IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SKAGIT COUNTY, a municipal corporation of the State of Washington,	)	No. 64395-9-I
Appellant/ Cross-Respondent,	)	DIVISION ONE
v.	)	
SCOTT WALDAL, SKAGIT HILL RECYCLING, INC., a Washington corporation, and AVIS, LLC, a Washington corporation,	)	PUBLISHED IN PART
	)	FILED: August 29, 2011
Respondents/ Cross-Appellants.	)	

Becker, J. — Granting Skagit County's appeal, we reverse orders issued against the County early in the case by a judge who later recused. Denying relief to cross appellants, we affirm an order enjoining them from conducting solid waste handling activities without a permit.

EFFECT OF RECUSAL

Skagit County (the County) initiated this action by suing Scott Waldal, Skagit Hill Recycling, Inc., and Avis, LLC (collectively "Waldal") for abatement of a nuisance.

The County filed the complaint on June 12, 2009. Waldal filed a counterclaim on July 2, 2009. In the counterclaim, Waldal alleged that the County was a competitor with private recycling facilities in Skagit County; that two of the county commissioners were opposed to privatization of solid waste handling; and that one commissioner in particular had a personal pecuniary interest in preventing Skagit Hill Recycling from operating at its current site.

On June 23, the County had issued subpoenas to several of Waldal's lenders and to his wife's demolition company. Waldal and some of the subpoenaed parties moved to quash. Waldal requested sanctions for having to resist the subpoenas. Skagit County Judge Susan Cook presided over a hearing on the motions on July 24, 2009. During the hearing, counsel for the County discussed Waldal's allegations that the improper pecuniary interest of the commissioner was the driving force behind the decision to deny the permit.

Judge Cook ruled that the subpoenas were overly broad, unreasonable, and oppressive. She signed orders quashing the subpoenas on July 24, 2009, and indicated that she was also inclined to grant Waldal's request for monetary sanctions. At the time, counsel for Waldal did not have an order prepared with an exact dollar figure.

On August 3, 2009, the County asked Judge Cook to reconsider. The County also argued that sanctions were not warranted because the subpoenas were "substantially justified" within the meaning of CR 37, the rule allowing

discovery sanctions.

On August 17, 2009, the last brief on the topic of sanctions against the County was filed.

Also on August 17, all Skagit County Superior Court judges, including Judge Cook, recused from the case. The judges issued a brief announcement explaining the recusal was "due to the personal allegations involving our County Commissioners." The case was transferred to visiting Judge Ronald Castleberry of Snohomish County.[1]

On August 27, Judge Cook issued a letter ruling denying the County's motion for reconsideration. "I have now reviewed the pleadings filed in connection with the County's motion for reconsideration. The motion is denied."

On September 18, 2009, the County filed a memorandum arguing that Judge Cook, having recused herself, should vacate her previous orders and should take no further action in the case. Meanwhile, Waldal proposed an order granting sanctions.

On September 30, Judge Cook signed Waldal's proposed order granting $6,240 in sanctions against the County. The County's motion for discretionary review of that order was later accepted by this court as a direct appeal.

The County contends that all orders signed by Judge Cook must be vacated. The County's argument is based on the appearance of fairness

[1] According to the final judgment, the counterclaim was later dismissed, and it is not at issue in this appeal.

doctrine.

The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case. Evidence of a judge's actual or potential bias is required to establish a violation. In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056, review denied, 167 Wn.2d 1002 (2009). "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." Meredith, 148 Wn. App. at 903. Judges must recuse—that is, disqualify themselves from hearing a case—if they are biased against a party or if their impartiality may reasonably be questioned. Meredith, 148 Wn. App. at 903.

Whether recusal was necessary in this case is not the issue before us. The fact is, the judges did recuse. The issue is what actions a judge may or may not take after recusing. There appears to be no Washington authority on this point. Federal courts "have almost uniformly held that a trial judge who has recused himself should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge." Doddy v. Oxy USA, Inc., 101 F.3d 448, 457 (5th Cir. 1996) (even though no grounds supported judge's decision to recuse, judge could not reconsider that decision once recused); see also El Fenix de Puerto Rico v. M/Y Johanny, 36 F.3d 136, 142 (1st Cir. 1994) (though motion to disqualify judge should not have been granted, judge once recused should not have reconsidered the order granting the

motion). Although Washington courts have not addressed the issue, other states have. See, e.g., Payton v. State, 937 So.2d 462, 465 (Miss. Ct. App.) (adopting federal rule on issue of first impression and listing other states that follow same or similar rule), cert. denied, 937 So.2d 450 (Miss. 2006).

