IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GYLES R. LONG, Appellant, v. KING COUNTY METRO TRANSIT, Respondent.	)	No. 66741-6-I DIVISION ONE UNPUBLISHED OPINION FILED: November 13, 2012

BECKER, J. – Gyles Long filed this action for damages after a bus driver allegedly assaulted and injured him. The superior court denied Long's motions for a default judgment and production of a public record and dismissed his action on summary judgment. Finding no error in these rulings, we affirm.

FACTS

In July 2007, Gyles Long filed a claim for damages with the King County Office of Risk Management. He alleged that a bus driver employed by King County Metro Transit assaulted him on May 31, 2007.

In early 2008, following an investigation, the County informed Long that his claim was denied for lack of evidence of "negligence or liability on the part of King County."

On May 29, 2009, Long filed an unsigned summons and complaint

alleging that a bus driver repeatedly struck him, pushed him out the door, and caused him to fall and break his ankle. He mailed a copy of the complaint to the investigator who handled his claim for the office of risk management. He did not serve a copy on the clerk of the King County Council as required by applicable law.

On June 15, 2009, Long filed an unsigned amended complaint. He did not serve this complaint on the County.

On June 19, 2009, the County filed and served a notice of appearance without waiving affirmative defenses, including those relating to personal service.

On August 17, 2009, Long filed a "Motion for Default Judgment" and noted it for hearing on August 28, 2009. He alleged the County had not timely answered his complaint. The court denied the motion "as having been noted on the wrong calendar."

On August 26, 2009, the County filed and served an answer to the original complaint. The answer included affirmative defenses relating to service and the statute of limitations.

On April 15, 2010, Long filed a motion to compel disclosure of an investigative report prepared in connection with the claim he filed with the office of risk management. He argued that the office of risk management violated the Public Records Act, chapter 42.56 RCW, when it claimed the report was exempt

from disclosure under the work product doctrine and the attorney-client privilege. The County opposed the motion, arguing in part that it was untimely and that the report was properly withheld because it was performed at the direction of counsel in anticipation of litigation. The court denied the motion, ruling that the report was "prepared by Risk Management at the request of METRO's counsel in anticipation of litigation" and was thus exempt from disclosure.

On June 21, 2010, the County filed an answer to Long's amended complaint. Among other defenses, the answer alleged that the amended complaint was unsigned, that neither complaint had ever been properly served, and that Long's claims were barred by the statute of limitations.

On August 30, 2010, the County moved for summary judgment on the basis of its previously asserted defenses. Long filed no responsive pleadings and did not appear at the hearing.

On October 1, 2010, the court granted summary judgment, noting that "no opposition pleadings from plaintiff were received." The court ruled that service was insufficient and that Long had failed to commence his action within the applicable statutes of limitation. Long moved for reconsideration on the ground that the notice for the hearing erroneously stated that it would be in Seattle, and that he missed the hearing, which took place in Kent, through no fault of his own. Long did not note this motion for hearing, and the court never ruled on it.

The County noted the matter for entry of judgment on January 21, 2011.

Long filed nothing in opposition. Roughly six months after entry of judgment, Long belatedly filed a memorandum opposing summary judgment. He now appeals the order on summary judgment.

DECISION

Long assigns error to three orders entered in the proceedings below: the order denying his motion for default, the order denying his motion to compel, and the order granting the County's motion for summary judgment. Citing RAP 2.4(b), the County contends the first two orders are not properly before us because Long's notice of appeal only designates the order on summary judgment for review.

A notice of appeal must designate the decisions for which review is sought. RAP 5.3(a)(3). A ruling not designated in the notice will not be reviewed unless it "prejudicially affects the decision designated in the notice." RAP 2.4(b)(1). Neither party addresses whether the orders denying Long's motions for default and production of the investigative report prejudicially affected the subsequent summary judgment decision designated for review. We conclude it is unnecessary to decide whether the earlier orders are properly before us because even assuming they are, Long's challenges to them lack merit.

Long contends the superior court abused its discretion in denying his motion for a default judgment. Kaye v. Lowe's HIW, Inc., 158 Wn. App. 320, 326, 242 P.3d 27 (2010) (whether default will be granted is within the court's discretion and dependent on the circumstances). We disagree.

Long's sole argument below was that the County was in default because it

did not answer the original complaint within 20 days of service as required by CR 55. Long repeats this argument on appeal but nowhere addresses the superior court's basis for denying his motion, i.e., that he noted it on the wrong calendar. Nor does he dispute the County's contention that he did not sign or properly serve either of his complaints and did not timely serve his motion for default. In addition, the County cured any default because it appeared before Long moved for default and filed its answer before the hearing on his motion. See CR 55(a)(2); In re Marriage of Pennamen, 135 Wn. App. 790, 798-99, 146 P.3d 466 (2006). Accordingly, the court did not abuse its discretion in denying Long's motion for a default judgment. Long's other arguments on this issue are raised for the first time on appeal and need not be considered. RAP 2.5(a); In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (procedural rules apply equally to litigants represented by counsel and litigants proceeding pro se).

Long next contends the court erred in denying his motion to compel production of the investigation report by the office of risk management. The Public Records Act requires state and local agencies to disclose public records unless they fall within an exemption. RCW 42.56.070(1); Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 250, 884 P.2d 592 (1994). The act exempts records that would be protected from pretrial discovery, including attorney work product. RCW 42.56.290; Morgan v. City of Federal

Way, 166 Wn.2d 747, 754, 213 P.3d 596 (2009). Work product includes the "legal research and opinions, mental impressions, theories, or conclusions of the attorney or of other representatives of a party," "an attorney's written notes or memoranda of factual statements or investigation," and "formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation." Limstrom v. Ladenburg, 136 Wn.2d 595, 611, 963 P.2d 869 (1998) (plurality opinion). Counsel's opinions and impressions are absolutely protected, and factual statements are subject to disclosure only upon a showing of substantial need and inability, without undue hardship, to obtain them or the substantial equivalent. Id. at 611-12. Whether a particular document is work product is a factual determination that we review for substantial evidence. Soter v. Cowles Publ'g Co., 131 Wn. App. 882, 894, 130 P.3d 840 (2006), aff'd, 162 Wn.2d 716, 174 P.3d 60 (2007). Whether a party has shown substantial need and inability to obtain information is reviewed for abuse of discretion. Heidebrink v. Moriwaki, 104 Wn.2d 392, 401, 706 P.2d 212 (1985).

In this case, the court found that the investigative report was prepared at the direction of King County Metro Transit's counsel in anticipation of litigation and was therefore work product. Substantial evidence supports that finding. Moreover, Long did not demonstrate an inability to obtain factual information equivalent to the information in the report. As the County points out, he made no

discovery requests and failed to pursue other avenues for obtaining information about the incident. The court did not abuse its discretion in rejecting Long's claim of substantial need.

Long also argues, as he did below, that the report must be disclosed because it was prepared in the ordinary course of business. He contends the office of risk management had a duty to investigate his claim regardless of whether litigation was anticipated. He concludes, therefore, that the report was prepared in the ordinary course of business. Again, we disagree.

Long correctly notes that the work product doctrine does not shield records created during the ordinary course of business. Morgan, 166 Wn.2d at 754-55. However, a document normally prepared in the ordinary course of business may still be work product if the nature of the document or the facts indicate that it was prepared or obtained because of the prospect of litigation. See Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 733, 174 P.3d 60 (2007) (where litigation was anticipated from the outset and "dominant purpose" of investigation was to prepare for litigation, document was work product and would not be treated as being created in ordinary course of business); In re Det. of West, 171 Wn.2d 383, 405, 256 P.3d 302 (2011); Morgan v. City of Federal Way, 166 Wn.2d at 754-55. Here, an unrebutted declaration stated that the County's counsel reviewed Long's claim for damages shortly after he filed it and determined that it "had a likely potential to result in anticipated litigation." Counsel immediately directed the transit claims manager and the assigned investigator "to conduct an investigation at my direction and on my behalf." The record thus supports a conclusion that the dominant purpose of the report was to

prepare for litigation.

Finally, Long contends the court erred in granting summary judgment and in failing to rule on his motion for reconsideration. Although he claims to have filed a timely response to the summary judgment motion, a review of the record contradicts his claim. He neither filed a response nor appeared at the summary judgment hearing. While Long did file a motion for reconsideration explaining his absence and requesting a new hearing to present arguments against summary judgment, the County contends, and he does not dispute, that he failed to note the motion for hearing as required by local rules. See LCR 59(a) and LCR 7(b)(5)(A). Long also does not dispute the County's claim that he failed to properly serve the motion. Finally, while he eventually filed a memorandum in opposition to summary judgment, it is file stamped July 8, 2011, some nine months after entry of the order on summary judgment.

RAP 9.12 states in part that in reviewing an order granting summary judgment, "the appellate court will consider only evidence and issues called to the attention of the trial court." Long's arguments in opposition to summary judgment were not timely brought to the attention of the trial court. Thus, they are effectively raised for the first time on appeal and need not be considered. RAP 9.12; RAP 2.5(a). The superior court did not err in granting summary judgment or in declining to rule on Long's motion for reconsideration.

Affirmed.

Becker, J.

WE CONCUR:

Spearman, A.C.J.

Grosse, J.