Nathan Jovee, Petitioner, V. Child Advocacy Center Of Snohomish County, Respondent

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

NATHAN JOVEE and ANNE BLOCK,) No. 82171-7-I) (consolidated with Appellants,) Nos. 82395-7-I, 82570-4-I)) v.)) CHILD ADVOCACY CENTER) OF SNOHOMISH COUNTY AT) UNPUBLISHED OPINION DAWSON PLACE, also known as) DAWSON PLACE,)) Respondent.)

BOWMAN, J. Nathan Jovee and Anne Block appeal

denial of their motions to reconsider its order dismissing their Public Records Act

(PRA), chapter 42.56 RCW, actions and imposing sanctions. They also appeal

an order . We reject their appearance of

fairness claim, and affirm.

FACTS

In February 2018, Jovee and Block each sued the Child Advocacy Center

of Snohomish County at Dawson Place (Dawson Place) in Snohomish County

Superior Court, seeking access to records under the PRA. The court first

assigned the lawsuits to Judge George Appel. But both Jovee and Block soon

moved to disqualify Judge Appel. 1 As a result, the presiding judge reassigned

the cases to Judge Richard Okrent.

1 Subject to certain limitations, a party has the right to disqualify a judge once. See RCW 4.12.050(1). The parties then agreed to consolidate their cases under CR 42(a) 2 and

stay the lawsuits pending our decision in a related case, Shavlik v. Dawson

Place, 11 Wn. App. 2d 250, 452 P.3d 1241 (2019). 3 The parties agreed that their

lawsuits stipulated under CR 2A 4

that

the issue of whether Dawson Place is an agency or substantial equivalent thereof pursuant to the [PRA] [a]s presented by [the Shavlik] appeal is a controlling issue of law and all parties agree to be bound by the determination of the appellate courts.

On November 25, 2019, we issued our ruling in Shavlik, concluding that

Dawson Place is not a public subject to disclosure requirements under

the PRA. 11 Wn. App. 2d at 269. The Washington State Supreme Court denied

on June 3, 2020. Shavlik v. Dawson Place, 195

Wn.2d 1019, 464 P.3d 208 (2020). So Dawson Place presented Jovee and

Block with a stipulated order dismissing their PRA claims. Both refused to sign

the dismissal order and, instead, filed an amended complaint, seeking to add a

theory of contract liability. They alleged that Dawson Place agreed to comply

with the PRA when it signed a contract with the Department of Commerce. On

2 When actions involving a common question of law or fact are pending before the court, joint hearing or trial of any or all the matters in issue in the court consolidates two or more cases for trial, they are consolidated for the purpose of appellate review unless we direct otherwise. RAP 3.3(a). We note that after consolidation in the trial court, Jovee and Block began referring to themselves as - refer to Jovee and Block individually. 3 Judge Appel presided over and dismissed the Shavlik case. 4 CR 2A sets forth the manner and form for parties to present an agreement to the court with respect to a dispute within the proceedings. August 18, 2020, Dawson Place moved to dismiss the amended complaint and

sought fees.

On September 29, 2020, Block moved to disqualify Judge Okrent.

Dawson Place objected, pointing out that Block and Jovee had already exercised disqualifications as to Judge Appel. Judge Okrent then recused himself from presiding over the matter. On October 7, 2020, Dawson Place filed an amended motion to dismiss, asking the court to strike the amended complaint and impose sanctions against both plaintiffs for willfully circumventing the CR 2A stipulation and filing a frivolous amendment to the PRA complaint. Dawson Place noted a r 5 before Judge Millie

Judge.

Jovee then moved to strike amended motion to dismiss

and noted a hearing before Judge Paul Thompson, who was presiding over the October civil motions calendar. But Judge Thompson recused himself, so Jovee renoted his motion to strike for November before Judge Judge. Block then objected to Judge Judge. Judge David to strike .

Because Block objected to Judge Judge, Dawson Place again renoted its motion to dismiss and set a hearing on the civil motions calendar before Judge Marybeth Dingledy. Block then sent several derogatory e-mails to Judge Dingledy and, on November 9, 2020, moved to disqualify her. Judge Dingledy recused herself as well. Presiding Judge Bruce Weiss then assigned the case to King County Superior Court Judge Johanna Bender as a visiting Judge. Block immediately began sending derogatory ex parte e-mails to Judge Bender at her court and personal e-mail addresses and leaving

voicemail. Judge Bender issued an order prohibiting any party from contacting the judge directly and limiting e-mails from the parties to only one per day. Still, Block continued to contact Judge Bender through judicial e-mail, personal e-mail, the j , and her personal cell phone. Judge Bender eventually recused herself from the case.

