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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

CHRISTY DIEMOND, Appellant, v. KING COUNTY, Respondent.	No. 81420-6-I UNPUBLISHED OPINION

BOWMAN, J. — Christy Diemond appeals the dismissal of her lawsuit against King County (County), alleging violations of the Public Records Act (PRA), chapter 42.56 RCW. She argues the trial court erred when it denied her motion to continue a summary judgment hearing, granted the County's motion for summary judgment, and denied her motion to reconsider. We conclude Diemond's appeal of these orders is untimely. Diemond also contends the trial court erred when it denied her CR 60 motion to vacate its order granting summary judgment. Because the court did not abuse its discretion in denying Diemond's motion to vacate, we affirm.

FACTS

In 2012, a court convicted Diemond of animal cruelty after an investigation by the Regional Animal Services of King County and the King County Sheriff's

Office (KCSO). Believing she was wrongfully accused of starving her horses, Diemond set out to obtain evidence of misconduct by the agencies. Since 2013, she has filed more than 25 PRA requests with the County,[1] seeking over 70,000 pages of documents. Though Diemond received thousands of pages of records in ongoing installments, she believed the County "silently withheld" disclosable records in violation of the PRA.

In 2015, Diemond filed a "Complaint for Violations of the [PRA]" in Snohomish County Superior Court against the County. At the time, Diemond was represented by an attorney. While her lawsuit was pending, the County continued to send Diemond installments in response to her records requests, and provided links to an online portal to access most of the records. Though Diemond did not access the online portal between December 2016 and March 2018, she continued to file new records requests. The County released at least 23 installments of records between 2015 and 2018.

In March 2018, the County moved for summary judgment, seeking dismissal of Diemond's claims. The County served the motion and notice of the April hearing on Diemond's attorney at his office address. The County later struck the hearing date so the parties could pursue settlement negotiations.

In August 2018, Diemond's attorney filed a notice of withdrawal. The notice directed future service of legal process to Diemond's mailbox at the UPS Store. Diemond then filed a notice of appearance, declaring that she was

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[1] Diemond requested records from the King County Department of Executive Services and the KCSO.

proceeding pro se and directing future service of legal process to the same UPS Store.

On September 7, 2018, in a series of e-mail exchanges, Diemond agreed to meet with prosecutors on September 12 to try to settle her case with the County. The County told Diemond it would renote its previously stricken summary judgment motion hearing for October 12 if they could not settle. Three days later on September 10, the County e-mailed Diemond to let her know that it would change its proposed summary judgment hearing date to October 19 due to a scheduling conflict. Diemond replied, “Thanks for letting me know.” The parties met but did not settle.

On September 19, the County served Diemond with a summary judgment motion identical to the one it filed the previous March, along with a notice of hearing for October 19. A legal messenger served the documents at the UPS Store address Diemond provided in her notice of appearance. Diemond did not retrieve the documents from her mailbox until September 30.

Diemond did not file any responsive pleadings to the County’s summary judgment motion.[2] Instead, on October 12, Diemond filed a notice of unavailability, claiming she would be unavailable “from October 12, 2018 to an undetermined time.” She moved to continue the October 19 summary judgment hearing as well, citing “strict employment” obligations, an ongoing family emergency, and the need for more time to hire an attorney. Diemond asked for a

[2] Diemond’s response was due September 30, 2018. CR 56(c).

continuance of at least 90 days to late January 2019. Diemond did not note a hearing for the court to consider her motion to continue prior to the summary judgment motion date.

The County objected to the motion to continue. The County argued that it notified Diemond on September 7, 2018 that it would be setting a hearing for summary judgment on October 12 if the case did not settle, and that it followed up with Diemond on September 10 to let her know it would set the hearing for October 19 due to a scheduling conflict. The County also pointed out that its summary judgment pleadings were "identical" to those it filed in March.

On October 19, 2018, the County appeared for the summary judgment hearing. Diemond did not appear. The trial court denied Diemond's motion to continue the hearing and granted the County's motion for summary judgment, dismissing Diemond's claims with prejudice.

Diemond learned of the trial court's rulings on November 1, 2018 by checking the court's online docket. The same day, Diemond moved to reconsider, and noted a hearing for November 30. In her motion, Diemond suggested "possible criminal prosecutorial misconduct" without further detail, and renewed her motion to continue summary judgment so she could hire an attorney.

The County opposed Diemond's motion to reconsider. It asserted that Diemond's motion was untimely because she did not file it within 10 days after the court's October 19, 2018 orders, and did not allege any new facts or legal

argument to support her request. The trial court agreed with the County, and signed an order denying reconsideration on January 17, 2019.