Waldal assumes the recusal by the judges was motivated by a concern about the potential for an appearance of bias in favor of the County. He argues that because Judge Cook ruled against the County, there is no need to reverse the order of sanctions. We reject this argument. All we know about why the Skagit County judges recused is that it was due to "personal allegations involving our County Commissioners." All we can infer is that the judges believed that due to those allegations, their impartiality might reasonably be questioned if any of them made rulings in the case. Whatever may be the reason a judge announces that he or she must refrain from judging a case, any rulings by that judge in that case will appear to a disinterested person as being potentially tainted by bias no matter which way the rulings go. This is so even where the direction of the bias may seem obvious, as where the judge has a family relationship with a party. When a judge is thought to have a bias in favor of one party, that party may still seek recusal out of concern that the judge, "in an effort to avoid any possible appearance of partiality, might bend over backward in favor of the other side." 13D Charles Alan Wright et al., Federal Practice and Procedure § 3553 (3d ed. 2008), citing Pashaian v. Eccelston Props., Ltd., 88 F.3d 77, 83 (2d Cir. 1996).

We follow other courts in adopting a bright line rule: once a judge has recused, the judge should take no other action in the case except for the necessary ministerial acts to have the case transferred to another judge. On this ground, we conclude the two orders entered by Judge Cook after recusing—the order denying the County's motion for reconsideration and the order granting sanctions—must be reversed.

The County contends that the proper remedy is to reverse not only the orders Judge Cook entered after she recused, but also her earlier order granting the motions to quash the subpoenas. This order was entered before recusal but after Judge Cook became aware of Waldal's allegations involving the county commissioners.

The test for recusal is an objective one under either the appearance of fairness doctrine or the code of judicial conduct. Meredith, 148 Wn. App. at 903. Judges must disqualify themselves from hearing a case if they are actually biased against a party or if their impartiality may reasonably be questioned. Meredith, 148 Wn. App. at 903. The presence in the lawsuit of personal allegations involving the county commissioners was the reason given by all the judges for their decision to recuse. An objective person might reasonably question whether Judge Cook's rulings, from the point at which she became aware of those allegations, were affected by those allegations. For this reason, the order quashing the subpoenas will also be reversed.

Whether the motions by Waldal that led to the orders may be renewed in

further proceedings is an issue not briefed by the parties, and we do not address it.

The orders quashing subpoenas, denying reconsideration, and granting sanctions are reversed. The orders granting summary judgment and injunctive relief are affirmed.

The remainder of this opinion has no precedential value. Therefore, it will not be published but has been filed for public record. See RCW 2.06.040; CAR 14.

Waldal's cross appeal seeks reversal of Judge Castleberry's orders granting the County's motions for summary judgment and injunctive relief. We conclude the record does not support Waldal's claim that the landfill was engaged in activities for which no permit was required.

This court reviews summary judgment de novo, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 693, 169 P.3d 14 (2007).

Waldal, doing business as Skagit Hill Recycling, has been operating a solid waste handling facility since 2006 on a seven acre site near Sedro Woolley, Washington. The property contains a central pit historically used as a sand and gravel quarry and surrounding upper areas with dirt roads and small

buildings. Both sorted and mixed solid wastes are piled in the quarry pit and the upper areas.

When Waldal bought the property in 2006, the Skagit County Health Department transferred the former owner's inert waste landfill permit to Waldal. An inspector for the health department visited the site after the transfer. She found piles of construction and demolition waste in the pit. The waste consisted of various kinds of noninert wastes including wood, carpeting, foam, fiberglass, insulation, wiring, metal, plastics and roofing. On the upper portion of the property, she found piles of wood waste, concrete, asphalt, other mixed wastes, tires, and ash. Visiting again one month later, she found Waldal had accepted and stockpiled tires. Most of the wastes the inspector observed were noninert wastes that Waldal's permit did not authorize him to accept on the property.

Waldal was warned that he needed to remove noninert materials or to apply for appropriate permits. Nevertheless, inspectors continued to find and photograph the same materials on later visits. Based on the inspection reports and Waldal's failure to submit an operation plan for the site, Waldal's application to renew his permit for 2007 was denied.

Waldal appealed the denial. Before the appeal was decided, he submitted an operation plan and his renewal was approved for 2007. In 2007, the inspector returned for a site visit. She observed "uncovered piles of non-inert waste containing signs; laminates; wood, including painted wood, disintegrating press board, plywood, laminated wood, timbers, and dimensional

lumber; flooring; linoleum; fabrics; asphaltic roofing; tar paper; miscellaneous metals; plastics including sheeting, buckets, pipe, fiberglass; foam; insulation; wiring; tires; land clearing debris; concrete; wood ash; and construction and demolition debris." Waldal was shredding tires and keeping mixed construction and demolition wastes on site. He had also accepted a large amount of ash that contained heavy metals such as arsenic, cadmium, mercury, and lead. The ash sat uncovered on porous soil and, according to two neighbors, sometimes blew onto adjacent properties.

Based on Waldal's failure to comply with his 2007 permit and operation plan, the health department denied his application to renew his permit for 2008 renewal and directed him to cease all solid waste activities.

Waldal appealed the denial of his permit renewal to the county health officer, claiming the solid waste activities at the site were exempt from any requirement to obtain a permit. In March 2008, the health officer denied his appeal. The health officer specifically rejected Waldal's assertion that he was processing only waste that had been separated at its source. Waldal appealed to the Pollution Control Hearings Board (Board). In December 2008, the Board denied Waldal's appeal. Waldal's appeal from the Board's decision was recently resolved against him in Division Two of this court. Skagit County v. Skagit Hill Recycling, Inc., __ Wn. App. __, 253 P.3d 1135 (2011).

In June 2009, the County initiated the present suit by filing a complaint for injunctive relief. The County moved for summary judgment grounds that Waldal

was operating a solid waste handling facility without a permit, in violation of the county code. The court granted the motion and ordered Waldal to remove all noninert waste accepted after March 14, 2008, the date the health department denied renewal of his permit for 2008. Waldal was ordered to cease any solid waste handling activity, "including the use of property for the acceptance or disposal of any type of solid waste," without a permit or a permit exemption approved by the court or local agency with jurisdiction. At Waldal's request, the court modified the injunction to allow for handling and removal of the ash.

Waldal's cross appeal from the order granting summary judgment is grounded in the solid waste statutes and the implementing regulations.

The interpretation of a statute and its implementing regulations is a question of law that this court reviews de novo. Littleton v. Whatcom County, 121 Wn. App. 108, 112, 86 P.3d 1253 (2004). The court's goal is to give effect to the legislature's purpose as it is expressed in the act by looking to the statutory scheme as a whole. Littleton, 121 Wn. App. at 112-13.

The solid waste statutes, chapter 70.95 RCW, require a person to obtain a solid waste handling permit before establishing, maintaining, or modifying a solid waste handling facility unless specific exceptions provided in the chapter are met. RCW 70.95.170. The State Department of Ecology is authorized to promulgate rules exempting certain categories of solid waste handling facilities from permit requirements. RCW 70.95.305. But exemption is not available for facilities that handle "mixed solid wastes that have not been processed to

segregate solid waste materials destined for disposal from other solid waste materials destined for a beneficial use or recycling." RCW 70.95.305(2)(c). This is in line with the legislature's stated findings and priorities that solid waste, especially recyclable materials, be separated by source. RCW 70.95.010(5), (8)(b).

Following the statute, the Department of Ecology has exempted certain solid waste handling activities and facilities from permitting. Chapter 173-350 WAC. Waldal contends his operation is exempt under these regulations. He admits that he accepted, sorted, and processed demolition and construction waste at the site, but contends no permit was necessary because he was operating a materials recovery facility or a recycling facility, not a landfill.

