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No. 71896-7-I

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

DANIEL M. HARDING,

Appellant,

V.

ARNE O. DENNY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Harding asks this court to agree that the trial court lacked jurisdiction to dismiss his complaint. Contrary to Harding's sole assignment of error, the court had jurisdiction over the parties and the subject matter and its order was not void.

II. ISSUES PRESENTED FOR REVIEW

1. Does a reference to the entity funding the defendant's defense in the introductory clause of a motion to dismiss deprive the court of jurisdiction to grant the motion to dismiss?

2. Is Harding's appeal frivolous and, if so, should the court sanction him for compensatory damages and costs?

III. STATEMENT OF THE CASE

Before filing his complaint against Arne O. Denny, CP 139-14, Harding failed to file a notice of claim with Skagit County. CP 110, 66.

Denny filed a notice of appearance stating that he "does appear in the above entitled action[.]" CP 152-53. Denny signed all of the pleadings, including the Motion to Dismiss and to Award Sanctions to Skagit County, CP 130; the Reply re: Motion to Dismiss, CP 37; the

Supplemental Authorities in Support of Motion to Dismiss, CP 27¹; Cost Bill, CP 150-15; and the Declaration in Support of Cost Bill, CP 147-49.

Denny also appeared before the trial court to argue the motion to dismiss. RP 1 (“The defendant represented himself.”)

Harding sought dismissal of Denny’s motion arguing:

Well, I concur with Your Honor, Your Honor. The plaintiff in this case is an individual - - the defendant in this case is an individual A. O. Denny. And I noticed that when he presented his motion to dismiss he did not present it on his behalf. He presented it as if he was the attorney for Skagit County, and I don’t see that they are a party to this case. So I would dismiss this out of hand because of that.

RP 8.

The court found that “Mr. Denny now moves to dismiss Mr. Harding’s complaint and seeks an award of reasonable attorney fees to Skagit County for bringing another frivolous lawsuit,” RP 11, granted the motion to dismiss, and denied the request for an award of sanctions to Skagit County. CP 8-12. Denny presented the Order, signing it in his personal capacity. CP 12.

Denny explained:

Now, the reason I asked for attorney fees for Skagit County is because basically I work for the Skagit County Prosecuting Attorney. They’re

¹ A page may be missing from this document. The signature page should be CP 28.

supplying, you know, me to defend this case, and you know, the attorney would normally get the attorney fees' the fees don't come to me, which is why I asked for it to be done that way. I don't want the money for myself.

RP 16.

IV. ANALYSIS

Harding's assignment of error presents an extremely narrow issue. He asserts that a non-party filed the CR12(b) motion to dismiss and, as a result, the court lacked jurisdiction to dismiss his complaint.

This argument is unfounded and his appeal is frivolous.

A. The superior court had jurisdiction to issue its order dismissing Harding's complaint as frivolous.

"A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved." City of Seattle v. May, 171 Wn.2d 847, 861, 256 P.3d 1161 (2011).

Harding argues that the court lacked jurisdiction because the "COMES NOW" introduction to Denny's Motion to Dismiss provided:

COMES NOW Skagit County on behalf of defendant A. O. Denny and moves the court for an order dismissing Harding's complaint for failure to state a claim upon which relief may be granted. Skagit County also requests an award of sanctions for having to respond to Harding's frivolous complaint.

CP 115. In focusing solely on this “COMES NOW” introduction, Harding willfully ignores the facts that establish the trial court’s jurisdiction over himself, Denny, and the motion to dismiss.

For example, Harding ignores the footnote accompanying the introduction, which explains why Skagit County is mentioned in the brief’s introduction:

Denny is a Skagit County officer, a deputy prosecuting attorney assigned to the office of the Skagit County Prosecuting Attorney. As such, any judgment for damages would be paid by Skagit County and Denny is entitled to representation by the county. *See* SCC 2.20.030 (“Skagit County may provide legal services for the defense of any of its officers, employees or volunteers when a lawsuit against them arises out of an official act or omission[.]”) Thus, Skagit County has authorized the defense of Denny at county expense. *See* Decl. Kiesser, ex. 10

CP 115. He also ignores Denny’s Notice of Appearance, CP 152-53, and the fact that Denny signed every pleading, including the Reply re: Motion to Dismiss, which provided:

Defendant has moved for summary judgment on several grounds, none of which involve the merits of Harding’s complaint.

