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Supreme Court No. 93956-0
Court of Appeals No. 48098-1-II

**THE SUPREME COURT
OF THE STATE OF WASHINGTON**

MICHAEL NOEL and DIANA NOEL,

Appellants/Petitioners,

v.

CITY OF LAKEWOOD, a Washington municipal corporation, and
CITY OF LAKEWOOD POLICE DEPARTMENT, a political subdivision,
and BRET FARRAR, individually and as Chief of Police,

Respondents.

ANSWER TO AMENDED PETITION FOR REVIEW

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I. INTRODUCTION

Respondents the City of Lakewood, the Lakewood Police Department, and retired Chief of Police Bret Farrar (collectively, “Lakewood”) request the Court deny the amended petition for review filed by petitioner Michael Noel (“Noel”).¹ The Court of Appeals, Division II, properly affirmed the superior court order dismissing Noel’s lawsuit based on the “two dismissal rule” of CR 41(a).² In his amended petition for review, Noel fails to identify any issue of substantial public interest stemming from dismissal of his lawsuit. The issue decided by the Court of Appeals involved the straightforward application of the Civil Rules.

Noel was employed as a sergeant with the Lakewood Police Department until his termination in March of 2012. Noel was terminated after committing a series of policy violations, including the failure to attend a mandatory debriefing after an officer-involved shooting, improperly communicating with witnesses during a subsequent disciplinary investigation, and failing to cooperate with respect to a

¹ Michael and Diana Noel, husband and wife, were originally identified as plaintiffs in this lawsuit. All claims stem from Michael Noel’s employment with the Lakewood Police Department, therefore only Michael Noel is referred to in this brief.

² CR 41(a)(4) provides as follows, in relevant part: “[A]n order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.”

psychological fitness for duty examination. While the background facts may be interesting, Noel's lawsuit was dismissed by the superior court—and affirmed by the Court of Appeals—on purely procedural grounds, namely, the two dismissal rule of CR 41(a).

The current lawsuit from which this appeal stems represents Noel's fourth attempt at recovery in connection with his employment and termination from the Lakewood Police Department. Prior to this lawsuit, Noel voluntarily dismissed two earlier lawsuits involving the same factual allegations, same claims, and same defendants. In this lawsuit, the superior court dismissed all claims asserted by Noel on several grounds, including the two dismissal rule of CR 41(a). On review by the Court of Appeals, Noel conceded all claims with exception of discrimination and retaliation in violation of the Washington Law Against Discrimination (WLAD), RCW 49.60. The Court of Appeals held CR 41(a) barred his WLAD claim, recognizing Noel had voluntarily and unilaterally dismissed two previous lawsuits.

In his amended petition for review, Noel argues an issue of substantial public interest exists based on the alleged need for "clarity" between CR 41(a) and RCW 4.96.020, which governs tort claims against local governmental entities. RCW 4.96.020 requires a tort claimant, such as Noel, to first serve a standard tort claim form on a local governmental

entity at least 60 days before commencing a lawsuit. A claimant who fails to comply with RCW 4.96.020 risks dismissal by a superior court. In his earlier lawsuits, Noel failed to fully comply with RCW 4.96.020 by not listing all his claims. By the time Noel served an amended tort claim form that fully complied with RCW 4.96.020, he had already triggered CR 41(a). Both CR 41(a) and RCW 4.96.020 are cleanly interpreted without ambiguity or conflict, no need for “clarity” exists. Noel simply painted himself into a corner by adopting the unusual tactic of filing and dismissing multiple lawsuits.

Noel does not explain the substantial public interest implicated by dismissal of his lawsuit. Instead, Noel presents three arguments challenging the holding of the Court of Appeals. First, Noel argues CR 41(a) should not apply because his failure to comply with RCW 4.96.020 “deprived the court of subject matter jurisdiction.” In other words, Noel argues his earlier lawsuits “did not count” against the two dismissal rule because they were procedurally deficient. This argument was rejected by the Court of Appeals based on established Washington law. *See Shoop v. Kittitas County*, 108 Wn. App. 388 (2001) (superior courts retain jurisdiction even when claims are deficient under RCW 4.96). Second, Noel argues CR 41(a) should not apply because his earlier dismissals were not “voluntarily and unilaterally obtained.” The

record betrays Noel's assertion and the Court of Appeals could not find any evidence to the contrary. Moreover, the legal authority cited by Noel disfavors his position. See *Spokane County v. Specialty Auto and Truck Painting*, 153 Wn.2d 238 (2004) (applying the two-dismissal rule despite allegations of "an agreement or stipulation" between parties). Third, Noel argues he has sufficient evidence to support a *prima facie* claim under WLAD. Lakewood disagrees with this assertion. Regardless, the alleged merits of Noel's lawsuit are irrelevant based on the procedural bar of CR 41(a). Neither the superior court nor the Court of Appeals found it necessary to address Noel's factual allegations when dismissing his lawsuit as a matter of law.

Noel has failed to implicate an issue of substantial public interest. The Court of Appeals properly interpreted and applied the two-dismissal rule of CR 41(a) when it affirmed dismissal of Noel's lawsuit. Noel's amended petition for review should be rejected.

II. STATEMENT OF THE CASE

A. Factual Background.

While the factual background surrounding Noel's employment and eventual termination from the Lakewood Police Department is interesting, it is irrelevant to the issues presented in Noel's amended petition for review. Both the superior court and Court of Appeals addressed purely

procedural issues. While Lakewood disagrees with the factual representations made by Noel in his amended petition for review, it need not provide an exhaustive summary of disputed facts because the facts are irrelevant. Instead, Lakewood adopts the factual summary stated by the Court of Appeals: “Noel was employed as a sergeant with the City of Lakewood Police Department until his termination on March 2, 2012.” *Noel v. City of Lakewood*, No. 48098-1-II at 1 (2016).

B. Procedural History.

This lawsuit represents Noel’s fourth attempt at legal recovery based on his employment and termination from the Lakewood Police Department. By the time Noel filed the current lawsuit in 2014, he had already triggered the two dismissal rule of CR 41(a) by voluntarily dismissing nearly identical lawsuits filed in 2012 and 2013. The litigation history is summarized below.

1. The 2011 Lawsuit.

In August of 2011, prior to his termination from the Lakewood Police Department, Noel filed his first lawsuit, requesting injunctive relief in connection with his fitness for duty certification, and asserting a variety of other damage claims against Lakewood. *See* Piece County Superior Court No. 11-2-123486. The superior court denied Noel’s request for a temporary restraining order and dismissed his other claims after he failed

to appear. Noel's 2011 lawsuit did not implicate CR 41(a) because it was dismissed by the superior court, not voluntarily by Noel.

2. The 2012 Lawsuit.

In May of 2012, following his termination from the Lakewood Police Department, Noel filed his second lawsuit, alleging a variety of claims against Lakewood. *See* Pierce County Superior Court No. 12-2-08690-2. Lakewood removed the lawsuit to federal court on the basis of federal question jurisdiction. While at the federal level, Lakewood filed a motion for summary judgment, requesting dismissal of all claims. In response, Noel voluntarily dismissed several claims, including all his federal claims. The remaining claims were remanded to state court. Following remand, Lakewood filed another motion for summary judgment, requesting dismissal of all remaining claims. On the morning of the summary judgment hearing, Noel arrived in court and voluntarily dismissed his entire lawsuit. Noel did so based on his failure to comply with the requirements of RCW 4.96.020. To rectify this issue, Noel elected to voluntarily dismiss his lawsuit, file an amended tort claim form, and "start over" with a new lawsuit. *Id.* The order of dismissal signed by both the superior court and Noel indicated his claims were "voluntarily dismissed by plaintiffs." CP 538-539. Noel did not object to the language in the order, nor did he file an appeal. Lakewood made clear to the

superior court that it did not stipulate to the dismissal and would continue to pursue dismissal of Noel's claims. CP 533-34. Noel's dismissal of his 2012 lawsuit counted towards CR 41(a).

3. The 2013 Lawsuit.

In June of 2013, while his 2012 lawsuit was still pending, Noel filed his third lawsuit. *See* Pierce County Superior Court No. 13-2-11383-5. The 2013 lawsuit was virtually identical to the 2012 lawsuit. Lakewood notified Noel of its intention to dismiss the 2013 lawsuit as duplicative. In response, and without further explanation, Noel voluntarily dismissed the 2013 lawsuit. CP 323-324. Noel's dismissal of his 2013 lawsuit counted towards CR 41(a).

4. The Current 2014 Lawsuit.

In June of 2014, Noel filed his fourth lawsuit, the current lawsuit. *See* Pierce County Superior Court No. 14-2-09354-9). This lawsuit involves variations of the same factual allegations, same parties, and same legal claims as Noel's earlier 2012 and 2013 lawsuits.

In August of 2015, Lakewood filed a motion for summary judgment, requesting dismissal of all claims identified by Noel. CP 38-69. The superior court dismissed all claims based on procedural grounds, including the two dismissal rule. RP 13-14; 21.

Following dismissal by the superior court, Noel appealed. During oral argument before the Court of Appeals, Noel conceded all claims except his claim of discrimination and retaliation under WLAD. *Noel v. City of Lakewood*, No. 48098-1-II at 3 (2016). The Court of Appeals affirmed the superior court based on application of CR 41(a). The Court of Appeals rejected Noel's argument that CR 41(a) somehow conflicted with RCW 4.96 and rejected Noel's argument that his earlier dismissals were not voluntarily and unilaterally obtained. *See Noel v. City of Lakewood*, No. 48098-1-II (2016).

III. ARGUMENT

A. There Are No Issues of Substantial Public Interest.

Review under RAP 13.4(b) may be accepted by this Court under a limited number of circumstances. "Under these considerations review will be accepted by this court only if the decision of the Court of Appeals is in conflict with a decision of this court or another decision of the Court of Appeals, involves a significant question of law under the Constitution of the State of Washington or of the United States, or involves an issue of substantial public interest that should be determined by this court." *In Re Post-Sentence Petition of Combs*, 182 Wn.2d 1015 (2015). As the basis for review, Noel cites RAP 13.4(b)(4), which provides that review may be accepted "if the petition involves an issue of substantial public interest." *See Amended Petition for Review* at 1; 8. "We may grant review and consider a Court of Appeals opinion if it involves an issue of substantial

public interest that should be determined by the Supreme Court.” *State v. Watson*, 155 Wn.2d 574, 577 (2005).

Noel fails to explain how dismissal of his lawsuit implicates an issue of substantial public interest. Courts have considered issues of substantial public interest in a variety of circumstances. For example, an issue of substantial public interest may exist when a decision has the potential to affect a number of proceedings in lower courts, resulting in unnecessary litigation and confusion of a common issue. *In Re Flip*, 185 Wn.2d 1032 (2016). As another example, courts deciding whether to accept review of a moot controversy examine three factors implicating substantial public interest: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination for the future guidance of public officers; and (3) the likelihood of future recurrence of the question.” *State v. Hunley*, 175 Wn.2d 901, 907 (2012). Noel does not address these factors or any similar factors in support of his position. The dismissal of Noel’s lawsuit involved the straightforward application of a well-established procedural rule. The rule in question, CR 41(a), is itself supported by important policy considerations. “The narrow purpose of CR 41(a)(4) is to prevent the abuse and harassment of a defendant and the unfair use of dismissal.” *Feature Realty v. Kirkpatrick & Lockhart Preston Gates Ellis LLP*, 161 Wn.2d 214, 219 (2007). Noel could have avoided the two dismissal rule by refraining from filing multiple, duplicative lawsuits. There is no ambiguity or risk of confusion by future plaintiffs. Noel has not met the standard under RAP 13.4(b).

