

COURT OF APPEALS
DIVISION II

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NO. 43891-7

STATE OF WASHINGTON

BY *[Signature]*
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JEFFERY RANDALL MCKEE,

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents.

RESPONDENTS' BRIEF

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ORIGINAL

TABLE OF CONTENTS

I.	NATURE OF THE CASE.....	1
II.	RESTATEMENT OF THE FACTS.....	2
	A. Procedural Facts.....	2
	B. Undisputed Facts At Summary Judgment.....	5
III.	RESTATEMENT OF THE ISSUES.....	6
IV.	ARGUMENT	6
	A. Standard Of Review.....	6
	B. The Superior Court Appropriately Denied Mr. McKee’s Request For Continuance.....	7
	C. The State Of Washington’s Motion For Summary Judgment Was Properly Granted	10
V.	CONCLUSION	13

TABLE OF AUTHORITIES

Cases

Batten v. Abrams,
28 Wn. App. 737, 626 P.2d 984, review denied, 95 Wn.2d 1033
(1981)..... 13

Bldg. Indus. Ass'n. of Wash. v. McCarthy,
152 Wn. App. 720, 218 P.3d 196 (2009)..... 11, 12, 13

Butler v. Joy,
116 Wn. App. 291, 65 P.3d 671 (2003)..... 8

Folsom v. Burger King,
135 Wn.2d 658, 958 P.2d 301 (1998)..... 7

In re Recall of Lindquist,
172 Wn.2d 120, 258 P.3d 9 (2011)..... 6

Manary v. Anderson,
176 Wn.2d 342, 292 P.3d 96 (2013)..... 11

Marshall v. Bally's Pacwest, Inc.,
94 Wn. App. 372, 972 P.2d 475 (1999)..... 11

State v. Downing,
151 Wn.2d 265, 87 P.3d 1169 (2004)..... 7, 9

White v. John-Manville Corp.,
103 Wn.2d 344, 693 P.2d 687 (1985)..... 12

Winston v. State,
130 Wn. App. 61, 121 P.3d 1201 (2005)..... 8

Statutes

RCW 4.16.005 12

RCW 4.16.170 12

Rules

CR 56(e)..... 12

Fed. R. Civ. P. 56(c) 11

Fed. R. Civ. P. 56(f)..... 8

I. NATURE OF THE CASE

Mr. McKee, acting pro se, filed a complaint against the State stemming from his arrest for suspicion of driving under the influence of alcohol on the evening of November 8, 2008. Mr. McKee's claims include: libel, assault, false imprisonment, trespass, false arrest, gross negligence, negligence, wanton/willful misconduct, intentional infliction of emotional distress, negligent infliction of emotional distress, the tort of outrage, state constitutional violations, and 42 U.S.C. § 1983 claims. CP 2, 4-5. Mr. McKee filed his tort claim on November 10, 2011, and his claims were dismissed on summary judgment as being barred by the statutes of limitations. CP 24, 59-60.

The evening of November 8, 2008, Trooper Bauer observed an approaching car speeding 58 mph in a 35 mph zone. CP 41, 45. Trooper Bauer activated his emergency lights and the speeding car passed him. CP 41. Trooper Bauer made a u-turn, caught up to the evading car, and then the evading car accelerated faster. CP 41. Trooper Bauer kept a visual on the car despite the driver turning into a residential driveway. CP 41. The driver ran from the car toward the home ignoring Trooper Bauer's lights, sirens, and commands to stop. CP 41, 46.

The driver unlocked the home's front door and looked back at Trooper Bauer pursuing him. CP 41. The driver managed to shut the

front door just as Trooper Bauer reached the door. CP 41. Trooper Bauer pounded on the door, secured the perimeter, and called for a telephonic arrest warrant. CP 41. Trooper Bauer executed the arrest warrant, entered the home, and found Mr. McKee alone in the home. CP 43. Mr. McKee exuded a strong odor of intoxicants, slurred his words, and appeared to have bloodshot/watery eyes. CP 43. Mr. McKee was arrested for driving under the influence. CP 46.

The State filed a motion for summary judgment based upon Mr. McKee's claims being barred by the statute of limitations. CP 21. The trial court granted the motion for summary judgment and denied Mr. McKee's motion for reconsideration. CP 113-14.

Mr. McKee wants this Court to disregard the trial court's decisions to deny a continuance, grant summary judgment, and deny his motion for reconsideration, despite the fact that, (1) Mr. McKee failed to submit any necessary affidavits or other documentation in support of his factual allegations, and (2) there was no issue of material fact presented for the trial court to consider on summary judgment.

II. RESTATEMENT OF THE FACTS

A. Procedural Facts

On June 6, 2012, the State of Washington's motion for summary judgment and supporting declarations were filed with the trial court and

served on Mr. McKee.¹ CP 22, 25, 28, 113. The trial court scheduled the motion for July 13, 2012. CP 51. On July 2nd, Mr. McKee's response to the motion was due. CP 113. On July 10th, more than a week overdue for his response and only three days before the hearing, Mr. McKee called the trial court and requested for an accommodation for the motion "to be continued until a date when [he could] travel to the hearing without aggravating [his] healing injury." CP 58, 113. On July 11th, the trial court granted the request authorizing a telephonic appearance.² CP 58, 113.

On July 13, 2012, the trial judge, the Honorable Judge M. Karlynn Haberly, denied Mr. McKee's request for a continuance stating, "Mr. McKee, the motion for continuance is untimely, given that this matter was filed June 6. I am going to deny the motion for continuance." CP 78. The trial court heard oral argument from Mr. McKee and Defendants. CP 59-60.

The State of Washington argued and prevailed on summary judgment based on the straight forward application of the statute of limitations for each claim. CP 84. The arrest occurred on November 8, 2008. CP 18. Mr. McKee's complaints of libel, assault, and false imprisonment each have a two year statute of limitations which

¹ Mr. McKee's misstates the date as June 7th. *Appellant's Brief* at 1.

² Mr. McKee misstates this date as July 10th. *Appellant's Brief* at 2.

expired in November 2010. CP 18. Mr. McKee filed his complaint in January 2012 and served defendants in April 2012. CP 18. The remainder of Mr. McKee's claims³ have a three year statute of limitations which expired in November 2011. CP 18.

The court ruled, "I have reviewed the pleadings filed here and heard oral argument here, and I am going to grant the state's motion for summary judgment." CP 84. Mr. McKee filed no response, no affidavits, no declarations, and no supporting written materials of any kind for the trial court to consider in response to the motion for summary judgment. CP 59, 114. Mr. McKee also failed to explain how extra time would allow him to establish evidence for the trial court to consider. CP 74. He stated his reason for the continuance was so he "[could] travel back and forth to the law library and to the court." CP 74.

Mr. McKee, pro se, sought reconsideration of the trial court's decision, first arguing that the State of Washington's counsel made "material misrepresentations" amounting to criminal false swearing. CP 61. He also argued that the statute of limitations should be tolled by personal disability. CP 69. Mr. McKee filed an eleven page motion for reconsideration with attachments. CP 61-112. However, Mr. McKee

³ Mr. McKee's three year statute of limitations claims include: trespass, false arrest, gross negligence, negligence, wanton/willful misconduct, intentional infliction of emotional distress, negligent infliction of emotional distress, the tort of outrage, state constitutional violations, and 42 U.S.C. § 1983 claims.

failed to submit necessary “affidavits or other documentation” supporting his factual allegations. CP 114.

The trial court again denied Mr. McKee’s request for a continuance. CP 113. The trial court held, “There was adequate time for Mr. McKee to seek a continuance between June 29th and July 13, 2012. He failed to do so.” Further the trial court also found, “Mr. McKee abandoned his request for a continuance and proceeded to argument on the merits of the motion.” CP 113-14. Mr. McKee again failed to indicate what evidence would be established if he were given a continuance. He only stated he needed to have “access to legal research.” CP 68.

The trial court denied the motion for reconsideration reasoning that, “Mr. McKee made some factual allegations in his argument but they are not admissible. The response must be supported by affidavits or other documentation. CR 56(c).” CP 114.

Mr. McKee now asks this Court to find that the trial court erred in denying the continuance, granting the summary judgment motion, and denying the motion for reconsideration of both decisions.

B. Undisputed Facts At Summary Judgment

On November 8, 2008, Mr. McKee was arrested for suspicion of driving under the influence of alcohol after he was observed, “running from a vehicle and opening the door at the residence.” CP 46.

On November 10, 2011, three years and two days after the arrest, Mr. McKee filed his tort claim with risk management. CP 24. On January 17, 2012, over two months later, Mr. McKee filed his lawsuit with Kitsap County Superior Court. CP 1. On April 16, 2012, Mr. McKee served the Attorney General's Office.⁴ CP 1, 27.

III. RESTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in denying a continuance when it was untimely and Mr. McKee failed to show good reason for delay.
2. Whether the trial court erred in granting summary judgment when Mr. McKee failed to submit admissible evidence for the trial court to consider and there was no issue of material fact.

IV. ARGUMENT

A. Standard Of Review

The standard of review for a denial of continuance is abuse of discretion. "The denial of a continuance rests in the sound discretion of the trial court and will not be reversed except for manifest abuse." *In re Recall of Lindquist*, 172 Wn.2d 120, 130, 258 P.3d 9 (2011) (quoting *Donaldson v. Greenwood*, 40 Wn.2d 238, 242 P.2d 1038 (1952)). Under this standard, in order for Mr. McKee to prevail he must make "a clear showing . . . that the trial court's discretion is manifestly unreasonable, or

⁴ Mr. McKee mistakenly implies it took the Attorney General's Office over three months to answer his complaint. The Attorney General was served on April 16, 2012 and filed its answer on April 24, 2012. CP 1, 8-13; *Appellant's Brief* at 1.

exercised on untenable grounds, or for untenable reasons.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting in part *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The standard of review for appeal of summary judgment is de novo. “The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion[,] . . . the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.” *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (internal citations omitted).

B. The Superior Court Appropriately Denied Mr. McKee’s Request For Continuance

Mr. McKee has failed to meet his high burden of showing that the trial court abused its discretion in denying his request for continuance. A trial court abuses its discretion only if it makes a decision that is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Downing*, 151 Wn.2d at 242.

While it is true that the non-moving party may request that a summary judgment hearing be continued, the trial court should deny the continuance when, “(1) the requesting party does not have a good reason

for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.” *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003).

A continuance is only proper when the nonmoving party can show a need for additional time to “obtain additional affidavits, take depositions, or conduct discovery.” Fed. R. Civ. P. 56(f); *see also Winston v. State*, 130 Wn. App. 61, 64-5, 121 P.3d 1201 (2005). In *Winston*, the trial court denied the plaintiff’s request for continuance for two reasons, 1) Mr. Winston could have already conducted the discovery that he claimed to need and failed to show good cause for his delay in doing so, and 2) he relied on evidence he hoped to obtain through discovery rather than providing any evidence of material fact at the hearing. *See Winston*, 130 Wn. App. at 65. Upon review, Division III of the Washington State Court of Appeals found the first reason alone provided adequate grounds for denying a continuance.

Mr. McKee based his request for continuance on reasons completely unrelated to obtaining evidence or conducting further discovery. In his written request for continuance, he requested an indefinite continuance “until a date when I can travel to the hearing without aggravating my healing injury.” CP 49. At the Summary

Judgment hearing, which Mr. McKee attended telephonically, his verbal request for continuance was for “two weeks or three weeks until I can travel back and forth to the law library and to the court.” CP 74. Essentially, Mr. McKee requested a continuance to conduct further legal research.

Mr. McKee did not ask for more time to file additional documents or to conduct additional discovery. Rather, he requested additional time only to travel to the library and court. CP 74. Not only was his request untimely, but it was not based on any of the valid reasons for granting a continuance.

Because Mr. McKee did not argue any of the recognized reasons for a continuance, the trial court properly denied Mr. McKee’s request for continuation. Mr. McKee cannot show that the trial court abused its discretion in denying his request. Mr. McKee cannot show that the trial court made a decision that was “manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.” *Cf. Downing*, 151 Wn.2d at 242.

C. The State Of Washington's Motion For Summary Judgment Was Properly Granted⁵

Judge Haberly properly granted summary judgment because the factual record before the trial court demonstrated that Mr. McKee's claims were brought outside the relevant statutes of limitations. The applicable statute of limitations ended on November 8, 2010 for Mr. McKee's two year claims and on November 8, 2011 for his three year claims. Mr. McKee did not file his tort claim until November 10, 2011. Therefore, summary judgment as a matter of law is appropriate in this case.

The facts before the trial court were as follows. On November 8, 2008, Mr. McKee was arrested for suspicion of DUI after he was observed, "running from a vehicle and opening the door at the residence." CP 46. On November 10, 2011, three years and two days after the arrest, Mr. McKee filed his tort claim with risk management. CP 24. On January 17, 2012, sixty-eight days later, Mr. McKee filed his lawsuit with Kitsap County Superior Court. CP 1. On April 16, 2012, Mr. McKee served the Attorney General's Office. CP 1, 27. Mr. McKee failed to present any evidence to refute these facts.

⁵ In his Motion for Reconsideration (CP 61-112), Mr. McKee failed to attach any "affidavits or other documentation." CP 114. Therefore, there was no new evidence before the trial court. Because there was no new evidence brought to the trial court's attention after summary judgment was granted, the State of Washington addresses only the issues at summary judgment in this brief.

Summary judgment should be granted when there are no material issues of fact before the court and the evidence shows that the moving party is entitled to judgment as a matter of law. “Summary judgment is appropriate if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Manary v. Anderson*, 176 Wn.2d 342, 350, 292 P.3d 96 (2013).

This Court’s review of the granting of summary judgment is limited to the evidence and issues presented to the trial court. *Bldg. Indus. Ass’n. of Wash. v. McCarthy*, 152 Wn. App. 720, 733-34, 218 P.3d 196 (2009). The nonmoving party may not rely simply on speculation or his own argumentative assertions that disputes of fact exist. *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999). Rather, the nonmoving party must present “competent evidence by affidavit or otherwise.” *Bldg. Indus.*, 152 Wn. App. at 735.

If the plaintiff fails to create a genuine issue of fact, then the trial court should grant the defendant’s motion for summary judgment. *Id.*, 152 Wn. App. at 735. The plaintiff in *Bldg. Indus.* argued there were several material fact questions about the document retention procedures used in the defendant’s office. However, the trial court properly ruled that in order to avoid summary judgment, the plaintiff was required to bring

evidence to refute what the defendant presented to the court. The defendant brought evidence of their standard office practices and the plaintiff failed to bring contrary evidence. *Bldg. Indus.*, 152 Wn. App. at 735. This Court upheld the trial court's ruling, holding that summary judgment was proper because the plaintiff failed to bring evidence that contradicted the defendant's. *Id.*

The law governing civil actions in Washington bars any action not "commenced" within the applicable statute of limitations. RCW 4.16.005. Under RCW 4.16.170, a lawsuit is commenced when "the complaint is filed or summons is served whichever occurs first." The statute of limitations will also begin to run once a tortious activity occurs. *White v. John-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985).

Mr. McKee failed to raise any material issues of fact. His allegations were not evidence. CR 56(e). The State of Washington submitted declaratory evidence that Mr. McKee missed all of the pertinent statutes of limitations for his multitude of claims. CP 22, 25, 28, 113. Mr. McKee appeared at the summary judgment hearing without filing anything in response to the State of Washington's motion. CP 113.

Mr. McKee has given no explanation for his failure to provide the trial court with affidavit evidence as required by CR 56(e). Mr. McKee is an experienced pro se litigant. CP 75. Pro se litigants are held to the same

litigation rules as attorneys. *See e.g., Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, *review denied*, 95 Wn.2d 1033 (1981). Mr. McKee has not followed the court rules, nor has he provided any explanation for his failure to do so.

Just like the plaintiff in *Bldg. Indus.*, Mr. McKee had ample opportunity to present the trial court with any information that might have refuted the State of Washington's evidence. Mr. McKee failed to do so, instead relying on his own assertions at the hearing. CP 74. To the extent that he did make factual assertions, such as his contention that he was incarcerated for a period, Mr. McKee failed to provide any sworn documentation to support those assertions. CP 80-1.

Given these facts and the applicable law, the trial court was correct to rule that no reasonable minds could disagree that the statute of limitations had expired. Therefore the State of Washington was entitled to judgment as a matter of law.

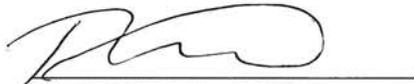
V. CONCLUSION

The trial court did not abuse its discretion in denying Mr. McKee's request for continuance because he did not argue any of the recognized reasons for a continuance. The trial court properly granted the State of Washington's Motion for Summary Judgment. The undisputed facts show that Mr. McKee failed to file his claims before the statutes of limitations

had expired. There were no material issues of fact before the trial court when summary judgment was granted, in part because Mr. McKee relied solely on his own self-serving assertions without bringing a legal and fact-based claim. Therefore, the trial court's decisions should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of August, 2013.

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NO. 43891-7-I

(Thurston County Cause
No. 12-2-00123-7)

PROOF OF SERVICE

I, Amanda Trittin, hereby certify that on August 28, 2013, I caused to be postmarked and sent for service a copy of the RESPONDENTS' BRIEF on the attorney for Appellant, as set forth below:

Attorney for Plaintiff:

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PO Box 8211
Port Orchard, WA 98366

- United States Mail
- Hand Delivered by Legal Messenger
- UPS Overnight Mail
- Email

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of August, 2013, at Olympia, WA.


AMANDA TRITTIN