CP 29 (emphasis added).

In conflict with his reliance on the COMES NOW introduction, Harding does not dispute the trial court’s personal jurisdiction over

himself or Denny, CP 136-38, that both parties were before the court on April 21, 2014, for argument about the motion to dismiss, RP 3, or that the trial court had subject matter jurisdiction.

The trial court was not confused. It recognized that the introduction to the Motion to Dismiss was framed to justify an award of attorney fees under CR 11 directly to Skagit County, which undertook Denny's defense:

Next, Mr. Denny argues that Skagit County should be awarded attorney fees against Mr. Harding in the present case. This relief must be denied for the simple reason that Skagit County is not a party to this case. It is elementary that the Court has no authority to order fees to a nonparty, and this is the end of that matter as it presently stands.

RP 14. Thus, the trial court distinguished between Denny's effort to acquire reimbursement of litigation costs for Skagit County and his role as a party-defendant, clearly finding that the motion to dismiss was Denny's:

I'm prepared to rule in this matter. Mr. Harding has sued Mr. Denny, and Mr. Denny now moves to dismiss Mr. Harding's complaint.

RP 10.

Harding offers no authority to support his argument that the naming of a non-party in the introduction of a motion overrides the trial court's clear jurisdiction over the parties and issues before it. Dike v. Dike, 75 Wn.2d 1, 448 P.2d 490 (1968) , cited by Harding, actually

supports the trial court's authority to make reasonable determinations regarding jurisdiction:

While a court may be expressly granted the incidental powers necessary to effectuate its jurisdiction, a grant of jurisdiction, in the absence of prohibitive legislation, implies the necessary and usual incidental powers essential to effectuate it, and, subject to existing laws and constitutional provisions, every regularly constituted court has power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, and for the enforcement of its judgments and mandates. (Footnotes omitted.) 21 C.J.S. *Courts* § 88, p. 136 (1940).

Dike v. Dike, 75 Wn.2d at 4-5. Mitchell v. Kitsap County, 59 Wn. App. 177, 797 P.2d 516 (1990), cited by Harding at page 6 of his Appellate Brief, does not support Harding either. The Mitchell plaintiffs did not agree in writing to a trial by a judge pro tempore as required by RCW 2.08.18, which lack of consent deprived the judge pro tempore of jurisdiction to hear the dispute. Mitchell v. Kitsap County, 59 Wn. App. at 181. No similar law applies here.

Because Harding fails to support this argument with reasoned analysis or relevant authority and ignores controlling facts, his argument should not be considered by the court. See Westmark Development Corp. v. City of Burien, 140 Wn. App. 540, 166 P.3d 813 (2007) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit

judicial consideration.”) *citing* Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997). *Also see* Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (Where a defendant fails to support an argument with citation to relevant facts in the record, the court will not consider the issue.)

The trial court had jurisdiction to enter its order dismissing Harding’s complaint. Harding does not establish otherwise.

B. Harding should be sanctioned for pursuing a malicious and unfounded appeal.

Denny requests reasonable attorney fees and costs under RAP 18.9(a) for having to respond to a frivolous appeal.

The court will dismiss review of a case “if the application for review is frivolous, moot, or solely for the purpose of delay.” RAP 18.9(c). The court may order a party who uses the Rules of Appellate Procedure “for the purpose of delay, files a frivolous appeal . . . to pay terms or compensatory damages to any other party[.]” RAP 18.9(a).

An appeal is frivolous when, after considering the record and resolving all doubts in favor of the appellant, there are no reasonably debatable issues. Tiffany Family Trust Corp. v. City of Kent, 119 Wn. App. 262, 275, 77 P.3d 354 (2003), *aff’d*, 155 Wn.2d 225, 119 P.3d 325

(2005). An appeal is moot if a court cannot grant effective relief. A moot case should not be considered by the court. State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

Harding's complaint is founded on an allegation of "false representation" that took place in a prior proceeding, before another court, with different parties, where Denny served as a deputy prosecuting attorney. Denny moved the court to dismiss under CR12(b)(6) on grounds that Harding does not have a civil cause of action for the alleged fraud. See CP 122 ("Harding alleges that Denny made 'numerous false representations' to the Skagit County Superior Court in a cost bill and declaration filed in a civil action that was adjudicated by the Skagit County Superior Court.") Denny supported his motion with citation to relevant authority, including W. G. Platts v. Platts, 73 Wn.2d 434, 440, 438 P.2d 867 (1968) ("Perjury is, of course, a public offense and punishable in criminal proceedings, but from earliest times the giving of false testimony has not been treated as a wrong actionable in civil proceedings.")