On January 27, 2021, Judge Weiss assigned the case to King County Superior Court Presiding Judge Jim Rogers. In February 2021, Jovee asked Judge Rogers to recuse himself, alleging that he financially contributed to Dawson Place. 5 Judge Rogers denied the motion.

Dawson Place tried several times to schedule a hearing for the court to consider its motion to dismiss. Jovee and Block repeatedly claimed they were unavailable for proposed hearing dates. Ultimately, on Monday, March 8, 2021, Judge Rogers told the parties that he would decide the motion without oral argument. The court noted that th gave the parties until the day to submit any further written argument before deciding the motion on Monday, March 15. Jovee moved again to strike Dawson . Block filed nothing.

On March 15, 2021, the court denied Jovee second motion to strike . It then 5

The record contains no evidence of such a contribution. dismiss the amended complaint, concluding that Jovee and Block knowingly and

voluntarily entered into a CR 2A agreement and bound themselves to the Shavlik

issued CR

11 sanctions against both Jovee and Block, awarding Dawson Place attorney

fees and costs.

Block and Jovee each moved to reconsider the order dismissing their

cases. They argued for the first time that Judge Rogers violated the appearance

of fairness doctrine because he failed to disclose that Block sued him and

another judge in October 2020. 6 On March 26, 2021, the court denied the

motions to reconsider and entered a judgment for Dawson Place in the amount of

$18,778.70. Jovee appealed the judgment on April 1, 2021 and designated six

more orders and notation rulings signed by Judge Rogers for review, as well

ssigning the case to Judge Rogers.

Meanwhile, on June 1, 2021, Block moved all orders issued by

Judge Jim Rogers CR 60(b)(11) for violating her right to a fair and

impartial judge. She also asked the court to transfer the case to Skagit County

Superior Court. Block argued that she received new public -mail from

Judge Rogers in an unrelated case, showing he was biased against her. Block

pointed to a September 18, 2020 e-mail in which she called another King County

6 In October 2020, Block sued a King County Superior Court judge who presided over another lawsuit of hers, as well as the entity of King County, the Washington State Bar Association, and Judge Rogers. She sought a writ of certiorari, declaratory relief, and injunctive relief, alleging that the judge presiding over her case had a conflict of interest and that Judge Rogers failed to disqualify him. The motions for reconsideration are not in the appellate record. But Judge Rogers addresses the

specific - his judgment and decision on reconsideration, and he attaches a copy of ober 2020 complaint to his decision. Superior Court jhad copied Judge Rogers

on the e-mail. 7 Judge Rogers responded the same day:

I have had you in Court many times and you have been respectful and appropriate. But repeatedly now, in dealing with some of our judges, you are t address my worst enemies the way you apparently feel comfortable talking about elected officials.

We will move to block your e[-]mail address. [8]

Judge Rogers denied motion to vacate as untimely and without

cause. Then, on June 15, 2021, Jovee filed an amended notice of direct appeal,

designating the same eight orders as the first notice but adding the order denying

motion to vacate. 9

ANALYSIS

Appearance of Fairness

Block argues that Judge R her] constitutional right to a fair

and impartial judicial officer by presiding over her case. According to Block,

Judge Rogers violated would have seen as having an actual inst her. We disagree. 10

s decision on a CR 60(b) motion, we review

for abuse of discretion s decision on the motion, not any of the

7 The record does not explain why Block copied Judge Rogers. We presume it was to inform him of her allegation because he was the presiding judge of King County Superior Court. 8 Jovee filed a declaration in support -]mail communications speak for themselves and show

in January 2021. 9 Block filed the opening brief on appeal. Jovee filed the reply brief. In his brief, Jovee asks us response brief on appeal. We deny his request. 10 On April 11, 2022, cial Officers Hearing this Case because two former King County Superior Court judges are on the - underlying orders. 11 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)); Bjurstrom v.

Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). We also review a trial

court s denial of a motion for reconsideration for abuse of discretion. Christian v.

Tohmeh, 191 Wn. App. 709, 728, 366 P.3d 16 (2015), review denied, 185 Wn.2d

1035, 377 P.3d 744 (2016). A trial court abuses its discretion by exercising it on

untenable grounds or for untenable reasons. Knutson, 114 Wn. App. at 871.

[a]ny . . . reason

serve the ends of justice in extreme, unexpected situations and when no other

Shandola v. Henry, 198 Wn. App. 889, 895,

396 P.3d 395 (2017). Courts should apply CR 60(b)(11) sparingly to situations

rul Knutson, 114 Wn. App. at 872-73 12

(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).

