party to maintain an electronic mailbox su electronic transmissions of notices, orders, and other documents. Parties are remi CR5(b)(7), a party may serve pleadings electronically on another party only with th An optional form Agreement to Accept Electronic Notification is available on the Cc

(b) Briefs. All motions, brief, declarations, affidavits, and other supporti pertaining to trials, summary judgements motions, lower court appeals and appeals f agencies (except the record transferred by the agency) and any other motions, and c hearings, such as trial management reports, proposed findings of fact and conclusic motions and sentencing position statements in criminal matters, and guardian ad lit (including criminal and domestic relations), shall be served and filed in the cause

(c) Bench Copies. Unless a party does not have access to a computer or the i such documents, as well as settlement positions statement in civil and domestic cas electronically via the internet at http://www.benton-franklinsuperiorcourt.com/subm http://motion.co.franklin.wa.us/. Parties without access to a computer and the int copies to the Court Administrator at the Benton County Justice Center. All bench c later than noon one court day prior to the scheduled hearing, proceeding or trial. settlement position statements, shall be submitted to the Court unless a copy has b opposing counsel or party if unrepresented if they are entitled to notice by law.

Bench copies submitted electronically are deleted from the system forty-five d hearing. Bench copies submitted on paper are destroyed five (5) court days after t counsel requests copies be returned, with return postage arranged, or unless Court the new hearing date. When hearings are continued, the parties shall amend the hea bench copies submitted electronically.

If a party fails to submit bench copies as set forth above the Court may conti and enter other orders as may be appropriate.

Bench copies of the following documents should not be electronically submitted for dockets, transmittal letters, proposed statements of defendant on plea of guilt sentences and proofs of service (unless service is at issue), and briefs and suppor summary judgment motions in state paternity cases need not be submitted.

(d) Proposed Orders. The moving party and any party opposing the motion shal order. Electronic copies shall be submitted under paragraph (c), above. The propc shall be filed with the clerk and an original order shall be presented at the heari

[Adopted effective April 1, 1986; Amended effective September 1, 2000; September 1, September 1, 2003; September 1, 2005, September 1, 2007, September 1, 2009, Septemb 2012, September 2, 2014, September 1, 2015, September 1, 2016]

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Appendix C

Benton/Franklin Superior Court

Local Civil Rule 7
PLEADINGS ALLOWED; FORM OF MOTIONS

(b) Motions and Other Papers.

(1) Memorandum of Authorities and Affidavits Required.

(A) The moving party shall serve and file with his or her Motion a brief writt and a brief containing reasons and citations of the authorities on which he or she the consideration of the facts not appearing of record, he or she shall also serve affidavits and photographic or other documentary evidence he intends to present in copies shall be submitted as provided in LCR 5.

(B) Each party opposing the Motion shall at least by noon, one (1) day prior t counsel for the moving party and file with the Clerk a brief containing reasons and upon which he relies, together with all affidavits and photographic or other docume material. Bench copies shall be submitted as provided in LCR 5.

(2) Necessary Provision in Pleadings Relating to Supplemental Proceedings and Contempt. In all supplemental proceedings wherein an order is to be issued requirin a party to be examined in open court, and in orders to show cause for contempt, the following words in capital letters:

> YOUR FAILURE TO APPEAR AS ABOVE SET FORTH AT THE TIME, DATE, AND PLACE THEREOF WILL CAUSE THE COURT TO ISSUE A BENCH WARRANT FOR YOUR APPREHENSION AND CONFINEMENT IN JAIL UNTIL SUCH TIME AS THE MATTER CAN BE HEARD OR UNTIL BAIL IS POSTED.

No bench warrant will be issued in such cases for the apprehension of the cite has been omitted.

(3) Counsel Fees. Appointed counsel submitting motions for fixing or payment that the Court fix fees in any other case (except for temporary fees in domestic re itemize their time, services rendered, or other detailed basis for the fees request thereof to the motion.

(4) Action Required by Clerk. All documents filed with the Clerk, other than the motion or trial dockets (see LCR 40) which require any action (other than filin

motion in the caption specifying the nature of the document the words: "CLERK'S ACT

(5) Motion to Shorten Time. All motions to shorten time must be in writing and affidavit that (a) states exigent circumstances or other compelling reasons why the shortened time and (b) demonstrates due diligence in the manner and method by which notice, was provided to all other parties regarding the presentation of the motion moving party, after showing due diligence, has been unable to notify all parties of it is within the judicial officer's discretion to proceed with the motion to shorte shall indicate on the order shortening time the minimum amount of notice to be prov which, barring extraordinary circumstances as set forth in the declaration or affid shall not be less than 48 hours. The court file must be presented along with the m declaration or affidavit, and the proposed order to the judicial officer considerin

(6) Document Format. Documents prepared for a judge's signature must contain text on the signature page.

(7) Hearing of Motion Calendar.

(A) Note for Motion Docket. Any attorney desiring to bring any issue of law o the Clerk and serve on all opposing counsel, not later than five (5) court days pri attorney desires it to be heard, a note for the motion docket which shall contain t cause number, a brief title of the cause, the date when the same shall be heard, th the name or names of each attorney involved in the matter, the nature of the motion be subscribed by the attorney filing the same and shall bear the designation of who The foregoing provisions shall not prohibit the hearing of emergency motions at the

(B) Over 10 Minutes for Hearing. If the moving party expects the motion to ta to argue by all sides collectively, the movant shall designate on the note for moti is "over 10 minutes."

(C) Confirmation of Summary Judgment and Over-Ten-Minute Hearings. The moving the clerk that summary judgment and over-ten-minute hearings will be heard on the d time periods:

i. Summary judgment and over-ten-minute hearings shall be confirmed in Benton Monday at 8:00 am and no later than Tuesday noon of the week in which the motion is

ii. Summary judgment and over-ten-minute hearings shall be confirmed in Frank Tuesday at 8:30 am and no later than Thursday noon of the week preceding the week i for hearing. Confirmations may be by telephone, or by e-mail to the addresses state

iii. The clerk shall not allow more than a total of three (3) summary judgmen hearings to be confirmed for any one date. The maximum for such motions may be chan

(D) Removal of Motion. If the motion is not so served, mailed, and filed the C strike the same from the calendar.

(E) Service of Notice. The motion will not be heard unless there is on file pr the attorney for the opposing party or there is an admission of service by opposing

(F) Continuance or Striking of Noted Motions by Parties. A matter noted on the continued pursuant to the following:

i. The moving party may strike or continue a motion at any time without cause parties. Sanctions may be imposed if the opposing party's appearance at the hearin due diligence of the moving party.

ii. Upon a showing of cause, the Court, in its discretion, may grant the non-m continuance.

iii. The party striking any matter may give notice to the non-moving parties by to provide actual notice. The clerk may be notified either by written notice or by to the Franklin County Clerk may be emailed to the following address: civilclerk@c cases; and domesticclerk@co.franklin.wa.us for domestic cases. Notice to the Bento to the following address: clerk@co.benton.wa.us.

iv. If the matter is stricken and the moving party desires a hearing, a new not filed with the Clerk in accordance with section (A), above. Except for matters con note for docket is required for motions that are continued.

(G) Calling Docket - Priority for Pro Bono Counsel. The causes on the civil do be called in order, and the moving party, if no one appears in opposition, may take proper proof of notice, unless the Court shall deem it unauthorized. In order to e pro bono legal representation, all motions, where one or both parties are represent at the request of the pro bono attorney be given priority on the docket. Such prio reference as to the reason why. All parties are to appear in person.

(H) Continuances by Court. Any motion or hearing may be continued by the Court or set down by the Court for hearing at another specified time, and the Court may a may be necessary to expedite the business of court.

(I) Frivolous Motions. Upon hearing any motion, if the Court is of the opini frivolous, or upon granting a continuance of any matter, terms may be imposed by th filing such motion, or against the party at whose instance such continuance is gran

(J) Ex Parte - Notice to Opposing Counsel. Lawyers should not ask the Court fo proper notice to opposing counsel, if counsel has appeared either formally or infor temporary restraining orders and orders to show cause in domestic relations cases, matters. (See Rule 65.)

(K) Decisions Without Oral Argument. Upon agreement of the parties, or upon re may be determined without oral argument. Matters may be noted for decision without dates and times established for regular calendars. The moving party shall certify every party has consented to determination without oral argument.

(L) Discovery Motions. The Court will not entertain any Motion or objection wi Rules 26, 27, 30, 31, 33, 34, 35 or 36, Civil Rules for Superior Court unless it af counsel have met and conferred with respect thereto. Counsel for the moving or obj such a conference. If the Court finds that counsel for any party, upon whom a Moti respect to matters covered by such rules is served, willfully refused to meet and c

refused or fails to confer in good faith, the Court may take appropriate action to e compliance. In the event of an emergency, the Court will entertain Motion objectio governed by the above rule.

(M) Argument Limitations. Argument on the civil docket shall be limited to (th:

[Adopted Effective April 1, 1986; Amended Effective August 1, 1990; September 1, 20(September 1, 2011,September 1, 2013,September 2, 2014,September 1, 2015, September

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DONNA ZINK - FILING PRO SE

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