Harding offered no authority to the Island County Superior Court to dispute this controlling precedent. CP 43-64. Similarly, he fails to offer this court any analysis or citation to authority or facts that could reverse the trial court's conclusion that "Harding[] cannot maintain a civil cause

of action against the prevailing attorney in a separate matter, with different parties, that was decided before the Skagit County Superior Court for an alleged misrepresentation before that court.” CP 11. Harding’s failure to do so necessarily concedes that his complaint is, as was found by the trial court, “frivolous and advanced without reasonable cause or inquiry and for improper purposes, including retaliation and delay.” CP 11. *See Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934, (7th Cir. 2011) (The “ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist is as unprofessional as it is pointless,” *citing Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989), *quoting Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987).

In addition to the lack of a cause of action, Harding’s appeal is moot. Because he failed to comply with the claim filing requirement under RCW 4.96.010, his complaint is terminally deficient. *See Lewis v. Mercer Island*, 63 Wn. App. 29, 32-33, 817 P.2d 408, *review denied*, 117 Wn.2d 1024, 820 P.2d 510 (1991) (“Compliance [with the notice requirements under RCW 4.96.010] is mandatory, and failure to comply bars a claimant from maintaining an action in court.”)

Despite these fatal errors Harding desires to bring Denny back into court just to redraw the chalk outlines around his complaint. *See Harding’s*

Appellate Brief at 1 (“The Appellant in this case believes in this right [to have his day in Court] and believes it is worth his time, and the time of this Court, to uphold this right.”) Missing from this statement is any cure for the failings of his complaint.

The court should not excuse Harding’s disregard of the law and facts when Denny has twice warned Harding that his complaints were unfounded and frivolous. After Harding filed his complaint against Skagit County, Denny advised Harding:

I encourage you to do the research you should have done before filing your lawsuit. If you look into this with more than a cursory interest, you’ll note other flaws in your theory and litigation.

CP 72-73. After advising Harding that his complaint in this matter – filed against Denny because he obtained sanctions for the frivolous complaint against Skagit County – failed to comply with the State Tort Claims Act and that his remedy was to appeal the earlier decision, Denny advised:

Once again, I encourage you to do the research you should have done before filing your lawsuit. If you look into this with more than the shallow effort you are prone to do when you fly off the handle, you’ll note other flaws in your theory and litigation. You have until next Thursday, March 20, 2014, to voluntarily dismiss your Island County complaint, or I shall file a motion to dismiss [] along with a request for sanctions.

CP 103-04.

Thus, Harding's real goal is blind retaliation and delay. *See* Order at 4 ("Harding's complaint in this matter is frivolous and advanced without reasonable cause or inquiry and for improper purposes, including retaliation and delay.") CP 11.

Appropriate sanctions for Harding's appeal of an unsalvageable complaint so that he may continue an unreasoned vendetta against Denny warrants an award of sanctions. Sanctions "may include, as compensatory damages, an award of attorney fees and costs to the opposing party." Yurtis v. Phipps, 143 Wn. App. 680, 696, 181 P.3d 849 (2008) *citing* Rhinehart v. Seattle Times, Inc., 59 Wn. App. 332, 342, 798 P.2d 1155 (1990).

V. CONCLUSION

For the reasons addressed above, the court should deny Harding's appeal and award sanctions under RAP 18.9.

RESPECTFULLY SUBMITTED this 14 day of August, 2014.

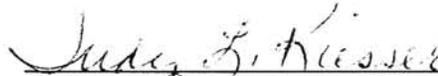
RICHARD A. WEYRICH
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By: 
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DECLARATION OF DELIVERY

I, Judy L. Kiesser, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Daniel Harding, 2108 Pennsylvania Court, Anacortes WA 98221. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 15th day of August 2014.



Judy L. Kiesser, Declarant