IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VALERIE I. KTENAS, an individual, Respondent, v. ROBERT TURK and DONNA TURK, husband and wife, Appellants.	No. 41186-5-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — In this easement dispute, Robert Turk appeals the trial court's order denying his CR 60(b) motion to vacate judgment in favor of his neighbor, Valerie I. Ktenas. In addition, Turk assigns error to the trial court's (1) denial of his motion for continuance, (2) failure to rule on his counterclaim and affirmative defenses, (3) granting an anti-harassment order, and (4) entering findings of fact and conclusions of law the evidence does not support. We hold that Turk has failed to timely appeal the trial court's final judgment and order and affirm the trial court's denial of his CR 60(b) motion.

FACTS

In 1957, Turk and Ktenas's predecessors-in-interest recorded a driveway easement with the Pierce County Auditor. The neighbors created a 15-foot driveway by each granting the other

a 7 1/2-foot perpetual easement. Ktenas purchased her home in 1991; Turk purchased his home in 1995. It appears a portion of Ktenas's carport roof encroached on the driveway easement. In 2000, Turk granted Ktenas permission for the encroachment to avoid the unnecessary expense to correct it.

A March 31, 2000 letter from an attorney who was representing Turk at the time notified Ktenas that Turk would be paving the driveway easement area and erecting "a fence between the properties on [her] north boundary line." Clerk's Papers at 155. On May 1, 2002, Turk rescinded his permission for Ktenas's encroachment. Turk requested that Ktenas not park in the driveway easement, remove a container that blocked a portion of the easement, and remove the offending portion of the carport roof. Ktenas had her property surveyed in May 2002, which confirmed that a small portion of her carport roof intruded into the easement.

It appears the conflict between the neighbors escalated after the 2002 property survey. At some point, Turk erected a six-foot fence in the middle of the driveway easement without Ktenas's permission. The fence effectively blocked Ktenas's use of the driveway to reach her side and back yards. Ktenas requested and the trial court issued temporary anti-harassment orders against Turk in 2002 and 2008.

On December 10, 2008, Ktenas filed a complaint for removal of easement obstruction, outrage,[1] and for an order of protection against Turk. Turk answered, asserting several affirmative defenses and filed a counterclaim to quiet title or for ejectment and for an order requiring Ktenas to remove obstructions from the easement area. On December 17, 2009, Turk

[1] On July 22, 2009, Turk moved for partial summary judgment to dismiss the claim of outrage. On August 10, the parties stipulated to dismiss Ktenas's claim for outrage with prejudice.

appeared pro se at trial to request a continuance to hold a settlement conference and to obtain counsel. The trial court found that due to a mailing error, Turk was unaware that his counsel had withdrawn representation and granted the motion. The trial court declined to hear Ktenas's motion for an order requiring Turk to remove the fence. The trial court continued trial to May 12, 2010.

On May 12, Turk again appeared pro se and moved for a continuance to retain counsel. Turk explained that he had hired an attorney but that the attorney could not represent Turk on that particular day due to a scheduling conflict. The trial court noted that the new attorney had not filed a notice of appearance and that Turk had five months to retain counsel. The trial court then gave Turk two options: first, Turk could go to administration[2] to trail for a 3-day period until a courtroom became available, or second, the trial court would grant Turk a 12-day continuance until May 24. Turk left the decision to the trial court. The trial court denied Turk's motion and sent the case to administration.

The case proceeded to bench trial later the same day. The trial court reminded Turk that he would represent himself because his attorney had not yet filed a notice of appearance. Turk stated that he understood. Ktenas and her mother testified; Turk declined cross-examination. Turk also declined to testify, did not object to the admission of any evidence or testimony, and did not make a closing argument. Following a short recess, the trial court orally ruled in Ktenas's favor. On May 21, the trial court entered written judgment, findings of fact, and conclusions of

---

[2] Under the Pierce County Superior Court Local Rules, if no judicial department is available to hear a scheduled matter, the court may transfer that case to the court administrator to be placed in queue for the next available courtroom. PCLR 40(e)(1), (2). While awaiting reassignment, litigants and their witnesses must remain available unless excused by the court administrator. PCLR 40(e)(3).

law, finding that Ktenas was entitled to have the fence removed as an impediment to her use of the easement. The trial court ordered Turk to remove the fence within 30 days of the judgment (or face a $50-per-day fine) and entered a third anti-harassment order.

Turk's new counsel filed a notice of appearance on May 18. On June 30, Turk moved to vacate judgment pursuant to CR 60(b) and for attorney fees. On July 27, the trial court ordered the parties to appear for a hearing to show cause why Turk's motion should be denied. Following a hearing held on August 20, the trial court denied Turk's motion and awarded attorney fees to Ktenas. Turk appeals.

DISCUSSION

Turk assigns error to the trial court's (1) denial of his motion for continuance, (2) failure to rule on his counterclaim and affirmative defenses, (3) denial of his motion to vacate judgment pursuant to CR 60(b), (4) granting the anti-harassment order, and (5) entering findings of fact and conclusions of law the evidence does not support. We affirm.

Timeliness of Appeal

The trial court orally ruled in Ktenas's favor on May 12, 2010, and entered written findings of fact, conclusions of law, and judgment on May 21. Thus, for this appeal to be timely, Turk must have filed a notice of appeal of the trial court's final judgment and order by June 20. Despite Turk's attorney filing a notice of appearance on May 18, Turk did not file a notice of appeal until September 14.

Turk does not argue that there were any "unique circumstances" justifying his noncompliance with the jurisdictional requirements permitting his appeal of the final judgment and order. *See Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 371, 849 P.2d

1225 (1993) (Justice Guy, dissenting) (the doctrine of unique circumstances permits an appeal "'despite noncompliance with jurisdictional requirements if the appellant relied upon judicial action and, in so relying, forfeited the right to appeal'" (quoting *Fiester v. Turner*, 783 F.2d 1474, 1476 (9th Cir. 1986))). Rather, Turk requests that we exercise our discretion under RAP 2.5(a) to review issues raised for the first time on appeal. Specifically, Turk argues that because the trial court erred in denying his motion for continuance to retain counsel, we should review the other issues he raises on appeal.[3] However, Turk does not support with legal authority his apparent contention that RAP 2.5(a) preserves issues for appeal when an appellant fails to timely appeal a trial court's final judgment and order. RAP 10.3(a)(6). Accordingly, we hold that Turk has failed to timely appeal the trial court's final judgment and order and we address the merits of his arguments with respect to the trial court's denial of his CR 60(b) motion to vacate judgment only. RAP 5.2(b).

CR 60(b)(4) Motion to Vacate Judgment[4]

Turk avers that Ktenas made several material misrepresentations at trial causing the trial court to erroneously deny his motion to vacate judgment. Specifically, Turk argues that Ktenas

[3] Although we do not reach the merits of Turk's arguments as to the trial court's denial of his second motion to continue, we note that Turk's assertion at oral argument that the trial court had a sua sponte duty to continue trial when it became apparent that he was unprepared to represent himself at trial is meritless. A pro se litigant is held to the same standard as an attorney, including knowledge of procedure and substantive law. *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, *review denied*, 95 Wn.2d 1033 (1981). Turk did not offer legal authority to support his contention and we assume he has none. Moreover, the record shows that Turk declined the trial court's offer to grant him a 12-day continuance. Because Turk's attorney filed a notice of appearance on May 18, if Turk had accepted the 12-day continuance, he would have had representation at trial.

[4] Turk limits the scope of the trial court's alleged error to CR 60(b)(4); he does not argue on appeal that the trial court erred under any other subsection of CR 60(b).

gave false testimony that she had never impeded the driveway easement. Thus, Turk argues that Ktenas's allegedly false testimony amounted to a misrepresentation entitling him to vacation of judgment.

CR 60(b)(4) provides that the trial court may relieve a party from final judgment or order for fraud, misrepresentation, or other misconduct by an adverse party. Such fraud or misrepresentation must have prevented the moving party from a full and fair presentation of his case. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991); *N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 232, 628 P.2d 482, *review denied*, 96 Wn.2d 1002 (1981). We review a denial of a CR 60(b)(4) motion to vacate a judgment for an abuse of discretion. *Matter of Guardianship of Adamec*, 100 Wn.2d 166, 178, 667 P.2d 1085 (1983). We will not disturb a trial court's decision on a CR 60(b) motion unless the court exercised its discretion on untenable grounds or for untenable reasons or unless the discretionary act was manifestly unreasonable. *Lindgren*, 58 Wn. App. at 595. An appeal from a CR 60(b) motion is limited to the propriety of the denial and not the impropriety of the underlying judgment. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

As an initial matter, we note that although the trial court held a hearing on Turk's motion to vacate judgment on August 20, 2010, Turk has not included a transcript of that hearing in the record for our review. RAP 9.2(b). The record contains only a trial transcript and shows that Turk declined to cross-examine the only two witnesses at trial: Ktenas and her mother. Turk did not object to any of Ktenas's testimony or evidence admitted at trial and did not present any evidence rebutting Ktenas's testimony. Turk also declined to present a case after Ktenas rested

and to give closing argument. Thus, the record Turk presents for our review does not support his claim that Ktenas's allegedly false testimony denied him an opportunity for full and fair presentation of his case. *Lindgren*, 58 Wn. App. at 596. Rather, the record shows that Turk repeatedly declined to present or argue his case.

Pro se litigants are bound by the same rules of procedure and substantive law as attorneys. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997) (citing *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 671, 887 P.2d 411 (1994), *review denied*, 126 Wn.2d 1018 (1995)). And, in the absence of rebutting evidence or a reviewable objection made to Ktenas's testimony at trial, we defer to the trial court for a credibility determination of her testimony. *Mitchell v. Wash. State Institute of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280 (2009), *review denied*, 169 Wn.2d 1012 (2010). Accordingly, because Ktenas's allegedly false testimony did not deny Turk a full and fair opportunity to present his case at bench trial, we hold that the trial court did not abuse its discretion in denying Turk's CR 60(b) motion to vacate judgment and affirm. *Lindgren*, 58 Wn. App. at 596.

Counterclaims and Affirmative Defenses

Turk asserts that the trial court erred in failing to rule on his counterclaim and affirmative defenses. As we indicate above, because Turk failed to timely file a notice of appeal of the trial court's judgment and order, we address the merits of his arguments as to his CR 60(b)(4) motion only. While the issue of whether a trial court must sua sponte rule on counterclaims and affirmative defenses that were pleaded but not argued appears to be novel under these circumstances, we hold that the trial court did not err here. Generally, Turk has the right to have his case heard unless he waives his right, abandons his claim, fails to prosecute it diligently, or

disobeys an order of the court. *See Lewis Cnty. Sav. & Loan Ass'n v. Black*, 60 Wn.2d 362, 370, 374 P.2d 157 (1962). Here, Turk neither argued his theories nor submitted evidence in support of his theories at the bench trial. Thus, although Turk properly pleaded his counterclaim and affirmative defenses, because he failed to raise them at bench trial, he abandoned the claims and the trial court did not err by not ruling on them. RAP 2.5(a); *see Green v. Normandy Park*, 137 Wn. App. 665, 687, 151 P.3d 1038 (2007) (contention that was pleaded, but not raised in opposition to summary judgment, cannot be considered for the first time on appeal), *review denied*, 163 Wn.2d 1003 (2008).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.