On February 14, 2019, Diemond's new attorney filed a notice of appearance. That same day, Diemond moved the Snohomish County Superior Court presiding judge to vacate the trial court's order granting summary judgment under CR 60, and to assign the case to a new "non-conflicted" judge. The County opposed the motion. The presiding judge declined to consider the motion, and referred it to the same trial judge who heard the summary judgment motion. That judge denied the CR 60 motion without oral argument on March 18, 2019.

Meanwhile, on February 21, 2019, while her CR 60 motion was pending, Diemond filed a notice of direct appeal to the Washington Supreme Court, designating the orders denying her motion to continue summary judgment, granting the County's motion for summary judgment, and denying her motion to reconsider. On March 20, 2019, Diemond amended her notice of appeal to include the order denying her CR 60 motion to vacate the summary judgment dismissal order. The Supreme Court transferred the case to this court for consideration.

ANALYSIS

Timeliness of Appeal

The County alleges Diemond's appeal is untimely as to the orders on summary judgment, motion to continue, and motion to reconsider. We agree.[3]

Under RAP 5.2, a notice of appeal must be filed "within the longer of" either 30 days after entry of the decision to be reviewed, or 30 days after entry of an order on reconsideration of the decision to be reviewed. RAP 5.2(a), (e). "Although a timely motion for reconsideration will extend the time for appeal, an untimely motion for reconsideration does not toll the 30-day deadline" to appeal. Sue Jin Yi v. Kroger Co., 2 Wn. App. 2d 395, 409, 409 P.3d 1191 (2018); RAP 5.2.

Under CR 59(b), a motion to reconsider must "be filed not later than 10 days after the entry of the judgment, order, or other decision." A trial court has no authority to enlarge the time for filing a motion to reconsider. Metz v. Sarandos, 91 Wn. App. 357, 360, 957 P.2d 795 (1998); see CR 6(b).[4] Here, the trial court denied Diemond's motion to continue and granted summary judgment dismissal on October 19, 2018. Diemond moved to reconsider the court's

[3] Several interested entities filed amici briefs. Amicus Washington Coalition for Open Government argues the County's local ordinance dividing its departments into separate divisions is unlawful. Because that issue is not properly before us, we do not address it. Amicus We the Governed LLC argues that we should not penalize Diemond by rigid rule interpretations, that we should forgive her "excusable neglect," and that it is "unreasonable" for pro se litigants to conduct daily inquiries when necessary to confirm the status of a pending motion. But it is well settled in the state of Washington that courts hold pro se litigants to the same standards as attorneys. Patterson v. Superintendent of Pub. Instruction, 76 Wn. App. 666, 671, 887 P.2d 411 (1994), review denied, 126 Wn.2d 1018, 894 P.2d 564 (1995).

[4] CR 6(b)(2) provides that a trial court may extend time for cause shown, "but it may not extend the time for taking any action under rule[ ] . . . 59(b)."

decisions on November 1—13 days after entry of the court's orders. Under CR 59(b), the motion was not timely. As a result, Diemond's appeal of the underlying orders is also untimely.[5]

Diemond argues that the deadline in CR 59(b) should not apply here because the court did not notify her of its orders, so she was unaware the court had ruled on the motions until November 1. She cites Rosenbloom v. United States, 355 U.S. 80, 78 S. Ct. 202, 2 L. Ed. 2d 110 (1957) (per curiam), and State ex rel. L. L. Buchanan & Co. v. Washington Public Service Commission, 39 Wn.2d 706, 237 P.2d 1024 (1951), in support of her argument. In Rosenblum, a federal rule required the trial court to mail its original order to the petitioner or his attorney. Rosenbloom, 355 U.S. at 80. Similarly, a court rule in Buchanan required both filing and service of an order before the clock for filing an appeal began to run. Buchanan, 39 Wn.2d at 709-10. Unlike Rosenbloom or Buchanan, neither CR 59(b) nor RAP 5.2 require the trial court to serve an appealable order on any party.[6] Instead, CR 58(b) provides, "Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing." Here, the trial court properly filed it orders with the clerk on October 19, and it was under no obligation to serve the orders on Diemond.

[5] Diemond's 30-day deadline to appeal the October 19, 2018 orders denying continuance and granting summary judgment was November 18, 2018. RAP 5.2(a). Diemond filed her notice of direct appeal on February 21, 2019.

[6] Diemond cites several other cases interpreting similarly outdated Washington court rules requiring service of an order before the time to appeal begins to run. But as stated, CR 59(b) and RAP 5.2 do not require such service.