Under the appearance of fairness doctrine, judges should disqualify

themselves in a proceeding in which their impartiality might reasonably be

Sherman v. State, 128 Wn.2d 164, 188, 905 P.2d 355 (1995). We

11 So even though Jovee designated several orders signed by Judge Rogers in his s to reconsider, the only motions asserting an appearance of fairness claim. 12 Internal quotation marks omitted. use an objective test to determine whether a judge should disqualify himself. In

re Pers. Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010).

The critical analysis for the appearance of fairness doctrine is how the

proceedings would appear to a reasonably prudent and disinterested person.

Chi., Milwaukee, St. Paul, , 87 Wn.2d 802,

810, 557 P.2d 307 (1976).

We presume judges perform their functions without bias or prejudice.

Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945 (1993). 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,

bias, such as personal or pecuniary interest on the part of the decision maker;

An appearance of fairness claim is not constitutional in nature under RAP

2.5(a)(3), so it may not be raised for the first time on appeal. In re Guardianship

of Cobb, 172 Wn. App. 393, 404, 292 P.3d 772 (2 Our appearance of

fairness doctrine, though related to concerns dealing with due process

consideration[s], is not constitutionally based. (quoting City of Bellevue v.

Boundary Review Bd., 90 Wn.2d 856, 863, 586 P.2d 470 (1978); State v.

Morgensen, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008). As a result,

who proceeds to trial knowing of potential bias by the trial court waives [her] objection and cannot challenge the court In re

Welfare of Carpenter, 21 Wn. App. 814, 820, 587 P.2d 588 (1978). Such a rule prevents a party from speculating about how the court will rule on issues in the case and then, if the rulings are not in the party s favor, raising the issues for the first time on appeal. Id.

Here, Block obviously was aware of her own October 2020 lawsuit naming Judge Rogers as a party when Judge Weiss assigned him to her case in January 2021. She had also received 18, 2020 e-mail months before the January 2021 assignment. Yet Block did not ask Judge Rogers to recuse himself. Instead, Block waited several months to raise an appearance of fairness violation in the form of a motion to reconsider and a motion to vacate, after Judge Rogers dismissed her case. As a result, she waived any objections the motions to reconsider and vacate.

And, even if Block had timely raised her concerns, they would not have warranted recusal. Block complains that Judge Rogers told her she was and abusive [her] e[-] litigant who abuses the judicial process. Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008). Explaining to a litigant that her conduct is unacceptable and exercising the discretion to place reasonable restrictions on her use of e-mail to prevent future abuse does not show actual or potential bias. lawsuit against Judge Rogers warrant recusal. A party cannot manufacture an appearance of unfairness by suing the presiding

official. In re Disciplinary Proceeding Against King, 168 Wn.2d 888, 905, 232 P.3d 1095 (2010); United States v. Pryor, 960 F.2d 1, 3 (1st Cir.1992) be that an automatic recusal can be obtained by the simple act of suing the (citing Ronwin v. State Bar of Ariz., 686 F.2d 692, 701 (9th Cir. 1982), cert. denied, 461 U.S. 938, 103 S. Ct. 2110, 77 L. Ed. 2d 314 (1983)). lawsuit alone casts no taint on Judge Rogers ability to be fair in this unrelated matter.

Attorney Fees

Block Costs and F if

Under RAP 18.1(a), a party may recover attorney fees on appeal if allowed under the applicable law. As Block is not a prevailing party, we deny her request.

Dawson Place also seeks costs and fees on appeal. It argues that appeal is frivolous under RAP 18.9(a), RCW 4.84.185, and CR 11. RAP 18.9(a) permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. See Reid v. Dalton, 124 Wn. App. 113, 128, 100 P.3d 349 (2004). An appeal is frivolous if after considering the entire record, we are convinced that the appeal presents no debatable issues on which reasonable minds might differ. Tiffany Family Tr. Corp. v. City of Kent, 155 Wn.2d 225, 241, 119 P.3d 325 (2005). We resolve all doubts on whether the appeal is frivolous in favor of the appellant. Id. Raising

at least one debatable issue precludes finding that the

appeal as a whole is frivolous. See Green River Cmty. Coll. Dist. No. 10 v.

Higher Educ. Pers. Bd., 107 Wn.2d 427, 443, 730 P.2d 653 (1986).

While we reject irness claim, it does not amount

to a frivolous appeal. appeal.

We affirm d

Right to Fair and Impartial Judge.

WE CONCUR: