IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DALLAS SWANK and JEANNE A. PASCAL SWANK,	)	No. 63784-3-I
Appellants,	)	DIVISION ONE
v.	)	
JIM DUFFY,	)	UNPUBLISHED OPINION
Respondent.	)	
	)	FILED: November 1, 2010

spearman, j. — This appeal involves Dallas and Jeanne Swank's efforts to recover the money they paid to Snohomish County to satisfy the County's lien against a settlement the Swanks received from another party. In August 1987, Dallas Swank was employed as a Snohomish County sheriff deputy when he was injured after falling from a helicopter during a training session. Self-insured Snohomish County paid for part of his medical bills. The Swanks sued various parties, settling with one. The County filed a lien on that settlement and recovered the amount it paid toward Swank's medical bills. Proceedings ensued under two different causes of action in Snohomish County Superior Court. In

cause number 88-2-01155-7, two defendants were granted summary judgment, and trial as to the remaining defendant resulted in a verdict in the defendant's favor. In that trial, the jury found that non-party Snohomish County was at fault but no percentage allocation was made. The cause of action against the County, cause number 92-2-00453-2, was eventually dismissed. In August 2008, the Swanks brought a motion under cause number 88-2-01155-7, requesting an allocation of fault hearing. The trial court entered an Order on Findings of Fact and Conclusions of Law, ruling that the Swanks were estopped from raising the issue of allocation of fault. The Swanks moved for reconsideration, which was denied. They appeal the conclusions of law and the denial of their motion for reconsideration. We affirm on the basis that any further proceedings in this matter are moot.

FACTS

On August 6, 1987, Dallas Swank was employed as a Snohomish County sheriff deputy when he was injured after a 90-foot fall from a helicopter during a Snohomish Sheriff Office Dive Team training session. The County, which was self-insured, paid for part of his medical bills. A board was convened to investigate the accident, and it made a number of findings about the events contributing to the accident. On March 4, 1988, Dallas Swank and his wife Jeanne Swank sued Chouinard Equipment, Ltd., Swallow, Inc., Snohomish

County Volunteer Search and Rescue, Inc., and James Duffy and Jane Doe Duffy. The action was dismissed on summary judgment as to Snohomish County Volunteer Search and Rescue and the Swallow, Inc. Chouinard settled with the Swanks in June 1993 for $550,000, leaving only Duffy as a defendant in that cause of action.

Around January 15, 1992, the Swanks filed a motion to amend their complaint to add Snohomish County (County). The trial court denied the motion on January 23, 1992. On January 27, 1992, the Swanks filed a separate cause of action against the County. The same attorneys represented the County from the Snohomish County Prosecuting Attorney's Office, as Duffy in the other action. In their briefing, neither party discusses the outcome of this cause of action, nor is it clear from the record. However, a review of this court's unpublished opinion in Swank v. Snohomish County, 124 Wn. App. 1056 (2005) reveals that the following events took place. The County moved for summary judgment and the trial court orally ruled in favor of the County but did not enter a written order. In December 1993, the court granted dismissal upon motion of the court clerk for failure to prosecute under CR 41(b)(2). The Swanks reportedly did not receive notice of the dismissal until 2000, and in 2003 they filed a motion to vacate the dismissal, which the trial court granted. This court granted discretionary review and reversed the trial court. We held that the summary

judgment proceedings and the lack of an order to dismiss should have tolled the operation of CR 41(b)(2), but that an error of law is not correctible through CR 60 and that even assuming the Swanks did not receive notice of the dismissal, they failed to challenge the dismissal within a reasonable time.

At some point after the Chouinard settlement, the County filed a labor and industry lien against the settlement in the amount the County had paid in medical benefits for Dallas Swank's injuries. On July 18, 1997, the Department of Labor and Industries (Department) filed an Order and Notice stating that RCW 51.24.060 required payment to Snohomish County by the Swanks. The Swanks requested reconsideration of the order, objecting on four grounds. On October 7, 1997, the Department affirmed the order. The Swanks did not appeal, and the order became final and binding pursuant to RCW 51.52.110.[1] As of May 12, 1999, the Swanks had not complied with the order. The County filed a Warrant for Unpaid Lien and Interest pursuant to RCW 51.24.060 on that date. On October 15, 1999, the Swanks satisfied the judgment.

