IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOSEPH KING, M.D. and HOLLY KING, husband and wife and the marital community comprised thereof, and WJK, LJK, and CJMK, minor children by and through their guardians, JOSEPH KING and HOLLY KING,	)	No. 67479-0-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
Appellants,	)	
v.	)	
MICHAEL EMERIC MOCKOVAK,	)	
Respondent.	)	FILED: February 19, 2013
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Appelwick, J. — Mockovak was arrested for solicitation of first degree murder after hiring hit men to murder his business partner, King. King and his family filed suit against Mockovak, claiming that they suffered severe emotional distress as a result of Mockovak's outrageous conduct. The trial court dismissed the Kings' complaint under CR 12(b)(6). The Kings failed to file a notice of appeal within 30 days of the dismissal. Accordingly, we dismiss the Kings' appeal as untimely.

FACTS

This appeal arises from a foiled murder for hire plot. Joseph King and Michael Mockovak were business partners and founded several eye surgery centers together. In June 2009, they decided to end their partnership. Before finalizing the terms of the separation, Mockovak hired hit men to murder King so he could collect King's life insurance payout. Mockovak planned for King to be murdered while on vacation with his family. Mockovak was arrested before King was killed. King and his family knew nothing of the plot until Mockovak's arrest.

Mockovak was charged with solicitation to commit first degree murder. Mockovak posted $2 million bail and was released pending trial. King and his family subsequently filed suit against Mockovak, asserting two causes of action. The Kings claimed that the criminal statutes outlawing solicitation of murder gave rise to a private cause of action. They also alleged that Mockovak's release on bail and the stress of reliving the incident as his criminal charges processed through the justice system caused them severe emotional distress. They argued that, because of Mockovak's outrageous conduct, he intentionally and/or negligently inflicted their emotional distress (torts of outrage and negligent infliction of emotional distress). Their case was stayed pending the outcome of Mockovak's criminal trial. A jury found Mockovak guilty. The court then lifted the stay and set a new case schedule for the Kings' civil lawsuit.

Mockovak filed a motion to dismiss the Kings' claims under CR 12(b)(6) for failure to state a claim. Mockovak argued, in part, that the Kings' emotional distress claims were barred, because they were not present when the conduct occurred. He

also argued that the Kings failed to allege objective symptoms of distress, as required for a negligent infliction of emotional distress claim. The Kings opposed Mockovak's motion on the merits. They also added that "if the Court finds that the claim for negligent infliction of emotional distress is insufficiently ple[a]d[ed], the Court should grant Plaintiffs leave to amend their complaint," citing CR 15(a). They explained that they would amend their complaint to include specific symptoms of emotional distress. They did not file a separate CR 15 motion to amend their complaint.

On June 8, 2011, the trial court granted Mockovak's motion to dismiss. On June 20, 2011, the Kings filed a CR 15 motion for leave to amend their complaint. They pointed out that the trial court's order of dismissal did not explain whether it was with or without prejudice, or with or without leave to amend. Their proposed amended complaint also sought to add two new claims: intentional injury to others and unjust enrichment.

On July 13, 2011,[1] the trial court issued an "ORDER RE: MOTION TO AMEND." That order reads, in part:

> By Order dated June 8, 2011 this court granted Defendant's CR 12(b)(6) motion to dismiss Plaintiff's entire case. In their opposition to the Defendant's motion to dismiss, the Plaintiffs asked leave to amend their pleading of their claim of Negligent Infliction of Emotional Distress. This court did not specifically deny the motion to amend at the time it granted the motion to dismiss, but had considered the proposed amendment and did not grant the motion to amend because the proposed amendment would not have cured the defect on which the dismissal was granted. To

[1] The parties cite to a copy of an order prepared by the court that was dated July 13, 2011, however the record contains no evidence that it was filed on that date. The case number on that order was incorrect. King's counsel acknowledged receipt of that order on July 15, 2011. The record indicates that the trial court again signed the order nunc pro tunc to July 31, 2011 on August 17, 2011. It was then filed on August 18, 2011.

> the extent this court failed to address the motion to amend contained within the Plaintiff's opposition to the Defendant's motion to dismiss, that motion is now DENIED.

The court acknowledged that leave to amend is usually freely granted. But, the court explained, the Kings' entire case was dismissed on June 8 and there were no remaining motions to reconsider or modify that would extend the court's jurisdiction. The court asked the parties to provide additional briefing on whether the court had jurisdiction to grant a motion to amend to add new claims after the entire case was dismissed.

On July 29, 2011, the Kings filed a notice of appeal—less than 30 days from the July 13 order, but more than 30 days from the June 8 order. On August 9, 2011, the trial court denied the Kings' CR 15 motion to amend. It did so largely based on Mockovak's argument that the court lacked jurisdiction, because the Kings failed to file a CR 59 motion to reconsider that would have extended jurisdiction. The Kings did not file a notice of appeal from the August 9 order.

DISCUSSION

The Kings argue that the trial court erred when it dismissed their claims for outrage and negligent infliction of emotional distress on the basis that they were not present for Mockovak's conduct. They concede they were not physically present when Mockovak planned to have King murdered. But, the Kings claim that their presence was not required, because they were the direct object of Mockovak's conduct. In Reid v. Pierce County, the Washington Supreme Court held that even if the Reid plaintiffs were the direct objects of outrageous conduct, they were not physically present for the conduct and therefore could not maintain outrage or negligent infliction of emotional

distress actions. 136 Wn.2d 195, 202-04, 961 P.2d 333 (1998). The Kings request an expansion of this rule, because of the degree of outrageousness of Mockovak's conduct and because they would otherwise be without a remedy. But, they ignore the clear limitations set by the Washington Supreme Court, which we are not at liberty to modify.

That being said, we do not reach the merits of this case, because the appeal was untimely. The Kings filed their appeal 51 days after the June 8 order of dismissal, but within 30 days of the July 13 order. The Kings concede that the trial court's July 13 order was not technically issued pursuant to a motion for reconsideration or a motion to amend the judgment, which would have extended the time for filing their appeal. But, they argue that their appeal from July 13 order brings up the June 8 order, so their notice of appeal was timely filed. They also contend that the trial court, in effect, treated their motion to amend as a motion for reconsideration, extending the time to appeal. In the alternative, they argue that even if we find their notice of appeal untimely, extraordinary circumstances exist under RAP 18.8(b) to justify extending their time to file.

I. Timeliness of Appeal

To be timely, an appeal must be filed within 30 days of the trial court's final decision. RAP 5.2(a); Schaefco, Inc. v. Columbia River Gorge Comm'n, 121 Wn.2d 366, 367, 849 P.2d 1225 (1993). Under RAP 5.2(e), certain postjudgment motions filed with the trial court extend the time for appeal, so long as the motion itself is timely filed. RAP 5.2(e) provides an exhaustive list of these motions, including a CR 59 motion for

reconsideration and a CR 59 motion to amend the judgment. The list does not include a CR 15 motion to amend the complaint.

The Kings rely on the Structurals case to support their argument that the July 13 order was, in effect, a denial of a CR 59 motion for reconsideration. Structurals Nw., Ltd. v. Fifth & Park Place, Inc., 33 Wn. App. 710, 658 P.2d 679 (1983). In Structurals, the trial court entered a judgment and decree on November 13. Id. at 713. The parties then stipulated that amended findings, conclusions, and judgment could be entered. Id. The trial court entered the stipulated amended judgment on November 23. Id. The defendants appealed less than 30 days from the November 23 judgment, but more than 30 days from the original November 13 judgment. Id. The court held that notice of appeal was timely filed and encompassed the November 13 judgment. Id. at 714. The court explained that while the stipulation allowing entry of an amended judgment was not technically a CR 59 motion for amended judgment, "in all practical effect the result is the same as if such a motion had been made and granted."[2] Id.

The Kings are correct that the RAPs are designed to allow some flexibility in order to avoid harsh results. Weeks v. Wash. State Patrol, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982). But, the Kings attempt to stretch the flexibility of Structurals and RAP 5.2(e) too far. In Structurals, the parties together submitted stipulated amended findings and judgment to the trial court, which the court entered. 33 Wn. App. at 713. That action effectively amended the judgment, only without the CR 59 label. Id. at 714. In contrast, the Kings made a specific CR 15 motion to amend their complaint. The

[2] The findings in Structural were amended within 10 days after entry of judgment. 33 Wn. App. at 713. The amendment was timely under CR 52(b).

standard for granting these motions is not the same. They told the trial court that they "do not seek reconsideration; they seek leave to amend." The Kings now tell this court that denial of their motion to amend "could be considered an order denying reconsideration of the June 8 order." We decline to recast their CR 15 motion as a motion for reconsideration when they expressly denied doing so below. Structurals does not compel otherwise.

The trial court acknowledged that its June 8 order did not explicitly deny the Kings' original motion to amend their negligent infliction of emotional distress claim. However, the court explained that it considered the Kings' original proposed amendment at the time, but did not grant the motion, because it would not have cured the claim's fatal defects. The Kings' argue that the July 13 order added specific findings and conclusions.[3] While this order may have clarified the King's understanding of the June 8 dismissal, nothing in the language of the July 13 order amended or reconsidered the June 8 judgment. The Kings' claims were still dismissed and their original request to amend was still denied.

Nevertheless, the Kings argued below and argue here that they did not know whether the June 8 order dismissed their claims with or without prejudice, so the July 13 order must have modified the original judgment. Washington courts follow federal law and treat a CR 12(b)(6) dismissal as a final judgment on the merits, unless otherwise specified. See In re Pers. Restraint of Metcalf, 92 Wn. App. 165, 175 n.6, 963 P.2d 911 (1998); see also McLean v. United States, 566 F.3d 391,396 (4th Cir.

[3] Findings and conclusions are not required for dismissal under CR 12(b)(6) so CR 52(b) would not apply.

2009). Here, the June 8 order was a final judgment on the merits. Because the court did not otherwise specify, it was with prejudice. Id.

Moreover, in their CR 15 motion to amend, the Kings told the court that "[b]y requesting leave to amend to add new causes of action, Plaintiffs do not waive their right to appeal the Court's dismissal of their original complaint." This indicates that the Kings knew the June 8 order was final and with prejudice. The Kings' alleged confusion does not transform the July 13 order into an amendment or reconsideration of the June 8 order. A CR 15 motion to amend is not one of the postjudgment motions enumerated in RAP 5.2(e), and we decline to treat it as such. The Kings filed their notice of appeal 51 days after the trial court's June 8 final judgment. Accordingly, their appeal was untimely.

II. Extraordinary Circumstances

The Kings argue that even if their appeal was not timely filed, we should extend the time to file, because extraordinary circumstances exist. RAP 1.2(a) generally requires liberal interpretation of the RAPs to promote justice and facilitate deciding cases on the merits. But, RAP 1.2(a) is subject to the restrictions of RAP 18.8(b). RAP 18.8(b) permits appellate courts to extend a party's time to file an appeal "only in extraordinary circumstances and to prevent a gross miscarriage of justice." The rule continues: "The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section." Id. Despite this strict language, the Kings maintain that this rule applies to their case, because they acted with reasonable diligence.

We rigorously apply the extraordinary circumstances and gross miscarriage of justice standards. Reichelt v. Raymark Indus., Inc., 52 Wn. App. 763, 765, 764 P.2d 653 (1988). "Extraordinary circumstances" include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. Id. Appellants must provide a sufficient excuse for their failure to file a timely notice of appeal and demonstrate sound reasons to abandon the judicial preference for finality. Schaefco, Inc., 121 Wn.2d at 368. This standard has rarely been satisfied in reported caselaw. Reichelt, 52 Wn. App. at 765.

In Reichelt, there were no extraordinary circumstances where an appeal was filed 10 days late, because one of two Raymark attorneys on the case quit during the 30 days to appeal, and the firm's appellate attorney had an unusually heavy workload during that time. Id. at 764, 766. In Beckman, there were no extraordinary circumstances where a late notice of appeal resulted in affirming a $17 million judgment against the State. Beckman v. Dep't of Soc. & Health Servs., 102 Wn. App. 687, 696, 11 P.3d 313 (2000). In Shumway, there were no extraordinary circumstances where a pro se litigant was erroneously informed by her ad hoc counsel that she did not need to file a particular motion in order to pursue a federal writ of habeas corpus. Shumway v. Payne, 136 Wn.2d 383, 396-97, 964 P.2d 349 (1998). In the cases where appellate courts have granted extra time, the moving party actually filed a notice of appeal within the 30 day period, but some aspect of the filing was defective. Riechelt, 52 Wn. App. at 765 (citing Weeks v. Wash. Chief of State Patrol, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (notice *timely* filed, but with the wrong court); State v. Ashbaugh, 90 Wn.2d

432, 438, 583 P.2d 1206 (1978) (notice *timely* filed, but rejected by the court for lack of filing fee)).

No such extraordinary circumstances exist here. The Kings claim reasonable diligence, but go no further in explaining the circumstances that gave rise to their late filing. Rather, they say only that they thought the appeal would bring up both orders for review. This is not the exceptional case where the appellant timely files a somehow defective appeal. Instead, the Kings filed their appeal 21 days after the 30 day time limit expired. Nothing was defective about the filing except that it was too late. We decline to extend the Kings time to file their appeal.

We dismiss the appeal as untimely.

WE CONCUR: