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No. 51749-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

GARY LIVINGSTON, and
PATRIOT SEALCOAT, INC.

Appellants

v.

DAVID ROBERTS,
Respondent.

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

The Honorable Suzan Clark

REPLY BRIEF OF APPELLANTS (CORRECTED)

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I. REPLY ARGUMENT

Respondent David Roberts' errantly claims that Livingston's appeal from the order of contempt and the due process claim are time-barred under *RAP 5.2*. David¹ misstates the law concerning the permissible scope of review in this matter by omitting material provisions of the Rules of Appellate Procedure (RAP) on which he purports to rely. Then, he fails to cite any legal authority in support of his interpretation of the *RAP*. The end result is that David's contentions are groundless and this appeal is properly before this Court.

A. Livingston's Appeal Was Timely Filed

First, David ignores the express language of *RAP 5.2* concerning the alternative time periods for filing an appeal.

RAP 5.2(a) states:

"a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed, or (2) the time provided in section (e)." (*Emphasis added*).

¹ Appellants will again refer to Respondent as "David" and Appellants collectively as "Livingston" for the sake of consistency.

RAP 5.2 (e), in part, provides:

“A notice of appeal of orders deciding certain timely motions designated in this section must be filed in the trial court within (1) 30 days after the entry of the order, ... The motions to which this rule applies are ... a motion for reconsideration or new trial under CR 59 ...”.

In *Stedman v. Cooper*, 172 Wn.App. 9, 14 (2012), the Court was asked, as a threshold question, to consider whether a notice of appeal was timely filed. The Court held that, in general, a notice of appeal must be filed within 30 days of the appealable order. However, a timely motion for reconsideration filed in the trial court extends the time to file a notice of appeal until 30 days after entry of the order deciding the reconsideration motion.

Here, much like the timeliness issue in *Stedman*, the trial court issued its order of contempt and judgment thereon on January 19, 2018. (CP 65). The trial court deemed Livingston’s Opposition to Entry of Contempt Order and Judgment (CP 57) to be a motion for reconsideration, which was timely filed as of January 19, 2018. (RP 4:23-5:3; 6:1-4) The trial court issued its order denying reconsideration on April 2, 2018. (CP 78). Accordingly, under RAP 5.2, Livingston had until May 2, 2018, to file a timely Notice of Appeal. Livingston filed the Notice of Appeal on April 12,

2018, (CP 79) well within the 30-day time period for a timely appeal.

For reasons that are unstated in his brief, David erroneously asserts that RAP 5.2(a) applies solely to a notice for discretionary review. However, subsection (a), by its stated terms, applies to a notice of appeal, while subsection (b) applies to discretionary review. Accordingly, David's argument is lacking in merit.

Moreover, even if such a defect existed, under RAP 5.1(c), the Court will give effect to an incorrectly designated notice, whether it is a notice of appeal or a notice for discretionary review, and Livingston appeal would be timely under *RAP 5.2(a)* or *RAP 5.2(b)*.

B. Livingston's Due Process Claim Is Properly Before The Court.

David errantly asserts that Livingston's due process claim in connection with the ex parte Order Shortening Time is time-barred. Much like his errant claim concerning the timeliness of Livingston's notice of appeal, David makes this assertion without benefit of any legal authority. As a result, he arrives at the wrong conclusion. Livingston's due process claim is properly before the Court as demonstrated below.

“*RAP 2.2(a)*, with certain limits, provides the exclusive list of superior court decisions that may be reviewed as a matter of right (appealed).” *Farhood v. Allyn*, 132 Wn.App. 371, 377 (2006). The superior court decisions that are listed as appealable under *RAP 2.2(a)*² share the common characteristic of “finality.” An order shortening time for hearing is not among the orders included in *RAP 2.2*, which is understandable because such an order lacks the essential element of “finality” needed to invoke the appellate Court’s jurisdiction. Therefore, contrary to David’s assertion, Livingston could not have sought an appeal as a matter of right on the ex parte order shortening time because it is not an appealable order.

In *Department of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 749-750 (2012), the Court held that where orders of the trial court are appealable as a matter of right under *RAP 2.2*, those

² The full list under *RAP 2.2(a)* includes the following: (1) Final Judgment. ... (3) Decision Determining Action. (4) Order of Public Use and Necessity. (5) Juvenile Court Disposition. (6) Termination of All Parental Rights. (7) Order of Incompetency. (8) Order of Commitment. (9) Order on Motion for New Trial or Amendment of Judgment. (10) Order on Motion for Vacation of Judgment. (11) Order on Motion for Arrest of Judgment. (12) Order Denying Motion to Vacate Order of Arrest of a Person. (13) Final Order after Judgment.

orders bring up for review the non-appealable orders that preceded them.

The Contempt Hearing Order issued on January 19, 2018 (CP 65), is a final judgment under *RAP 2.2(a)(1)*, and therefore subject to review as a matter of right. *In re Estates of Smaldino*, 151 Wn.App. 356, 363 (2009). The ex parte Order Shortening Time (CP 1) is a non-reviewable order under *RAP 2.2*, which preceded the Contempt Hearing Order (65) by 8 months. Consequently, under *Department of Ecology v. Tiger Oil Corp*, 166 Wn.App. at 749-750, the Order Shortening Time is reviewable by this Court.

Additionally, the ex parte Order Shortening Time (CP 1), is reviewable under *RAP 2.4*, which in in pertinent part, states:

“(a) *Generally*. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal..., and other decisions in the case as provided in sections (b), (c), (d), and (e).

(b) Order or Ruling Not Designated in the Notice.

The appellate court will review a trial court order or ruling not designated in the notice, including an

appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.”

RAP 2.4(b) was intended to eliminate the need for multiple appeals in the same matter, particularly where a subsequent order could render as moot an earlier adverse ruling or order. *Wlasiuk v. Whirlpool Corp.*, 76 Wn.App. 250, 259 (1994).

Here, Livingston filed a timely Notice of Appeal (CP 79) as a matter of right following the trial court’s order denying reconsideration. (CP 78). Under *RAP 2.4(b)*, this Court can review a trial court order or ruling not designated in the notice if the following two conditions are met, (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review. Both conditions are satisfied here.

First, whether Livingston’s due process rights were violated by the order shortening time is undoubtedly prejudicial to the order of contempt and judgment designated in the notice. If, as Livingston contends, his due process rights were violated because the shortened notice prevented him from having meaningful

opportunity to prepare a defense, gather evidence, procure witnesses, or hire counsel to advise him, then the shortened time was prejudicial. As such, it is subject to review under *RAP 2.4(b)*.

Second, the Order Shortening Time (CP 1) was entered months before this Court accepted review. Therefore, Livingston has satisfied both requirements under *RAP 2.4(b)*,

Contrary to David's assertions, the issue of whether Livingston's due process rights were violated is properly before this Court.

C. CR 45 Does Not Create a Parallel Set of Rules For The Conduct of a Deposition.

David errantly contends that the term "*give testimony*" in CR 45 obviates the whole of CR 30 concerning the conduct of a deposition if the deponent is a non-party. Despite the fact the plain language of CR 30(a), permits a party to "take the testimony of any *person ...*" (*emphasis added*), David asks this Court, without benefit of any legal authority in support, to disregard *CR 30* and interpret the term "*give testimony*" in CR 45 to mean that a non-party must answer every deposition question posed, regardless of whether the question is subject to objection or risk facing an order of contempt. Such an interpretation leads to an absurd result for any number of

reasons, not the least of which is that it creates a parallel set of rules for depositions depending on whether the deponent is a party or a non-party. Under David's analysis, whether a refusal to answer the exact same deposition question subjects a person to an order to compel or a judgment of contempt turns on whether the objecting person is a party or a non-party. That is not the law, and the Court should refuse David's request to so interpret CR 45.

D. The Court Should Reject David's Circular Reasoning Concerning The Contempt Order.

David seemingly argues that David was not required under CR 45(c)(2)(b) to obtain an order to compelling production of documents to which Livingston had timely objected because the contempt order compelled Livingston to produce documents. It is difficult to make sense of David's circular reasoning in this regard. David seemingly asks the Court to disregard the procedural requirements of CR 45(c)(2)(b) and proceed directly with a contempt under subpart (g). Yet, as with virtually every other proposition in his brief, David fails to cite any legal authority in support of such a position.

This Court should reject this unfounded position.

E. The Award of Fees and Costs should be Vacated.

Contrary to David's assertions, the trial court did not properly award fees and costs to David. First, the award should be set aside because the order of contempt was improperly issued. Second, the award included items to which David was not entitled as set forth in Livingston's Opposition to Entry of Contempt Order and Judgment (CP 57).

F. David's Request for Attorney Fees Should Fail.

David fails to provide any legitimate basis for his request for attorney's fees in this appeal. In fact, under *RAP 10.3(a)(6)*, the Court would be warranted in disregarding David's brief in its entirety because of his failure to cite adequate authority in support of the arguments stated herein. *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn.App. 376, fn 13 (2010).

II. CONCLUSION

Based on Livingston's Appellants Brief and this Reply Brief, Livingston respectfully requests this Court to:

1. Find that Livingston's due process rights were violated and vacate the order of contempt and judgment thereon;

2. Vacate the order of contempt and judgment thereon on the grounds that it was procedurally improper;
3. Vacate the award of fees and costs in connection with the order of contempt and judgment thereon; and,
4. Award Livingston attorney fees in connection with this appeal.

Dated this 5th day of November, 2018.

Respectfully submitted,



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