The action against Duffy proceeded to trial in May 2000. The jury found Duffy not negligent, but found that the County was at fault as an unnamed party or empty chair. The Swanks appealed the jury verdict. On January 16, 2001,

[1] Although both parties refer to RCW 51.52.110 as the statute pursuant to which the Department's order became final, it appears that the proper reference should be to RCW 51.52.050, as the order was never appealed to the Board of Industrial Insurance Appeals.

the Swanks and Duffy filed a stipulation and order with this court to dismiss the appeal with prejudice and without costs. We granted the motion and ordered the case dismissed on January 19, 2001. A satisfaction of judgment was entered in the trial court on January 30, 2001. Sometime before June 8, 2001,[2] the Swanks had moved to join the County as a party under the Duffy cause of action that had been dismissed by this court on January 19, 2001. On June 8, 2001, the trial court denied the motion, finding that it could not "be brought under this cause number because this cause number is no longer viable."

On May 4, 2004, the Swanks filed a motion in the trial court to allocate fault against the County, under the same cause of action against Duffy that had been dismissed by this court. On June 14, 2004, the Swanks filed a "Motion to Set a Date for Hearing Re: Allocation of Fault." Duffy opposed the motion, arguing that the mandate this court issued in the matter terminated all proceedings. In a letter, the trial court ordered the parties to submit proposed findings of fact and conclusions of law, as well as proposed orders. Duffy filed a notice of appeal on November 11, 2004, arguing that the trial court's order effectively vacated the mandate issued by this court on January 19, 2001. In the alternative, Duffy requested this court to grant discretionary review. On January

[2] As the County notes, Swank's motion is not in the record, only the trial court's order denying the motion.

19, 2005, this court denied the request for discretionary review, because we did not find that the trial court's actions signaled a final decision to disregard Duffy's

arguments that it no longer had authority to allocate fault. [3] Furthermore, this court found that discretionary review was not appropriate under RAP 2.3(b). Nonetheless, we noted our concern "with the unusual nature of a hearing to allocate fault to an empty chair five years after the final judgment and four years after a mandate in a dismissed appeal from that judgment." The Swanks did not re-note the motion to allocate fault in the trial court until three and a half years later. On May 5, 2006, the Swanks filed a petition for a writ of mandamus, requesting the trial court to order the County to reimburse the $71,224.65 plus interest that they paid on the lien on August 24, 1999, restore Swank's benefits, and award reasonable costs and attorney fees. The court dismissed the petition on April 23, 2008. In August 2008, the Swanks filed in the trial court, proposed findings of fact and conclusions of law and a memorandum and affidavit in support. The non-party County objected on various grounds, including jurisdiction. After oral argument, the trial court found that it had jurisdiction to consider the Swanks' "Memorandum Supporting Presentation of Fact and Conclusions of Law," denied the County's opposition for lack of jurisdiction, and ordered the County to submit proposed findings of fact and conclusions of law.

[3] The order noted, "The [trial court's] October 29, letter might be read as inviting both sides to propose findings and conclusions consistent with their respective positions, which may merely be findings and conclusions by Duffy offered to support his position that the trial court no longer has any jurisdiction."

The County did so on February 10, 2009. On April 30, 2009, the court issued an "Order on Findings of Fact and Conclusions of Law," [4] ruling that the Swanks were estopped from raising the issue of allocation of fault in light of Finding of Fact 16.[5] Finding of fact 16 stated:

> The jury instructions, and verdict form, provided by the Court to the Jury were those proposed by Plaintiffs. Plaintiffs' proposed verdict form did not invite the jury to allocate a percentage of fault to any other potentially negligent party—including Snohomish County, Chouinard or Swank himself—if it found Defendant Duffy not negligent.

On May 11, 2009, the Swanks filed a motion for reconsideration. The County filed an opposition. The trial court denied the motion for reconsideration on June 12, 2009.

On July 10, 2009, the Swanks filed a notice of appeal seeking review of the trial court's order on the findings of fact and conclusions of law entered April 30, 2009 and the court's order denying their motion for reconsideration entered June 12, 2009.

DISCUSSION

The Swanks argue that the trial court erred in its order on findings of fact and conclusions of law entered April 30, 2009. We affirm on the ground that the

[4] The ultimate effect of the trial court's order was to deny the Swanks a hearing to allocate fault.

[5] The County steadfastly maintains that the trial court's ruling was a "zero percent fault allocation to the County," but as the Swanks point out, this is incorrect. Rather, the court's ruling was that the Swanks were estopped from raising the issue of allocation of fault.

case is moot because the Swanks cannot reopen the Department order that became final and binding in 1997.

In its Conclusion of Law 2, the trial court found:

> [T]he State Department of Labor and Industries Notice and Order ('L&I Order') requiring Dallas D. Swank to reimburse the County $57,921.35 pursuant to RCW 51.24.060, dated July 18, 1997, became final and binding pursuant to RCW 51.52.110 after Swank failed to seek timely review of the Department's decision affirming the Order on October 3, 1997.

The Swanks concede that Conclusion of Law 2 is a correct statement of the law. But they contend that its implication is that the unappealed 1997 Department order has res judicata effect with respect to issues not decided in the order and over which the Department had no jurisdiction. The Swanks contend that allocation of fault was not decided by the Department's 1997 orders and that the Department lacked jurisdiction to allocate fault even if it wanted to. In response, the County argues that the Department's order became final and binding after the Swanks failed to appeal it, which is significant because the Swanks' purpose in allocating fault is to seek reconsideration of that order. The County argues that the Swanks, in raising this issue, are seeking an advisory opinion. It points out that this court does not give advisory opinions. Citing Commonwealth Ins. Co. of America v. Gray's Harbor County, 120 Wn. App. 232, 310, 94 P.3d 304 (2004).

The Swanks' interpretation of the trial court's order as being that the Department's order has a res judicata effect is not well taken. We read Conclusion of Law 2 to state that the Swanks' attempt to hold an allocation of fault hearing is moot, because even assuming a favorable result from an allocation of fault hearing and assuming that such a result would be binding on the non-party County, the Swanks still could not obtain the relief they seek, reversal of the Department's final order. Issues are moot when the court can no longer provide effective relief. In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141 (2009); In re Cross, 99 Wn.2d 373, 376–77, 662 P.2d 828 (1983). As the County points out, this court generally does not issue advisory opinions where there is no longer a case in controversy before us.[6] See Walker v. Munro, 124 Wn.2d 402, 414, 879 P.2d 920 (1994).

In their briefing, the Swanks set forth the law under which they seek to recover the lien amounts paid to the County. They point to former RCW 51.24.060(f) (1993), which existed at the time of the Chouinard settlement, and Clark v. Pacificorp, 118 Wn.2d 167, 822 P.2d 162 (1991), and contend that in their case, if the County's fault was determined to exceed that of Chouinard, the County could not recover on its lien against the Chouinard settlement. Former

[6] This court may exercise its discretion to hear a case involving moot issues if the case "presents issues that are of substantial and continuing interest." Blackmon v. Blackmon, 155 Wn. App. 715, 720, 230 P.3d 233 (2010). We do not find these criteria to be met here.

RCW 51.24.060(f) stated:

> If the employer or a co-employee are determined under RCW 4.22.070 to be at fault, (c) and (e) of this subsection do not apply and benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

While the Swanks argue that RCW 51.24.060 has never prohibited the "revisiting" of a lien taken from a settlement prior to allocation of fault, they cite to no authority for the proposition that a Department order that became final and binding nearly thirteen years ago could, at this juncture, be modified or reversed. Although a party may obtain relief from a judgment or order under narrow circumstances outlined in CR 60(a)(b),[7] those circumstances are not presented

[7] Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

here.

Accordingly, because this court cannot provide effective relief to the Swanks, their effort to proceed with an allocation of fault hearing is moot.

Affirmed.

Spearman, J.

WE CONCUR:

Appelwick, J.

Leach, A.C.J.

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(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or
(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.