And, as discussed below, the other legal challenges presented by Noel fail to withstand scrutiny.

B. The Superior Court Retained Subject Matter Jurisdiction Over Each Lawsuit Filed By Noel.

Noel argues an issue of substantial public interest exists because “clarity” is needed concerning the interplay between CR 41(a) and RCW 4.96.020. *See* Amended Petition for Review at 8. Noel argues his failure to comply with the administrative prerequisites of RCW 4.96.020 was a “jurisdictional” issue depriving the superior court of subject matter jurisdiction. *Id.* According to Noel, “the issue in this regard may be jurisdictional [...] dismissal of a claim in which a trial court lacks jurisdiction should be dismissed if a condition precedent has not been accomplished prior to filing suit.” *Id.* at 8-10. As recognized by the Court of Appeals, this argument fails for two independent reasons.

First, Washington law is clear that superior courts retain subject matter jurisdiction over lawsuits even when claims are procedurally deficient under RCW 4.96. *Shoop v. Kittitas County*, 108 Wn. App. 388 (2001). In *Shoop*, despite the “jurisdictional language” in RCW 4.96, the court recognized superior courts retain jurisdiction over defective claims:

No action *shall be commenced* against any local governmental entity for damages arising out of tortious conduct until 60 days have elapsed after the claim has first been presented to and filed with the governing body

thereof. RCW 4.96.020(4). Kittitas County has apparently assumed that the claim filing statute is a source of jurisdiction because “shall be commenced” is “jurisdictional language.” [...] If the claim filing statute is a source of jurisdiction, then failure to comply with it should lead to dismissal for want of jurisdiction. But the Supreme Court has held that a claimant’s failure to properly file a claim is a defense than can be waived by failing to timely assert it. If it is defense that can be waived, then failure to file a claim does *not* deprive the superior court of subject matter jurisdiction, notwithstanding the use of “jurisdictional language” in the claim filing statute.

Id. at 400 (citing *Miotke v. Spokane*, 101 Wn.2d 307, 337 (1984)). Other courts have recognized the Washington Constitution broadly grants original subject matter jurisdiction to superior courts that cannot be eroded by statutory law: “Superior courts possess subject matter jurisdiction that cannot be whittled away by statutes [...] If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.” *In re Marriage of McDermott*, 175 Wn. App. 467, 481 (2013). The Court of Appeals properly interpreted the law on this point when rejecting Noel’s argument on this topic. “First, failure to comply with RCW 4.96.020 does not deprive a superior court of subject matter jurisdiction.” *Noel v. City of Lakewood*, No. 48098-1-II at 5 (2016). In his earlier 2012 and 2013 lawsuits, Noel failed to comply with the prerequisites imposed by RCW 4.96.020. Noel had ample notice and opportunity to file an

amended tort claim form. Instead, Noel elected to voluntarily dismiss not one, but two lawsuits, prior to his compliance with RCW 4.96.020. Noel's failure to comply with RCW 4.96 does not serve as a "jurisdictional" shield to the application of CR 41(a), nor did it afford Noel *carte blanche* to file serial lawsuits without repercussion.

Second, although Noel now concedes he failed to comply with RCW 4.96.020 in connection with his 2012 and 2013 lawsuits, such a conclusion was never actually reached by the superior court because Noel voluntarily dismissed his lawsuits before such a ruling could be entered. "Noel sought voluntary dismissal before the superior court ever ruled on the issue of compliance with RCW 4.96.020." *Noel v. City of Lakewood*, No. 48098-1-II at 5 (2016). Noel did this for a deliberate tactical reason. Although his tort claim form filed under RCW 4.96.020 was partially defective, the superior court could have waived the defects under the "substantial compliance" exception of the statute. *See* RCW 4.96.020(5). To make this argument, however, Noel would have been obligated to proceed with the summary judgment hearing, thereby risking dismissal of his claims with prejudice based on Lakewood's other legal arguments. Instead, Noel elected to voluntarily dismiss. Because the superior court never had an opportunity to actually rule on the validity of Noel's claims

under RCW 4.96.020, Noel's "jurisdictional" challenge to the statute remains entirely hypothetical.

C. The Superior Court Properly Applied CR 41(a).

Noel claims an issue of substantial public interest exists because the superior court improperly applied CR 41(a), which is only effective when dismissals are voluntarily and unilaterally obtained by a plaintiff. *Guillen v. Pierce County*, 127 Wn. App. 278, 285 (2005). According to Noel, the two dismissal rule should not apply because the dismissal of his 2012 lawsuit was "based upon the agreement of the parties." *See* Amended Petition for Review at 13. This argument is betrayed by a clear and unequivocal record. As recognized by the Court of Appeals, "Lakewood never stipulated to dismissal." *Noel v. City of Lakewood*, No. 48098-1-II at 8 (2016). When Noel moved for a voluntary dismissal a second time, thereby triggering the procedural bar of CR 41(a), Lakewood clarified its position to the superior court: "I'm sorry. I believe this should go without saying, but just so I'm clear: By not objecting to this dismissal, we're not waiving the right to seek dismissal of these claims." CP 534. The superior court agreed Lakewood was not "waiving anything." *Id.* Moreover, the order entered by the superior court and signed by Noel indicated a "voluntary dismissal by plaintiffs." CP 539. Noel did not

challenge this characterization or file an appeal. Nothing in the record suggests otherwise.

Noel cites *Spokane County v. Specialty Auto & Trust Painting*, 153 Wn.2d 238 (2004). This case actually disfavors Noel's position. There, Spokane County found itself procedurally barred by the two dismissal rule of CR 41(a). It argued, *inter alia*, that its earlier dismissals were a "product of negotiation and agreement between the parties," and because the opposing attorney "assented to the first dismissal." *Id.* at 247-48. The court rejected these arguments, finding nothing in the record to indicate a stipulation or agreement, and holding that CR 41(a) "does not provide for court discretion to look into the reasons for the dismissal." *Id.* at 246. The court also rejected an argument that a procedurally defective or "null" complaint did not count against the two dismissal rule, holding that the "filing of a complaint alone commences an action for purposes of the two dismissal rule," regardless of the "nullity" of the lawsuit. *Id.* at 247. In affirming dismissal of Noel's lawsuit, the Court of Appeals could find no evidence supporting Noel's assertion that his earlier dismissal was based upon the agreement of the parties: "Nothing in the record suggests that the [...] dismissal was anything other than a voluntary, unilateral dismissal by Noel." *Noel v. City of Lakewood*, No. 48098-1-II at 6 (2016).

D. The Merits of Noel's WLAD Claim Are Irrelevant.

Finally, Noel argues an issue of substantial public interest exists because he has sufficient evidence to establish a *prima facie* claim of discrimination and retaliation under WLAD. Lakewood disputes this argument. Regardless, the merits of Noel's factual allegations are irrelevant because this lawsuit is procedurally barred by CR 41(a). Neither the superior court nor the Court of Appeals found it necessary to inquire into the sufficiency of Noel's WLAD claim. If Noel believed he had a meritorious lawsuit under WLAD, he had ample notice and opportunity to file an amended administrative claim for under RCW 4.96.020 before voluntarily dismissing not one, but two prior lawsuits.

IV. CONCLUSION

Based on the foregoing authority, Lakewood respectfully requests the Court reject the amended petition for review filed by Noel.

DATED this 21st day of February, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused the foregoing document to be served upon the following, via electronic service:

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