In the alternative, Diemond argues we should exercise our discretion to enlarge the time to file her notice of appeal under RAP 18.8(b), which provides, in relevant part:

> The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration.

Ordinarily, the benefit of finality "outweighs" a litigant's privilege to obtain an extension of time, absent extraordinary circumstances or a gross miscarriage of justice. RAP 18.8(b); State v. Moon, 130 Wn. App. 256, 260, 122 P.3d 192 (2005). The burden falls on the appellant to provide "sufficient excuse for [her] failure to file a timely notice of appeal," and to demonstrate "sound reasons to abandon the [judicial] preference for finality." Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993).

In Bostwick v. Ballard Marine, Inc., 127 Wn. App. 762, 775-76, 112 P.3d 571 (2005), we denied review where a litigant sought to excuse an untimely cross appeal because it did not receive a copy of the trial court's order. As here, the court rules did not require the court to notify the parties that it had entered an order. Bostwick, 127 Wn. App. at 775. We determined that the litigant's "lack of diligence in monitoring entry of an order on a pending motion does not amount to 'extraordinary circumstances' " under RAP 18.8(b). Bostwick, 127 Wn. App. at 776.

The record here shows the County warned Diemond about noting the hearing for summary judgment in an e-mail, and then properly served Diemond

with notice of the summary judgment hearing. Diemond did not timely respond to the motion, chose not to attend the hearing,[7] and made no attempt to contact the court or opposing counsel to find out the status of her motion to continue or whether the court had ruled on the County's summary judgment motion. Diemond fails to establish extraordinary circumstances or a gross miscarriage of justice that warrants enlarging the time to file her notice of appeal.

We dismiss as untimely Diemond's appeal of the trial court orders denying her motion to continue, granting summary judgment for the County, and denying her motion to reconsider.

CR 60 Motion To Vacate

Diemond argues the trial court should have granted her motion to vacate the order dismissing her lawsuit under CR 60(b)(11)[8] because the judge created "an appearance of impropriety and an appearance of a lack of impartiality and fairness" in ruling on the County's summary judgment motion. We disagree.[9]

We review a trial court's decision on a motion to vacate for an abuse of discretion. In re Marriage of Knutson, 114 Wn. App. 866, 871, 60 P.3d 681 (2003) (citing DeYoung v. Cenex Ltd., 100 Wn. App. 885, 894, 1 P.3d 587 (2000), review denied, 146 Wn.2d 1016, 51 P.3d 87 (2002)). A trial court abuses

[7] Snohomish County Local Civil Rule 7(b)(2)(d)(10)(b) provides, "If no one appears in opposition to a motion at the time set for hearing, the court may enter the order sought, unless the court deems it inappropriate to do so."

[8] Diemond argued below that the court should vacate its order under CR 60(a) and (b)(1), (3), (4), (5), (9), and (11). On appeal, Diemond argues for relief under only CR 60(b)(11).

[9] Diemond also suggests the court should have vacated the order because the County misled her into believing it would not move for summary judgment, and deliberately failed to e-mail her notice of the summary judgment hearing date. The record does not support her argument.

its discretion by exercising it on untenable grounds or for untenable reasons. Knutson, 114 Wn. App. at 871. Under CR 60(b)(11), a court may vacate a judgment for "any . . . reason justifying relief from the operation of the judgment." Courts should apply CR 60(b)(11) sparingly to situations " 'involving extraordinary circumstances not covered by any other section of the rules.' " Knutson, 114 Wn. App. at 872-73[10] (quoting In re Marriage of Irwin, 64 Wn. App. 38, 63, 822 P.2d 797 (1992)).

A violation of the appearance of fairness doctrine amounts to an extraordinary circumstance under CR 60(b)(11). Tatham v. Rogers, 170 Wn. App. 76, 81, 283 P.3d 583 (2012). A party asserting a violation of the appearance of fairness doctrine must show evidence of actual or potential bias. State v. Chamberlin, 161 Wn.2d 30, 37, 162 P.3d 389 (2007) (citing State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992)); see also In re Pers. Restraint of Haynes, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000) (A party "must produce sufficient evidence demonstrating bias, such as personal or pecuniary interest on the part of the decision maker; mere speculation is not enough."). We use an objective test to determine whether a judge should disqualify herself "where the judge's impartiality might reasonably be questioned." In re Pers. Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing State v. Leon, 133 Wn. App. 810, 812, 138 P.3d 159 (2006)). We presume judges perform their functions without bias or prejudice. Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945 (1993). The critical

[10] Internal quotation marks omitted.

analysis for the appearance of fairness doctrine is how the proceedings would appear to a reasonably prudent and disinterested person. Chi., Milwaukee, St. Paul, & Pac. R.R. v. Wash. State Human Rights Comm'n, 87 Wn.2d 802, 810, 557 P.2d 307 (1976).