MATERIALS RECOVERY FACILITIES

"Materials recovery facilities" are exempt from permitting if they meet the performance standards of WAC 173-350-040. WAC 173-350-310(2). "Piles used for storage" must also comply. WAC 173-350-320(1)(c)(ii). To qualify for exemption, a materials recovery facility must accept "only source separated recyclable materials and dispose of an incidental and accidental residual not to exceed five percent of the total waste received, by weight per year, or ten percent by weight per load." WAC 173-350-310(2)(b)(ii).

Waldal asserts that the construction and demolition debris he accepted was composed almost entirely of materials he intended to recycle. He asserts

that he accepted less than five percent nonrecyclable materials. But his description of recyclable materials does not coincide with the statutory or code definition. "Recyclable materials" are only those materials "identified as recyclable material pursuant to a local comprehensive solid waste plan." RCW 70.95.030(17); WAC 173-350-100. The County's comprehensive solid waste plan does not identify demolition and construction waste as a recyclable material. Nor does it so identify the furniture, linoleum, insulation, asphalt shingles, tar paper, toys, mattresses, and carpeting that Waldal accepted.

Not only does Waldal fail to establish that 95 percent of the waste he accepted was actually "recyclable materials," he does not show that the materials he classifies as nonrecyclable (5 percent of the total) were "an incidental and accidental residual." He accepted all the debris of entire demolition or construction sites without attempting to separate the nonrecyclable materials before transport. This means the nonrecyclable residual was not accidental. We conclude his site does not qualify for a materials recovery facility exemption.

RECYCLING

Recycling is an activity that can be exempt from permitting under certain conditions. WAC 173-350-210(2)(b). One requirement for exemption is that the recycler accept "only source separated solid waste for the purpose of recycling." WAC 173-350-210(2)(b)(ii). Waldal contends he qualifies for the recycling

exemption. His argument rests on the idea that construction and demolition waste is a "source separated solid waste."

"Solid waste" is "all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials." RCW 70.95.030(22). In this definition, "demolition and construction wastes" is listed as an example of "solid waste." The definition of "source separation" is "the separation of different kinds of solid waste at the place where the waste originates." RCW 70.95.030(24); WAC 173-350-100. Waldal concludes that all waste generated at a construction or demolition site is by definition source separated.

Waldal's interpretation is not logical. The "solid waste" definition lists both "demolition and construction wastes" and "recyclable materials" separately as examples of "solid waste." Reading the examples of "solid waste" as an official list of "different kinds of solid waste" for purposes of "source separation" would mean that source separated demolition and construction wastes could not contain recyclable materials. The two "different kinds of solid waste" would have to be separated where the waste originates.

The statutes and regulations focus on the concept of separating solid waste where it originates for the purpose of recycling. Next to waste reduction, the legislature decided that "recycling, with source separation of recyclable materials as the preferred method" is the highest priority for collection, handling,

and management of solid waste. RCW 70.95.010(8)(b). As noted earlier, the statute authorizing exemptions from permitting requirements does not apply to facilities that handle "mixed solid wastes that have not been processed to segregate solid waste materials destined for disposal from other solid waste materials destined for a beneficial use or recycling." RCW 70.95.305(2)(c).

Waldal's mixed demolition and construction waste was composed of some items destined for disposal, other items destined for some beneficial use, and still other items identified by the county plan as "recyclable materials." Looking at the statute as a whole, it does not make sense that this jumble of wastes would be considered source separated for the purposes of recycling. We conclude Waldal does not qualify for the recycling permit exemption.

The site contains piles of wood waste, wood derived fuel, ash, and other inert materials such as concrete and asphalt. Waldal claims that these types of waste qualify for stockpiling permit exemptions. Again, however, he fails to demonstrate compliance with performance standards, including that his facility complies with the "approved local comprehensive solid waste management plan" and "with all other applicable local, state, and federal laws and regulations." WAC 173-350-040(3), (5). Waldal does not refute evidence in the record that the uncovered pile of ash was maintained on a permeable surface and was blowing onto neighboring properties. Exemption is not available for such a facility. Furthermore, Waldal did not ask the trial court to exclude these stockpiling activities from the injunction. Showing that some piles of inert waste

on his property might qualify for the stockpiling exemption would not change the fact that he used virtually the entire site for unpermitted solid waste activities.

