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SEP 26, 2016

Court of Appeals
Division III
State of Washington

No. 34150-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DONNA ZINK, et vir,

Appellant

v.

BENTON COUNTY, et al,

Respondent

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

NO. 15-2-02298-6

BRIEF OF RESPONDENT

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I. INTRODUCTION

On July 15, 2013, Appellant, Donna Zink, submitted a public records request to Benton County requesting records related to sex offenders. CP 3 (¶13). On August 5, 2013, Benton County sent out notification letters to all level one sex offenders identified in documents responsive to Ms. Zink's public records request as permitted by RCW 42.56.540. CP 4 (¶27), 16. On July 1, 2015, Benton County notified additional level one sex offenders identified in documents responsive to one of Ms. Zink's public records requests. CP 53. On October 6, 2015, Donna and Jeff Zink (hereinafter the "Zinks") filed a Complaint requesting relief against Benton County and several individual County employees and elected officials in their official capacity; specifically, Andrew K. Miller, Ryan Brown, Ryan Lukson, Sandi Maine-Delepierre, Steven Keane, and Bobbi Romine (hereinafter the "County"), for ten alleged causes of action under the following statutes and constitutional provisions: (1) Public Records Act ("PRA") at RCW 42.56.240(8), 42.56.520, and 42.56.550; (2) free speech under article 1, section 5 of the Washington State Constitution and the First Amendment to the U.S. Constitution; (3) cruel and unusual punishment pursuant to the Eighth Amendment to the U.S. Constitution; (4) equal protection pursuant to the Fourteenth Amendment to the U.S. Constitution; (5) invasion of Zinks'

home through unlawful harassment and intimidation pursuant to article 1, section 7 of the Washington State Constitution; (6) breach of duty; (7) intentional and unlawful harassment and intimidation in violation of RCW 10.14.020 and .030; (8) wanton and intentional infliction of emotional distress; (9) negligent infliction of emotional distress; and (10) Jeff Zink's loss of consortium through the loss of love, affection, and assistance from his wife, Donna Zink. CP 1-53.

The Zinks' sole basis, and only argument made for this appeal, is the County's alleged failure to note its motion to dismiss properly, and the trial court's corresponding failure to reconsider its ruling that the motion to dismiss was noted properly. While the Zinks list as an assignment of error that "[t]he trial court erred and abused it's [sic] discretion in ordering the dismissal of Zink's claims," they fail to provide any argument or authority with respect to this issue. Br. of Appellant at 5. "It is well settled that a party's failure to . . . provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error." *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214, *review denied*, 155 Wn.2d 1026 (2005) (quoting *Escude ex rel. Escude v. King Cnty. Pub. Hosp. Dist. No. 2*, 111 Wn. App. 183, 190, 69 P.3d 895 (2003)). Because the Zinks, on reconsideration and on appeal, make no substantive arguments with

respect to the merits of the dismissal, or whether the grounds for dismissal were proper, the County will not address this issue other than to state it relies on the grounds for dismissal as set forth in its briefing before the trial court in its motion to dismiss. *See* CP 66-68, 69-91. Accordingly, the County will only directly respond to the issues raised by the Zinks with respect to which they provide argument on appeal.

II. STATEMENT OF ISSUES

- A. Did the County properly note its motion to dismiss under CR 6(d) and Benton/Franklin Counties Superior Court Local Rule 7(b)(7)(A)?
- B. Did the trial court abuse its discretion in finding the Zinks' failure to respond to the County's motion to dismiss, or appear at the hearing, was not due to excusable neglect pursuant the CR 6(b)?

III. STATEMENT OF THE CASE

On October 13, 2015, the County inquired as to whether the Zinks would agree to email service in this matter. CP 207. On October 14, 2015, the Zinks agreed to email service. CP 261. On October 29, 2015, the County noted its motion to dismiss the Zinks' Complaint and filed a motion and affidavit for change of judge against the Honorable Judge Bruce Spanner. CP 62-65, 95-97. On October 30, 2015, Ms. Zink informed the County she was unavailable November 6, 2015, as well as

November 13, December 11, and several dates in January and February of 2016. CP 262-63. To accommodate the Zinks' schedule, the County agreed to reset its motion to dismiss for December 4, 2015. CP 264. Subsequently, on October 30, 2015, the Zinks confirmed they were available for hearing on December 4, 2015. CP 267. Accordingly, an amended note for motion was filed November 2, 2015. CP 98-100. On November 5, 2015, Ms. Zink filed an affidavit of prejudice against the Honorable Judge Vic VanderSchoor. CP 103. On November 6, 2015, knowing that Judge VanderSchoor was the civil presiding judge for December, and knowing an affidavit of prejudice was filed against him (as well as Judge Spanner), the County contacted Benton County Superior Court Administration to confirm it was still able to provide a judge for the hearing on December 4, 2015. CP 281. On November 10, 2015, Court Administration confirmed it was able to accommodate the parties' mutually agreed hearing date with a judge other than the three who were disqualified from hearing the motion (Judge Swisher, who had previously recused himself from similar litigation involving Ms. Zink, was also unable to hear the matter). *Id.*

On November 25, 2015, Ms. Zink informed the County that because she had filed an affidavit of prejudice against Judge VanderSchoor, and he was the civil presiding judge for the month of

December, the hearing for December 4, 2015, would need to be rescheduled. CP 289. The County responded that it had already anticipated that issue and confirmed with Court Administration a judge other than Spanner, VanderSchoor, and Swisher would be assigned to hear the motion. CP 288. Ms. Zink responded with frustration that she was not aware which judge was assigned to hear the motion. *Id.* The County responded by informing Ms. Zink it did not know who the judge would be at the hearing either. CP 287.

On the date of the hearing, December 4, 2015, the County contacted Ms. Zink inquiring whether a pleading was filed in response to its motion to dismiss. CP 295. Ms. Zink responded that because she did not receive a special set notice, and was not aware of which judge was assigned to the hearing, she was “not going to waste time on a case that won’t go forward” and suggested the County “reschedule or wait until another judge takes the bench.” CP 294. The County responded by informing Ms. Zink it intended to proceed with the hearing set for 1:30 p.m. on December 4, 2015, as well as providing a copy of the amended note for motion Ms. Zink was previously provided informing her of the hearing date. CP 294, 299-302. Ms. Zink responded that a special set notice was required for the hearing, she was not provided proper notice, and as such the hearing should be rescheduled to sometime in January. CP

318-19. The County informed Ms. Zink she should appear at the hearing to argue lack of notice as it planned to argue for dismissal at the hearing set for December 4, 2015, at 1:30 p.m. CP 318. Ms. Zink responded she would not be attending the hearing due to lack of notice. *Id.*

After reviewing the briefing of the County, and argument of the County's counsel, the trial court entered an order of dismissal finding that the Zinks' Complaint failed to state a claim against the County upon which relief could be granted. CP 106-07. This order was entered on December 4, 2015, without the Zinks being present or submitting a response. *Id.*

IV. ARGUMENT

A. CR 12(b)(6) and motion for reconsideration standards of review.

A trial court's ruling on a motion to dismiss under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Courts should dismiss a claim under CR 12(b)(6) only if beyond a reasonable doubt no facts exist that would justify recovery. *Id.*

Appellate courts review a trial court's denial of a motion for reconsideration for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). A trial court

abuses its discretion only if its ruling is manifestly unreasonable or rests upon untenable grounds. *Id.* Furthermore, a trial court's ruling on whether to accept an untimely response, or to strike it as untimely, is reviewed for an abuse of discretion. *Id.* at 500.

B. The Zinks were provided proper notice of the hearing and had every opportunity to respond timely.

On October 29, 2015, the County noted its motion to dismiss the Zinks' Complaint and filed a motion and affidavit for change of judge against the Honorable Judge Bruce Spanner. CP 62-65, 95-97. On October 30, 2015, Ms. Zink informed the County she was unavailable November 6, 2015, as well as November 13, December 11, and several dates in January and February of 2016. CP 262-63. To accommodate the Zinks' schedule, the County agreed to reset its motion to dismiss for December 4, 2015. CP 264. Subsequently, on October 30, 2015, the Zinks confirmed they were available for hearing on December 4, 2015. CP 267. Accordingly, an amended note for motion was filed November 2, 2015. CP 98-100.

On November 5, 2015, Ms. Zink filed an affidavit of prejudice against the Honorable Judge Vic VanderSchoor. CP 103. On November 6, 2015, knowing that Judge VanderSchoor was the civil presiding judge for December, and knowing an affidavit of prejudice was filed against him, the County contacted Court Administration to confirm it was still able to

provide a judge for the hearing on December 4, 2015, other than the two judges who had affidavits of prejudice filed against them in the matter, as well as Judge Swisher, who had previously recused himself from similar litigation involving Ms. Zink because of his past relationship with Ms. Zink as legal advisor to the City of Mesa. CP 281. On November 10, 2015, Court Administration confirmed it was able to accommodate the parties' mutually agreed hearing date with a judge other than the three who were disqualified from hearing the motion. *Id.*

On November 25, 2015, Ms. Zink informed the County that because she had filed an affidavit of prejudice against Judge VanderSchoor, and he was the civil presiding judge for the month of December, the hearing for December 4, 2015, would need to be rescheduled. CP 289. The County responded that it had already anticipated that issue and confirmed with Court Administration a judge other than Spanner, VanderSchoor, and Swisher would be assigned to hear the motion. CP 288. Ms. Zink responded with frustration that she was not aware which judge was assigned to the motion to dismiss hearing. *Id.* The County responded by informing Ms. Zink it did not know who the judge would be at the hearing either. CP 287.

As the above timeline of events makes clear, the County provided adequate notice to the Zinks of the hearing set for December 4, 2015. The

hearing was not special set before a particular judge and did not need to be stricken as the Zinks allege once Court Administration verified a judge was available to hear the matter. The County simply informed Court Administration of the fact, known by all parties, affidavits of prejudice had been filed against Judge VanderSchoor and Judge Spanner, and Judge Swisher had recused himself from cases related to the instant action due to his previous relationship as the legal advisor to the City of Mesa while Ms. Zink was its mayor. Court Administration informed the County it would be able to set the matter before one of the other four Superior Court judges on the same date and time as the regular civil docket. The County had no knowledge of which judge would be assigned to the hearing until the case schedule came out the day before the hearing, and as such, received no unfair advantage over the Zinks by confirming with Court Administration a judge would be available to hear its motion.

Although the Zinks allege there was a legal requirement on the County to notify them of the particular judge assigned to the case (even though the County did not know until the schedule came out the day before the hearing), the rules of civil procedure, and local rules, contemplate nothing more than providing the opposing party six court days' notice prior to the date of the hearing. *See* CR 6(d); Benton/Franklin Counties Superior Court Local Rule 7(b)(7)(A) (of no consequence to this

matter, effective September 1, 2016, the notice requirement was amended to five days). In reviewing the County's amended note for motion, there is no question it meets the requirements of the local rule in providing "the title of the court, the cause number, a brief title of the cause, the date when the same shall be heard, the words 'Note for Motion Docket,' the name or names of each attorney involved in the matter, the nature of the motion, and by whom made." *See* Benton/Franklin Counties Superior Court Local Rule 7(b)(7)(A). The Zinks must demonstrate their failure to timely respond to the County's motion to dismiss, and appear at the hearing, was as a result of excusable neglect. *See* CR 6(b); *Davies*, 144 Wn. App. at 500. The Zinks' stated reason for not responding to the motion to dismiss, or appear at the hearing, is based on requirements they believe should be placed on the County in noting a motion for hearing which are not supported by any court rule or case law. The County's motion to dismiss was properly noted, and the Zinks had ample opportunity to respond and/or appear at the hearing. In fact, the County's motion to dismiss was filed on October 29, 2015, giving the Zinks over a month to respond prior to the hearing date. CP 66-67. If nothing else, the email exchanges between the parties cited herein make clear the Zinks could have attended the hearing for purposes of requesting a continuance or to make their argument of improper notice now being made. Because the Zinks failed to

present the trial court with any evidence their actions of failing to timely respond to the County's motion to dismiss and failing to appear at the hearing were the result of excusable neglect, as required by CR 6(d) and Benton/Franklin Counties Superior Court Local Rule 7(b)(1)(B), the trial court did not abuse its discretion in denying the Zinks' motion for reconsideration.

C. The Zinks had ample opportunity to respond to the County's motion to dismiss.

The Zinks are incorrect in their statement that the December 4, 2015, hearing date set for the regular civil docket was stricken when they filed an affidavit of prejudice against Judge VanderSchoor. Since Judge VanderSchoor was on the civil docket for the month of December, the effect of their affidavit of prejudice was nothing more than the matter could not be heard on the regular civil docket. Once Court Administration was able to confirm the fact a judge that was not disqualified from hearing the motion could be arranged, the hearing could proceed as scheduled. This fact was made known to Ms. Zink on November 25, 2015, eight days before her response to the motion was due. CP 288-89. The Zinks fail to cite any legal basis for their failure to respond to the County's motion to dismiss, and fail to provide a legal basis as to how the identity of the judge

hearing the case, even if it would have been known to the parties, affected their ability to respond timely to the County's motion.

Furthermore, the record reflects the Zinks had every opportunity to attend the hearing to argue their alleged lack of proper notice. On the date of the hearing, December 4, 2015, the County contacted Ms. Zink inquiring whether a response was filed regarding its motion to dismiss. CP 295. Ms. Zink responded that because she did not receive a special set notice, and was not aware of which judge was assigned to the hearing, she was "not going to waste time on a case that won't go forward" and suggested the County "reschedule or wait until another judge takes the bench." CP 294. The County responded by informing Ms. Zink it intended to proceed with the hearing set for 1:30 p.m. on December 4, 2015, as well as providing a copy of the amended note for motion Ms. Zink was previously provided informing her of the hearing date. CP 294, 299-302. Ms. Zink responded that a special set notice was required for the hearing, she was not provided proper notice, and as such the hearing should be rescheduled to sometime in January. CP 318-19. The County informed Ms. Zink she should appear at the hearing to argue lack of notice as it planned to argue for dismissal at the hearing set for December 4, 2015, at 1:30 p.m. CP 318. Ms. Zink responded she would not be attending the hearing due to lack of notice. *Id.*

The Zinks make an additional argument with respect to their inability to file bench copies with the Court because they lacked knowledge with respect to which judge would hear the matter. Benton/Franklin Counties Superior Court Local Rule 5(c) requires parties to submit bench copies to the Court by noon one court day prior to the scheduled hearing, proceeding, or trial. There is no requirement when filing bench copies to note, nor an option to even select, which judge will be hearing the motion. Regardless, this alleged hurdle had no effect on the Zinks' ability to file a response brief, attend the hearing to argue the merits of their response, or request a continuance if warranted.

With respect to untimely filed motions and responses, under CR 6(b), the trial court, for cause shown, may at any time in its discretion enlarge a time period set by court rule or court order. Importantly, however, once the adverse party misses the original deadline, a showing of excusable neglect is required under CR 6(b)(2). *See Davies*, 144 Wn. App. at 500. Similar to *Davies*, where the plaintiff failed to timely respond to a motion for partial summary judgment and did not move for a continuance of the hearing, in this matter, there is no evidence to support the Zinks' contention that they were unable to properly respond to the motion to dismiss, or that they were unable to move for a continuance. *See id.* at 499. The Zinks did not demonstrate excusable neglect in their

failure to respond to the County's motion or appear at the hearing for which they had ample notice. This finding was made clear by the trial court's order denying the Zinks' motion for reconsideration when Judge Ekstrom stated after reviewing the briefing and emails between the parties:

[T]he 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 LCR 7(b)(7)(A), and the Plaintiffs were not affirmatively misled by the 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.

After reviewing all pleadings submitted with respect to the County's motion to dismiss, the trial court properly granted its motion as a matter of law. Accordingly, based on the above record, the trial court did not abuse its discretion by denying the Zinks' motion for reconsideration as there was ample evidence for a reasonable fact-finder

to determine the Zinks did not miss the court deadlines due to excusable neglect.

D. The appearance of fairness doctrine does not apply to the Zinks' failure to respond timely to, or appear at the hearing regarding, the County's motion to dismiss.

Without citing to any case law, the Zinks argue that the County had unfair access to the Court by way of confirming with Court Administration a judge would be available to hear its motion. As stated *supra*, the County simply informed Court Administration of the fact, known by all parties, three judges were unable to hear its motion due to affidavits of prejudice being filed and an apparent conflict of interest in a previous matter involving Ms. Zink. Court Administration informed the County it would be able to set the matter before one of the other four Superior Court judges on the same date and time as the regular civil docket. The County had no knowledge of which judge would be assigned to the hearing until the case schedule came out the day before the hearing, received no unfair advantage over the Zinks in confirming with Court Administration a judge would be available to hear its motion, and had no legal obligation to inform Ms. Zink of the judge assigned to the case when it became aware of such.

The appearance of fairness doctrine was judicially established to ensure fair hearings by legislative bodies. *Raynes v. City of Leavenworth*,

118 Wn.2d 237, 245, 821 P.2d 1204 (1992). The doctrine requires that public hearings which are adjudicatory in nature be procedurally fair and conducted by impartial decision makers. *Id.* This doctrine is in no way related to the County's attempts to confirm with Court Administration that its scheduled hearing could go forward with one of the non-disqualified judges.

V. CONCLUSION

Based on the foregoing, it is clear the Zinks were provided with adequate notice of the motion to dismiss hearing and chose not to respond to the County's motion, or to appear at the hearing. The Zinks did not provide the trial court, or this Court, with any evidence their inaction was as a result of excusable neglect. As such, the County respectfully requests this Court affirm the trial court's dismissal of this matter.

RESPECTFULLY SUBMITTED this 26th day of September,
2016.

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Prosecutor



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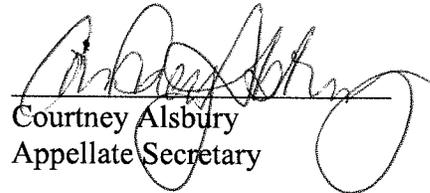
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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E-mail service by agreement
was made to the following
parties: dzink@centurytel.net;
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Signed at Kennewick, Washington on September 26, 2016.


Courtney Alsbury
Appellate Secretary