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Court of Appeals
Division II
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No. 54057-6-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

DONNA ZINK, APPELLANT

v.

JOHN DOE L, et al, RESPONDENTS

REPLY BRIEF OF APPELLANT DONNA ZINK

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I. RESPONSE

A. Overview

Respondents arguments are disingenuous. Zink is not arguing that the merits of this case need to continue to be adjudicated since they have been decided on appeal. Zink argues that after the summary judgment decisions were made in this case by the trial court, dismissal is prohibited pursuant to RCW 4.56.120(1)(b).

Furthermore, Zink argues that the trial court is mandated to hold an *Ishikawa* hearing justifying all sealing and redaction of the names of the John Does as mandated by the Washington state constitution and case law; including this Court's mandate on remand. This is true whether a case is dismissed or not.

The collateral issue of sealing court records cannot be moot in any case before the courts, even in cases of dismissal, since any person upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing no longer exist, can request the records be unsealed pursuant to GR 15(e)(3).¹

¹ A sealed court record in a civil case shall be ordered unsealed only upon stipulation of all parties or upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing no longer exist, or pursuant to RCW 4.24 or CR 26(j). If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by the Superior Court Rules, an affidavit may be filed with the court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful.

B. Respondents did not move for dismissal well before trial

Respondents acknowledge that a summary judgment decision was rendered in each of these consolidated cases (Level I Resp. 5; Level II/III Resp 3) and the evidence clearly shows that summary judgment decisions on the merits were made in each of these consolidated cases (CP 130-143; 144-153; 154-163; 171-185). None the less, citing to *League of Women Voters of Wash. v. King County*, 133 Wn. App. 374, 379-80, 135 P.3d 985 (2006)(*League of Women's Voters*), Respondents frivolously argue that a summary judgment decision is not a final decision because the case had not yet gone to trial and the trial court had no discretion to deny the motion to dismiss under CR 41(a)(1).

While Division I, in *League of Women's Voters*, determined that a plaintiff has the right to dismiss after a preliminary injunction has issued, Division I determined that a plaintiff has no right to dismiss an order once summary judgment has been rendered.

For example, a motion for summary judgment is a request for a final ruling on the merits of the case. A motion for a preliminary injunction is not. While the court must consider the merits in making its determination, the standard for granting a preliminary injunction is different than that for granting summary judgment.

League of Women Voters at 384)(footnotes omitted). Division I based their opinion on the Supreme Court's decision that a summary judgment decision has the same effect as a full trial.

A grant of summary judgment is a final judgment on the merits with the same preclusive effect as a full trial.

DeYoung v. Cenex, Ltd ., 100 Wn. App. 885 , 892, 1 P.3d 587 (2000).

None of the Respondents in these consolidated cases has a right to mandatory dismissal under CR 41(a)(1) or (2) because they **did not** move for dismissal prior to summary judgment order being entered, the trial court's decision to dismiss is error of law and must be reversed.

Furthermore, voluntary dismissal is prohibited by RCW 4.56.120(1)(b) after a summary judgment decision has been made whether the party seeking voluntary dismissal is seeking dismissal "to evade an unfavorable summary judgment decision" or not. Because summary judgment decisions were made and orders were entered in all of these consolidated cases, Respondents are not entitled to dismissal under CR 41(a)(1) or (2).

C. There is no legal authority in Washington state allowing a party to dismiss litigation if they are not allowed to file under seal

All litigation comes with risks. In some litigation money is involved. In other litigation property is involved. Never-the-less, once a party initiates an action, the decisions made in their case, whether favorable or not, are binding on them. In this case Respondents risked being identified in the court records if they did not prevail. Respondents did not prevail. Our Supreme Court determined that the identity of those convicted of sex offenses, whether adults or juveniles, are not protected from disclosure to the public at large (*John Doe A v. Wash. State Patrol*, 185 Wn.2d 363, ¶1,

374 P.3d 63 (2016)(*John Doe A*)(see also appendix A attached to opening brief of Zink). Our Supreme Court determined that the SSOSA evaluations which contain private details of sex offender's mental health and families among other data are not exempt from disclosure (*John Doe G v. Dep't of Corr.*, 190 Wn.2d 185, ¶23, 410 P.3d 1156 (2018)(*John Doe G*). Finally our Supreme Court determined that under the Washington constitution, article I, section 10, even those convicted of sex offenses are not privileged and must meet the standards set forth by GR 15 and an *Ishikawa* hearing if they wish to be anonymous in our judicial system (*John Doe G*, ¶26-33).

None the less, Respondents put forth an argument citing to *State v. McEnroe*, 174 Wn.2d 795, 279 P.3d 861 (2012)(*McEnroe*) that they have the right to bypass the Washington state constitution article 1, section 10 and court rules (CR 4(b)(1)(i), 10(a)(1) and 17(a) because of their criminal convictions. This argument is frivolous and without legal foundation.

Contrary to Respondents claims otherwise, the decision in *McEnroe* does not show that our Supreme Court agrees with the principle that a party should be allowed to dismiss their action without having to identify themselves if they do not meet the qualifications of an *Ishikawa* hearing. The Court in *McEnroe* discussed whether the language of GR 15 foreclosed the withdrawal of documents or other materials prior to being filed (*McEnroe*. ¶20-23). The Court found that allowing withdrawal of discovery evidence was consistent with case law since “the constitutional right to open courts does not compel open filing of mere discovery since it

"does not become part of the court's decision-making process" (*McEnroe* ¶26).

Here the court rules "require" Respondents to file litigation under their true names (CR 4(b)(1)(i)), 10(a)(1), and 17(a) in order to adhere to our constitution, determine jurisdiction, and determine whether the party is the true party of interest. Therefore, the name of the party is used by the court at the time the petition is filed. Furthermore, RCW 42.56.540 requires a party to be identified in order to determine if they are, in fact, named in the requested records. Clearly the identity of the parties becomes part of the court's decision-making process at the time litigation is initiated and the Court's decision in *McEnroe* does not speak to the issue of pseudonym use in the captions of cases or in the court indices as determined by our Supreme Court in *John Doe G*.

The Washington constitution, state statutes and court rules were enacted so that justice in all cases is applied equally. Zink, and the public, are harmed when their constitutional right to know the identity of litigants is disregarded by our courts without just cause. Further, there is harm when our courts refuse to abide by well-established state statutes, court rules and case law based on the identity of litigants, in this case those convicted of sex offenses, rather than on any legal authority. Finally, our Supreme Court has determined that Zink, and the public, are prejudiced

“when the constitutional right to open courts is violated” (*John Doe G*, ¶31).

D. The issue of sealing court records through redaction is not moot

As previously argued in opening briefing, dismissal of an action does not prohibit a court from ruling on the collateral issue of the sealing through redaction of court records (Zink Open, section V(C)). Pursuant to GR 15(e) any person may request sealed court records be unsealed at any time. (GR 15(e)(3)(*In re Marriage of R.E.*, 144 Wn. App. 393, ¶16, 183 P.3d 339 (2008)).² Therefore, issue of the sealing of court records can not be moot if any person can seek to unseal court records at any time. Finding otherwise would be prejudicial to Zink since she would lose a legal right all other persons have under the Washington state constitution, court rules and case law.

The court rules for unsealing court records under GR 15(e) applies regardless of this Court’s inconsistencies in its decision that John Doe C,

² Sealed court records may be examined by the public only after the court records have been ordered unsealed pursuant to this section or after entry of a court order allowing access to a sealed court record. GR 15(e)(1).

A sealed court record in a civil case shall be ordered unsealed only ... upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing no longer exist, or pursuant to RCW 4.24 or CR 26(j). If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by the Superior Court Rules, an affidavit may be filed with the court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful. GR 15(e)(3)(emphasis added).

D, and G could remain anonymous in the caption of the case and SCOMIS without justification, while John Doe L, M, N, and O could not. (*Doe L v. Pierce County*, 7 Wn. App. 2d 157, 164, 201 n.22, 433 P.3d 838 (2019)(*John Doe L*). Pursuant to court rule GR 15(e)(1;3) Zink, as well as any person, retains the right to seek to unseal the redacted court records of John Doe C, D, and G at any time in the future, regardless of this Court's decision in John Doe L if "proof that identified compelling circumstances for continued sealing no longer exist" (GR 15(e)(3)). This Court should address its decision concerning the redaction of all names from the caption of the cases and SCOMIS and rectify all conflicts as allowed under RAP 2.5(c)(2) so justice is served.³

RAP 2.5(c)(2) restricts application of the law of the case doctrine. The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005); *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). We have recognized that the doctrine "seeks to promote finality and efficiency in the judicial process," *Roberson*, 156 Wn.2d at 41, but RAP 2.5(c)(2) provides that if a case returns to an appellate court following a remand, [t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the

³ The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review. RAP 2.5(c)(2).

case on the basis of the appellate court's opinion of the law at the time of the later review.

State v. Schwab, 163 Wn.2d 664, ¶11, 185 P.3d 1151 (2008).

Respondents' argument that while "plaintiffs" are allowed to file an action under seal without application of GR 15 and an *Ishikawa* hearing as long as it is before dismissal, "defendants" are not allowed after dismissal is disingenuous and without any legal foundation.⁴ Interpreting our constitution and laws in such a way is simply not equitable or just. In our judicial system both plaintiffs and defendants are considered equal and our laws apply to each equitably. Furthermore, our Supreme Court made clear that it is the name in the caption that implicates article 1, section 10 and not whether the party is the plaintiff or the defendant or whether the case was dismissed or, as in this case, determined on summary judgment.

We further hold that names in captions implicate article I, section 10, and that the trial court erred in granting the John Does' motion to proceed in pseudonym because the trial court failed to apply GR 15 and the *Ishikawa* factors.

John Doe G, ¶34. In sum, the constitutional issue of sealing court records is not mooted by voluntary dismissal.

⁴ Only a plaintiff can request voluntary dismissal of the action.

Mandatory. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court: ... By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case. CR 41(a)(1)(A) (emphasis added)

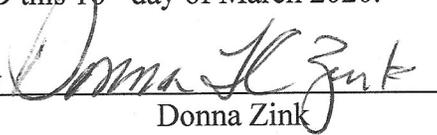
Permissive. After plaintiff rests after plaintiff's opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper. CR 41(a)(2)(emphasis added).

II. CONCLUSION

Summary judgment is the same as a trial. Once the orders on summary judgment were entered in each of these cases, dismissal is prohibited by state statute. Furthermore, the issue of sealed court records is not moot and the trial court erred in refusing to follow this Court's mandate.

RESPECTFULLY SUBMITTED this 16th day of March 2020.

By

A handwritten signature in cursive script, appearing to read "Donna Zink", written over a horizontal line.

Donna Zink

Pro se

DONNA ZINK - FILING PRO SE

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