Pointing to the trial judge's September 2017 conviction for driving while under the influence of alcohol, Diemond contends the judge created an appearance of unfairness by failing to recuse herself because "at the time she ruled on these motions," the judge was "on probation under the supervision and control of the very County and prosecuting attorney's office whose motion she was being asked to grant." According to Diemond, the judge could not be fair because she was "ruling on a motion brought by the County that has the power to seek revocation of her probation and reinstatement of her full 364 additional days of jail of her sentence." But the judge's conditions of probation required her to maintain law abiding behavior, abstain from alcohol or nonprescribed drugs at least eight hours before driving, comply with the Department of Licensing ignition interlock, and pay her legal financial obligations. Diemond fails to explain how ruling against the County as part of her judicial duties could put the judge at risk of violating her conditions of sentence.

Even so, Diemond argues the trial court's rulings themselves show the judge was biased. But judicial rulings alone " 'almost never constitute a valid showing of bias.' " West v. Wash. State Dist. & Mun. Court Judges' Ass'n, 190 Wn. App. 931, 943, 361 P.3d 210 (2015) (quoting In re Pers. Restraint of Davis,

152 Wn.2d 647, 692, 101 P.3d 1 (2004)). And here, the record supports the trial court's decisions throughout the proceedings.

For example, as discussed above, the trial court properly exercised its discretion in denying Diemond's motion to continue. See Bavand v. OneWest Bank, FSB, 196 Wn. App. 813, 821-22, 385 P.3d 233 (2016) (abuse of discretion is proper standard for review of trial court ruling on motion to continue summary judgment). In her notice of unavailability, Diemond moved to continue the County's summary judgment motion, but did not note her motion for a hearing before the summary judgment hearing date. And she failed to support her motion to continue with facts and evidence. Diemond also claimed she was the "principal contact" for a "family medical emergency," but did not disclose the nature of the emergency or why it prevented her from responding to the County's summary judgment motion. Similarly, Diemond asserted she had "not had time to secure new counsel," even though it had been more than a month since the settlement negotiations failed. Finally, Diemond claimed she would incur "a disproportionate legal consequence" if she appeared for the October 19 hearing because she could not fulfill a "pre committed employment contract." Again, Diemond did not explain whether she entered the contract after she learned of the hearing date or inform the court as to what the "disproportionate legal consequence" might be. The court's order denying the motion to continue does not evidence bias.

Similarly, the record supports the trial court's decision to dismiss Diemond's lawsuit on summary judgment. Summary judgment is appropriate

where there is “no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). After the moving party submits adequate affidavits, the nonmoving party must set forth facts sufficient to rebut the moving party’s contentions and show that a genuine issue of material fact exists. Seven Gables Corp. v. MGM/UA Entm’t Co., 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). CR 56(c) requires that a party opposing a summary judgment motion respond no later than 11 days before the motion hearing. But Diemond never responded to the County’s motion for summary judgment. As a result, the trial court relied on the County’s declarations with supporting exhibits from five County public records officers, documenting their ongoing efforts to fulfill Diemond’s PRA requests. The court showed no bias when it determined that Diemond failed to raise an issue of material fact and that the County was entitled to judgment as a matter of law.

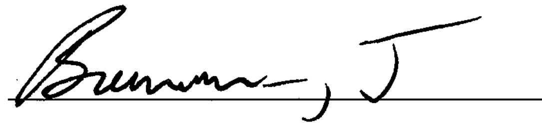
Finally, Diemond contends the Snohomish County Superior Court presiding judge should have ruled on her appearance of fairness issue, rather than referring the matter back to the trial judge for consideration. But absent an allegation of unconstitutional bias, recusal decisions lie within the sound discretion of the trial court. See State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995); Tatham, 170 Wn. App. at 88-89. Unconstitutional judicial bias exists when (1) a judge has a financial interest in the outcome of a case, (2) a judge previously participated in a case in an investigative or prosecutorial capacity, or (3) an individual with a stake in a case had a significant and disproportionate role in placing a judge on the case through the campaign process. State v. Blizzard,

195 Wn. App. 717, 727-28, 381 P.3d 1241 (2016). None of Diemond's allegations amount to unconstitutional bias.

Attorney Fees

Diemond requests attorney fees, costs, and statutory penalty fees under RCW 42.56.550(4) as "a public records requestor who prevails" in a PRA action. Because Diemond did not prevail below or on appeal, we deny her request.

We affirm.



WE CONCUR: