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Court of Appeal Cause No. 69996-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RONALD WASTEWATER DISTRICT, Respondent

v.

RODOLFO APOSTOL, Petitioner/Appellant

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

I, Rodolfo Apostol, the Petitioner/Appellant asks this court to accept review of the Court of Appeals decision termination review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

I request the Supreme Court to review the decision of the Court of Appeals dated April 21, 2014.

A copy of the decision is in the Appendix at pages A-1 through A-10.

C. ISSUES PRESENTED FOR REVIEW

1. It appears from the record that the trial court did not address the issue of whether Apostol was entitled to relief on the grounds that Apostol's mental condition prevented him from obtaining counsel.
2. Can the Supreme Court determine if striking Apostol's demand for a jury trial violated his constitutional rights under Washington Constitution Article I, Section 21?
3. Can the Supreme Court offer relief to Apostol, set aside the judgment and order a new trial?

D. STATEMENT OF THE CASE

Because Washington courts have not addressed the circumstances in which a pro se litigant's mental disabilities and financial hardship can constitute grounds for vacating a judgment under CR 60(b) (11), I ask the Supreme Court to accept review. And, determine whether constitutional rights were violated when the trial judge strike Apostol's demand for a jury trial and determine damages.

E. WHY REVIEW SHOULD BE ACCEPTED

Washington courts look to federal cases interpreting federal counterparts to federal cases interpreting federal counterparts to state court rules as persuasive authority when the rules are substantially similar. See, e.g., Luckett v. Boeing Co., 98 Wash. App. 307, 311-12, 989 P.2d 1144 (1999); Peoples State Bank v. Hickey, 55 Wash. App. 367, 370-71, 777 P.2d 1056 (1989).

1. The Superior Court abused its discretion by entirely disregarding Apostol's showing that his mental illness prevented him from securing counsel on a contingent fee basis, the only basis on which he could afford counsel.

As the Ninth Circuit observed in Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301, 1310 (9th Cir. 1981), litigating a civil right suit is so complex that where a civil rights plaintiff must proceed pro se he in effect does not have the opportunity to litigate his suit.

Through my diligent efforts in obtaining counsel, I did not have the funds to secure legal counsel. I was terminated from the Respondent in February 2006. No employer would hire me despite my credentials. I received my B.S. degree in Engineering from WSU and took the Washington State Professional Engineering exam and passed and received my Professional Engineering Certification to practice Engineering in Washington State. Without employment, I lacked the funds necessary to obtain legal counsel.

Due to my disabilities, I was awarded Social Security Disability Benefits in June 2011, which enabled me to hire an attorney to file a CR 60 (b) Motion to Vacate Summary Judgment dismissal in the trial courts. When my motion was denied, I had no money left to secure legal counsel for further appeals. I was left with the daunting task to proceed pro se and continued to seek justice. In addition, during this time, I was being treated and continued receiving treatment to this day for various mental and physical disabilities I suffered as a result from the treatment I received from my former employer, Respondent. My medical records support the exhausting efforts I sought from medical doctors, therapists and holistic practitioners to diagnose and treat my ailments and conditions. I was diagnosed with PTSD, dysthymia (a form of depression), sleep apnea, gastritis, colitis, fibromyalgia and chronic fatigue syndrome among others. I found it difficult and impossible to secure legal counsel since no attorney was interested in my case to make it worthwhile for them to take on a contingent fee basis. Although my case was dismissed as a summary judgment final order, the merits of my claim had virtually not been heard. My medical disabilities (both mental and physical) and financial difficulties prevented me in effect to litigate my case.

Since my disabilities has somewhat been abated, I am in a condition where upon retrial with a civil jury and support with legal counsel, I would have the opportunity to litigate my case.

2. As determined in Randall v. Merrill Lynch and Barr v. MacGugan, mental illness need not rise to the level of legal incompetence to warrant relief under CR 60. See Randall v. Merrill Lynch, 820 F.2d 1317, 1319, 1321 (D.C. Cir. 1987); Barr v. MacGugan, 119 Wn.App. 43, 48 (2003).

In Randall, he suffered an attack of acute, stress-related anxiety disorder and was certified as fully disabled by the State of California. Mr. Randall's doctors directed him not to participate in any cross-country litigation because of serious risk of suffering a heart attack or stroke. Mr. Randall's inability to work coupled with the medical costs necessitated by his illness depleted the Randalls' financial resources.

The court concluded:

> Mr. Randall suffered a disabling illness that would have permitted his participation in the litigation only at the risk of even greater disability. We find that the district court did not abuse its

> discretion in determining that this combination of health and financial considerations was sufficient to permit relief under Fed. Rule 60(b)(6).

From the records, the court could determine Apostol faced similar financial and medical hardship such in Randall that would be sufficient to permit relief under Fed. Rule 60(b)(6), Washington's counterpart to CR 60 (b)(11).

In Barr, Barr's attorney suffered from severe clinical depression-not incompetence or deliberate inattention to his workload. (The parties do not dispute that the attorney's mental illness caused him to neglect his practice.) Similarly, without legal representation, "I, in effect did not have the opportunity to litigate my suit".

I was truly diligent in the matters of my case. I submitted all my briefs on time, participated in legal with the courts and opposing counsel as noted by the courts. I read, research and wrote all my briefs. I had to borrow money from my family and my bank, sold the only property I owned to pay for court fees, office supplies, deposition hearings, traveling and parking expenses, as well as my medical bills and medication.

The parties here would not dispute the fact without representation in a complex civil case, my chances of succeeding would nearly be nil.

Since the law favors resolution of cases on their merits. See Lane, 81 Wn. App. At 106. A new trial would resolve my case on the merits so justice may be preserved.

In Barr, the merits of her case have never been addressed. Barr v. MacGugan 47, 119 Wn. App. 43, Nov. 2003. This court affirmed her motion and with new counsel she prevailed. If the court may, accept review, and remand for a new trial, with counsel, I may have this same opportunity.

Since I was not able to present my case to a jury, the trial judge denied my trial demand request. This was not only wrong, it prejudice my entire case in receiving a fair tribunal.

Now, granting a new trial in front of a jury, the fact finder would find at minimum a retaliation and termination violation from the Respondent when Apostol sought workers' compensation benefits under the Industrial Insurance

Act and in which medical documentation from his doctors excusing Apostol and unable to return to work through April 2006. See Appendix I, FACTS.

When a Jury is demanded, a judge cannot waive one. Washington State Constitution in Article I, Section 21 states:

> **SECTION 21 TRIAL BY JURY.** The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Since I demanded a jury trial and was denied one, the trial judge abused his discretion since I did not consent nor waived my rights to a jury. This is in violation with Washington Constitution. A trial court's striking of a party's demand for a jury trial is reviewed for an abuse of discretion. Wilson v. Olivetti N. AM., 805, 85 Wn. App, 934 P.2d 1231, April 1997.

With discretion, the Court of Appeals defer to review under an abuse of discretion standard rather de novo. I ask the Supreme Court to accept this review determine if any of my constitutional rights had been violated.

The right to trial by jury in a civil proceeding in this state is guaranteed solely by article 1, section 21 of the state constitution. Sofie v. Fibreboard Corp. 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260.

In addition, "The jury is given the constitutional role to determine questions of fact and the amount of damages is a question of fact." Robeck, 79, Wn.2d at 869. Cite: 180 Bunch v. King County Dep't of Youth Servs. July 2005, 155 Wn.2d 165.

Could the Supreme Court determine I am entitled to a jury trial to determine damages due to Apostol?

When Washington court adopted the Rules of Appellate Procedure in 1976, RAP 2.5(a) replaced the common-law rule for newly raised issues on appeal. RAP 2.5(a) states:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3)manifest error affecting a constitutional right. 138 Wn.2d 595, State v. WWJ Corp., July 1999.

Furthermore, permitting review under RAP 2.5(a)(3), only if it results in a concrete detriment to the claimant's constitutional rights and rests upon a

plausible argument that is supported by the record from the trial court. Review is not warranted if the merits of constitutional claim cannot be determined from the record. Ibid.

From the records in trial court, the merits of my constitutional claim can be determined, thus warrant review.

Here, Apostol faced similar "extraordinary circumstances" as required in Barr. The absence of representation and the mental illness Barr's attorney and Apostol suffered. Similar to Barr, the records reflect Apostol suffered from mental disabilities, not incompetence or deliberate inattention to his case. But, the parties here would not dispute that Apostol without representation was nevertheless, futile in his case. As in Barr virtually lacking no representation during her attorney's mental illness affected the proceedings and the outcome of her case, this court granted a CR 60(b) (11) motion. The Supreme Court upon accepting review, can determine Apostol without representation was the primary reason his case failed. Now, on retrial and with counsel, Apostol would be able to prosecute his claims.

As stated in Bradshaw:

> It is well established that civil rights lawsuits are too complex for plaintiffs to litigate without counsel. So when a civil rights plaintiffs suffers a mental illness that may not be severe enough to render them legally incompetent, but nonetheless so severe that attorneys are not willing to risk representing them on a contingent fee basis, they are in effect prevented from bringing their case to court."

In Apostol's case, when the mental illness was caused or materially worsened by the defendant's unlawful discrimination, it allowed the defendant to escape responsibility by denying Apostol the opportunity to effectively litigate the suit. When his mental illness has abated, and he can secure counsel on a contingent fee basis to represent him is antithetical to the purpose of the Washington Law Against Discrimination. Indeed, in cases in which the defendant's discrimination impairs the plaintiff's mental health, allowing such a result gives the defendant incentive to harm the plaintiff severely enough to render him unattractive to attorneys who otherwise might find his case sufficiently promising to litigate on a contingent fee basis.

Moreover, the Supreme Court must accept this review because the public policy underlying the Washington Law Against Discrimination, eradicating discrimination, is according to the WA Supreme Court, of the "highest priority." Antonius v. King County, 153 Wash.2d, 267-68, 103 P.3d 729 (2004); Brown v. Scott Paper, 143 Wash.2d 349, 360, 20 P.3d 921 (2001).

F. Conclusion

Remand for new trial by jury or any action this court deems just.

May 21, 2014

Respectfully,

May 21, 2014

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APPENDIX-I

Court of Appeals, Division One - Decision

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

RODOLFO APOSTOL, Appellant, v. RONALD WASTEWATER DISTRICT, a King County municipal corporation, Respondent.	No. 69996-2-I DIVISION ONE UNPUBLISHED OPINION FILED: April 21, 2014

LEACH, J. — Rodolfo Apostol appeals the trial court's denial of his CR 60(b)(11) motion to vacate the dismissal of his lawsuit against Ronald Wastewater District (District). He claims that he was incompetent to represent himself and to testify during the original trial court proceedings. But Apostol did not submit any evidence that established his alleged incompetence. And the trial judge, who had observed Apostol in court during the lawsuit, found that he was capable of representing himself. Because Apostol failed to identify extraordinary circumstances warranting the requested relief, the trial court did not abuse its discretion in denying the motion to vacate. We affirm.

FACTS

The District hired Apostol as a maintenance technician in 1994. In 2002, Apostol began accusing co-workers and managers of discrimination and harassment. Apostol's relationship with the District deteriorated until September

21, 2005, when he left the workplace and did not return. The District terminated Apostol in February 2006.

On August 28, 2008, Apostol filed a lawsuit against the District, alleging claims for harassment, discrimination, retaliation, negligent and intentional infliction of emotional distress, and constructive discharge. On April 23, 2010, the trial court dismissed the action on summary judgment. This court affirmed, concluding that Apostol's claims were either barred by the statute of limitations or unsupported by sufficient evidence to establish a prima facie case.[1] Apostol appeared pro se throughout the proceedings in the trial court and on appeal.

On January 9, 2013, represented by counsel, Apostol moved to vacate the summary judgment under CR 60(b)(11). He argued that the discrimination and harassment he suffered at work had aggravated his mental illness, rendering him incompetent to represent himself or to testify during the trial court proceedings. Apostol supported the motion primarily with declarations from several treatment providers, an attorney, and a co-worker.

The same judge who had conducted the trial court proceedings denied the motion to vacate. The court expressly noted that despite any existing mental infirmity, Apostol's correspondence with opposing counsel during the original proceedings and his conduct in open court established that he "was sufficiently

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[1] Apostol v. Ronald Wastewater Dist., noted at 162 Wn. App. 1036, 2011 WL 2611748, review denied, 173 Wn.2d 1010 (2012).

capable of representing himself so as to make the relief requested under CR 60(b)(11) unwarranted." Apostol, appearing pro se, has appealed.

ANALYSIS

Although he is appealing from the denial of his CR 60(b)(11) motion to vacate, Apostol has devoted most of his arguments to reasserting the discrimination, harassment, and retaliation claims that the trial court dismissed on summary judgment in 2010. But this court affirmed the dismissal on appeal, and that decision became final when the mandate issued on February 29, 2012.[2] Moreover, a CR 60(b) motion is not a substitute for an appeal.[3] "An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment."[4] Accordingly, we review only the denial of Apostol's CR 60(b)(11) motion to vacate.

CR 60(b)(11) permits the trial court to vacate a judgment or order for "[a]ny other reason justifying relief." Relief under CR 60(b)(11) is limited to "'extraordinary circumstances not covered by any other section of the rule.'"[5] The circumstances must involve irregularities extraneous to the court's action or

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[2] See RAP 12.7(a) (generally, Court of Appeals loses power to change or modify its decision upon issuance of the mandate).

[3] See Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

[4] Bjurstrom, 27 Wn. App. at 450-51.

[5] In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (quoting State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982)).

concerns about the regularity of the court's proceedings.[6] We review the trial court's ruling on a motion to vacate for an abuse of discretion.[7]

Apostol contends that a mental disability made him incompetent to represent himself and to testify during the original trial court proceedings and that this extraordinary circumstance justified vacation of the underlying judgment. In Washington, courts presume the mental competency of litigants.[8] But courts must balance the presumption of competency and "the fundamental right of a party to use his or her personal judgment and intelligence in connection with his or her lawsuit" with the obligation "to protect the rights of a litigant who appears to be incompetent."[9] Consequently, the trial court "should appoint a guardian ad litem for a litigant when it is 'reasonably convinced that a party litigant is not competent, understandingly and intelligently, to comprehend the significance of legal proceedings and the effect and relationship of such proceedings in terms of the best interests of such party litigant.'"[10]

Courts also presume that every person is competent to testify.[11] Witnesses are incompetent to testify if they are (1) "of unsound mind, or intoxicated at the time of their production for examination," or (2) "appear

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[6] Yearout, 41 Wn. App. at 902.

[7] In re Marriage of Shoemaker, 128 Wn.2d 116, 120-21, 904 P.2d 1150 (1995).

[8] Vo v. Pham, 81 Wn. App. 781, 784, 916 P.2d 462 (1996).

[9] Vo, 81 Wn. App. at 785.

[10] Vo, 81 Wn. App. at 790 (trial court erred by failing to conduct a hearing to determine pro se litigant's competency after litigant exhibited bizarre behavior during trial) (quoting Graham v. Graham, 40 Wn.2d 64, 66-67, 240 P.2d 564 (1952)).

[11] State v. S.J.W., 170 Wn.2d 92, 100, 239 P.3d 568 (2010).

incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly."[12] The determination of witness competency necessarily rests primarily with the trial judge, who "sees the witness, notices his manner, and considers his capacity and intelligence."[13]

To support his claim of a mental disability, Apostol submitted several declarations and a 2011 administrative law decision finding him disabled for purposes of the Social Security Act, 42 U.S.C. §§ 416(i) and 423 (d).

Susan Mindenbergs

Apostol retained attorney Mindenbergs in May 2005 to have discussions with the District about his harassment allegations. In September 2005, Apostol called Mindenbergs and asked her to file a civil rights action against the District. Apparently based on Apostol's distress during the telephone call, Mindenbergs declined to represent him, believing that his mental condition rendered him unable "to withstand the stress entailed in prosecuting a civil rights suit."

Stephen Paulus

Paulus, a maintenance manager for the District, hired Apostol and remained his supervisor until retiring in 2003. Based on his observations, he believed that Apostol's claims of harassment and discrimination were credible. Paulus does not indicate that he had any contact with Apostol after 2005.

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[12] RCW 5.60.050(1)-(2).
[13] State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

Hainan Berman, PhD

Berman, a clinical psychologist, provided anger management counseling for Apostol in 1997 and 1999. Apostol returned for therapy in 2006, reporting distress and anxiety arising from his experiences at the District. In 2012, in response to a request from Apostol's counsel, Berman acknowledged that he had not seen Apostol since 2006 and that his contact up to that time had been "episodic, limited and intended solely to provide support and short-term psychotherapy." Based on that contact, Berman "doubt[ed]" that Apostol had been fully capable of effectively representing himself or testifying "in a lawsuit against his employer in 2006."

Kenneth Mayeda, MD

Mayeda, Apostol's personal physician, began treating Apostol for anxiety, depression, and insomnia in the late 1990s. Mayeda attributed the deterioration in Apostol's condition in 2004 to his experiences at work. From October 2005 to April 2006, Mayeda certified that Apostol needed to take a leave from work to facilitate his recovery.

David Dixon, PhD

Dixon, a clinical psychologist, met Apostol in December 2006 in conjunction with Apostol's worker's compensation claim. Dixon administered standardized psychological tests and testified on Apostol's behalf before the Board of Industrial Insurance Appeals in February 2007. During the proceeding, Dixon observed Apostol, who represented himself. Dixon apparently had no

further contact with Apostol until June 2012, when he performed a second psychological evaluation to support the motion to vacate.

Based on his evaluations and contact with Apostol in 2006, 2007, and 2012, Dixon diagnosed Apostol with posttraumatic stress disorder and generalized anxiety disorder. He concluded that Apostol's "mental illnesses likely rendered him unable to represent himself in court or in any adversarial proceeding" from 2005 to 2012 and incapable of testifying as a witness from 2005 "through, at least, 2008." Dixon found that Apostol's condition had improved by 2012 sufficiently to permit him to testify.

2011 Administrative Law Decision

On June 22, 2011, an administrative law judge found that Apostol had been disabled since September 21, 2005, under sections 216(i) and 223(d) of the Social Securities Act. In determining that Apostol's condition was sufficiently severe to establish disability, the judge relied on, among other things, Apostol's feelings of being unappreciated and misunderstood, his difficulty in forming relationships, restrictions in the activities of daily living, anger control problems, negativistic attitudes, depressed mood, and "moderate difficulties in maintaining concentration, persistence or pace."

Apostol represented himself in the trial court from August 28, 2008, when he filed the lawsuit against the District, until April 23, 2010, when the trial court dismissed the claims on summary judgment. He alleged 13 causes of action in his complaint and participated in the subsequent proceedings, including

discovery. He corresponded with opposing counsel, responded to motions, and appeared at court hearings. In his own supporting declaration, Apostol acknowledged that he consulted with an attorney before filing the lawsuit and that he "researched the law and filed the appropriate documents with the court to the best of my ability." After the trial court dismissed his claims, Apostol represented himself throughout the appeal.

Mindenbergs, Paulus, and Dr. Berman had no contact with Apostol after 2005 or 2006. Dr. Dixon evaluated Apostol in February 2007 and again in 2012, but he had no contact with him during the trial court proceedings. Apostol apparently continued to see Dr. Mayeda, his personal physician, during 2008 and 2009. But Dr. Mayeda did not describe Apostol's condition during this period and did not suggest that Apostol had ever been incompetent to represent himself or to testify.

Although the administrative law judge found that Apostol had been disabled since September 2005, the decision defined "disability" for purposes of the Social Security Act as "the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments." Nothing in this definition or in the decision suggests that Apostol, who represented himself and testified during the proceeding, was incompetent.

In summary, none of the declarants treated or observed Apostol during the course of the trial court proceedings. Nor did Apostol identify any incident or

conduct during the proceedings suggesting that he was unable to comprehend the legal significance of the proceedings or indicating that he was of "unsound mind" or incapable of receiving just impressions of the facts.[14] Under the circumstances, the evidence of alleged incompetence was highly speculative.[15] The trial judge, on the other hand, had observed Apostol throughout the proceedings and expressly noted Apostol's participation in the action and his conduct in open court.

Apostol's reliance on In re Disciplinary Proceedings Against Meade[16] is misplaced. In Meade, the court held that in order to be competent to appear in bar disciplinary proceedings, an attorney must meet the same standard governing a criminal defendant's competency to stand trial.[17] In addition, due process requires that attorneys appearing pro se in disciplinary proceedings have "the requisite mental competency to intelligently waive the services of counsel or to adequately represent himself or herself."[18]

Apostol has not cited any authority suggesting that a similar standard applies to civil litigants who appear pro se. Moreover, the incompetency determination in Meade rested on the uncontroverted evaluation of a psychiatrist

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[14] See State v. Watkins, 71 Wn. App. 164, 169, 857 P.2d 300 (1993) ("unsound mind" under RCW 5.60.050 "refers only to those with no comprehension at all, not to those with merely limited comprehension").

[15] In re Disciplinary Proceeding Against Koehler, 110 Wn.2d 24, 30, 750 P.2d 254 (1988) (psychiatrist's evaluation of competency one year after relevant time period too speculative when contradicted by firsthand observations of hearing officer).

[16] 103 Wn.2d 374, 693 P.2d 713 (1985).

[17] Mead, 103 Wn.2d at 380.

[18] Mead, 103 Wn.2d at 381.

and the hearing officer's contemporaneous observations questioning the attorney's mental condition. Apostol failed to submit any comparable evidence to support his claimed incompetence.

Because Apostol failed to establish extraordinary circumstances warranting relief under CR 60(b)(11), the trial court did not abuse its discretion in denying the motion to vacate.

Affirmed.

Leach, J.

WE CONCUR:

Spearman, C.J.

CERTIFICATE OF SERVICE

I, Rodolfo Apostol, hereby certify that on May 21, 2014, I served copies of PETITION FOR REVIEW IN THE SUPREME COURT OF THE STATE OF WASHINGTON, on the following parties by way of U.S. mail.

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May 21, 2014 Rodolfo Apostol

Date Signature

State of Washington Court of Appeals Division One