SUMMARY JUDGMENT

Waldal contends the court granted summary judgment on a basis different than what the County set forth in its motion.

"It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 168, 810 P.2d 4 (1991). Once the moving party has established that there is no dispute as to any issue of material fact, the burden shifts to the nonmoving party to establish the existence of an element material to its case. Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 183 P.3d 1118 (2008). After the nonmoving party has filed its materials, the moving party may file rebuttal documents limited to documents "which explain, disprove, or contradict the adverse party's evidence." White, 61 Wn. App. at 168-69.

In White, the medical center moved for summary judgment on the basis that White lacked admissible expert testimony establishing the standard of care. White responded adequately by submitting expert testimony. On rebuttal, the medical center argued for the first time that White lacked evidence of causation. The trial court granted summary judgment on several grounds, including lack of evidence of proximate cause. This court held the trial court committed error

under CR 56 by considering the issue of proximate cause. "Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." White, 61 Wn. App. at 168. White's responsive materials included deposition testimony referring to proximate cause, but this did not satisfy the medical center's obligation to raise the issue in its own moving papers.

> Here, White's responsive materials did not seek summary judgment on or otherwise put into issue the question of proximate cause. Her inclusion of deposition testimony that refers to proximate cause does not raise the issue in the context of a summary judgment motion. There was, therefore, no proximate cause question for Defendants to rebut. Consequently, their unwarranted attempt to do so was beyond what is allowed under CR 56(c).

White, 61 Wn. App. at 169. The order granting summary judgment was reversed because it had been granted for lack of evidence of proximate cause, an issue on which White had no opportunity to respond. White, 61 Wn. App. at 169.

The County's basis for moving for summary judgment was that Waldal was handling solid waste illegally without a permit. Once the County presented sufficient evidence to establish that Waldal was handling solid waste and did not have a permit, it became Waldal's burden to come forward with evidence sufficient to create a material issue of fact. He attempted to do so by asserting he was operating a type of facility for which no permit was required. Under White, the County was entitled to offer rebuttal evidence and argument in reply, and did so below—as it has also done on appeal—by showing that Waldal's

operation requires a permit. We conclude Waldal had ample notice of the basis on which summary judgment was sought and granted.

STAY STATUTE

Waldal next argues that his 2007 permit remains effective so long as his appeal to the Pollution Control Hearings Board remains unresolved by a final decision. In this argument, he claims his site is an "operating waste recycling facility." By statute, a permit for an "operating waste recycling facility" remains effective if renewal is denied until any appeal before the Board is complete:

> If the jurisdictional health department denies a permit renewal or suspends a permit for an operating waste recycling facility that receives waste from more than one city or county, and the applicant or holder of the permit requests a hearing or files an appeal under this section, the permit denial or suspension shall not be effective until the completion of the appeal process under this section, unless the jurisdictional health department declares that continued operation of the waste recycling facility poses a very probable threat to human health and the environment.

RCW 70.95.210; WAC 173-350-710(6)(c).

Waldal did not make this argument to the trial court until his motion for reconsideration. Because there is no indication that the trial court exercised its discretion to reconsider its ruling in light of the new argument, the argument is not properly before us. CR 59 does not permit a party to propose a new theory of the case in a motion for reconsideration. Ensley v. Mollmann, 155 Wn. App. 744, 753 n.10, 230 P.3d 599, review denied, 170 Wn.2d 1002 (2010). But in any event, the record does not support classification of Waldal's facility as an

operating waste recycling facility. The piles of mixed construction waste on Waldal's property continued to grow from year to year rather than being recycled, and the site was permitted as an inert waste landfill, not as a recycling facility. The solid waste handling regulations set forth specific requirements for obtaining permits to engage in different types of recycling. The stay statute is meant for the benefit of genuine recycling facilities in keeping with the legislative priority for recycling solid waste. It would be at odds with the plain language of the statute, RCW 70.95.210, and legislative priorities to stay the denial of a permit for a landfill.

The orders quashing subpoenas, denying reconsideration, and granting sanctions are reversed. The orders granting summary judgment and injunctive relief are affirmed.

Becker, J.

WE CONCUR:

Spearman, J.

Grosse, J.