# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| ROSE HOWELL,<br>Appellant,<br><br>v.<br><br>ARLIS J. PLOTNER, as personal representative of the ESTATE OF KEITH WALTER PLOTNER, deceased,<br>Respondent. | No. 39670-0-II<br><br>Consolidated with<br>No. 40004-9-II<br><br>UNPUBLISHED OPINION |

Van Deren, J. — Keith Plotner injured Rose Howell in a 1999 car accident. After trial, Howell received a judgment for $6,946.50. She appeals the trial court's orders and rulings (1) denying her motion for default and a default judgment, (2) denying her second affidavit of prejudice, (3) appointing a guardian ad litem to assess her competence, (4) declining to perpetuate an out-of-state deposition, and (5) denying her request for a pro se lien. We affirm and award Plotner attorney fees and costs on appeal.

FACTS

On March 3, 1999, Plotner collided with the rear of Howell's car while Howell was stopped in a construction area. On July 10, 2001, Howell sued Plotner in Clark County Superior

Court, alleging personal injuries and requesting damages for pain and suffering. On August 10, Plotner's attorney, through his insurer, Safeco Insurance Company, filed a notice of appearance. On December 4, 2003, Plotner answered Howell's complaint. In July 2004, Howell amended her complaint and Plotner answered again. Plotner died on May 2, 2005; on July 25, Howell filed a motion requesting substitution of Plotner's estate and to amend the complaint; on August 26, the trial court granted this motion; and on August 29, Howell filed an amended complaint that reflected this substitution of his estate as defendant. The estate did not file a third answer until Howell moved for default in 2008.

On June 19, 2007, Howell notified the court that she wished to represent herself pro se in any further proceedings. In that first pro se filing, she noted that Plotner's estate had not answered the August 29, 2005, amended complaint. On February 12, 2008, Howell moved to default the estate because it had not answered her second amended complaint. Thus, on February 15, the estate filed an answer to the second amended complaint. Despite the estate's answer, Howell moved for a default judgment, which the trial court denied, noting that the estate or Plotner (1) answered the first two complaints; (2) did not initially answer the August 29, 2005, complaint that Howell amended solely to substitute Plotner's estate as defendant; (3) answered the second amended complaint on February 15, 2008; and (4) timely responded to Howell's motion for default before the March 7 hearing. Howell renewed her motion for a default judgment throughout the remainder of the proceedings. Howell also requested damages in excess of $13 billion. The trial court set trial for September 15.

On April 4, Howell filed an affidavit of prejudice against the trial judge and requested appointment of a new judge, a request which was granted. On July 8, Howell filed an affidavit of

prejudice against the second judge assigned, in part because he did not grant her renewed requests for a default judgment against the estate and because she alleged that the judge had ex parte communications with Plotner or his estate. The trial court denied Howell's affidavit of prejudice and her renewed motion for a default judgment, noting that the estate's answer satisfied the requirements of CR 55 and that the previous judge's rulings were correct.

On September 12, over Howell's objection, the trial court struck the trial date and appointed a guardian ad litem to address concerns regarding Howell's competency. The guardian ad litem appears to have recommended that Howell be found competent, at which point the case again began moving toward trial.

On April 13, 2009, Howell petitioned for perpetuation of the out-of-state deposition of a California physician who Howell sought to introduce as an expert witness at trial. The trial court denied Howell's request because defense counsel was unavailable to interview the physician and because the proposed expert had "not examined . . . Howell since the early 1990's." Clerk's Papers (CP) at 618. Following the out-of-state physician's deposition, Howell made an offer of proof to support admission of the deposition as trial testimony, which the trial court denied because "some of the things that the doctor was testifying about were never linked with reasonable medical probability[1] that these were a result of the automobile accident" and because the doctor discussed exhibits, of unknown origin, that Howell did not attach to the deposition. CP at 618.

Following a bench trial, the trial court ruled that Plotner's negligent driving caused

[1] At an earlier hearing, the trial court granted partial summary judgment to Plotner's estate and restricted potential testimony about the relationship between a medical condition called syringomyelia and physical trauma.

Howell's injury and it awarded Howell damages of $6,867.52 for whiplash, lost wages, and stipulated medical expenses. As Plotner's offer of settlement exceeded the damages awarded by the trial court, the trial court awarded Plotner's estate $450 in costs.

The trial court ordered the estate to deposit the remaining funds into the court registry so that creditors, if any, might have an opportunity to file liens against the judgment. Howell then filed a notice of a pro se lien for $711,358.47 against Plotner's estate, citing RCW 60.40.010(3) as authority for the lien; Howell also moved to quash all invalid liens. The trial court denied her lien and her motion to quash all invalid liens and awarded $3,937.83 to Howell's previous attorney, $139.04 to Medicare, and $1,602.52 to State Farm Insurance.

Howell appeals issues related to the trial and the lien.[2]

ANALYSIS

I. Default Judgment

Howell contends that the trial court should have granted her motion for default and entered a default judgment in her favor after the many years she awaited resolution. She further contends that the trial court[3] thus lacked authority for many of its actions after denying her motion for default and argues that we should also reverse those rulings.

"The rule is well established in this state that the granting of or refusal to grant a motion for default rests within the sound discretion of the trial court." *Bown v. Fleischauer*, 53 Wn.2d

[2] Howell also requested that we impose the "[p]ro [s]e [l]ien" and review "[f]uture [o]rders of the trial court." Clerk's Papers (COA No. 40004-9-II) at 71. In a ruling dated November 25, 2009, a commissioner of this court consolidated review of the lien with the pending appeal and declined to grant review of nonexistent orders.

[3] Howell also contends that we erred when we did not grant her motion for default. Howell overestimates the scope of our review. *See* RAP 2.4(a).

419, 425, 334 P.2d 174 (1959). A trial court abuses its discretion if it "exercise[s] its discretion on untenable grounds or for untenable reasons" or if "the discretionary act was manifestly unreasonable." *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990).

Under CR 55, a party may move for default where the opposing party has not appeared, pleaded, or defended. CR 55(a)(1). If the party opposing the motion has appeared,[4] that party "may respond to the pleading or otherwise defend at any time before the hearing on the motion." CR 55(a)(2). Default occurs when the opposing party does not respond to the motion, at which point the trial court may choose to enter a default judgment after the hearing on the default. *See* CR 55(b). A party, who has appeared and responded "before the hearing[,] cures the default and allows the court to consider the merits of the case." *In re Marriage of Pennamen*, 135 Wn. App. 790, 799, 146 P.3d 466 (2006); *see Tacoma Recycling, Inc. v. Capitol Material Handling Co.*, 34 Wn. App. 392, 395, 661 P.2d 609 (1983). Furthermore, a trial court abuses its discretion if it grants a motion for default and enters an order of default when the opposing party has appeared and responds to the motion before the hearing. *Mecum v. Pomiak*, 119 Wn. App. 415, 422, 81 P.3d 154 (2003).

Here, Howell moved for default on February 12, 2008. Because Plotner had appeared earlier in the action, his estate had the opportunity to respond to the motion before the hearing. *See* CR 55(a)(2). Plotner's estate filed an answer to the second amended complaint on February 15, three weeks before the hearing scheduled for March 7. We are sensitive to the fact that Howell's case took almost a decade to conclude and that Howell disagrees with the trial court's

[4] A party has "appeared" when they have filed a notice of appearance, applied for an order, or submitted responsive pleadings, such as an answer or a demurrer. RCW 4.28.210.

ruling that denied her motion for default. But the court rule, as has been applied for many years, precluded any other decision by the trial court. Plotner's estate timely responded to the motion for default, and the trial court would have abused its discretion had it entered a default judgment in Howell's favor. We hold that the trial court did not abuse its discretion when it denied Howell's motion for default.

II. Affidavit of Prejudice

Howell also contends that the trial court erred when it denied her second affidavit of prejudice.

We review a trial court's denial of an affidavit of prejudice de novo. *See State v. Tarabochia*, 150 Wn.2d 59, 64-65, 68, 74 P.3d 642 (2003); *In re Estate of Black*, 116 Wn. App. 492, 496, 500, 66 P.3d 678 (2003). Under RCW 4.12.040 and .050, each party may file a timely motion and affidavit of prejudice to remove one superior court judge. For the motion to be timely, the party must file the motion "before the judge presiding has made any order or ruling involving discretion." RCW 4.12.050(1). Filing a timely motion and affidavit divests the judge of authority to pass on the merits of the case. *LaMon v. Butler*, 112 Wn.2d 193, 201-02, 770 P.2d 1027 (1989). But the statute does not compel a change of judge when the motion is untimely or when a party submits a second motion. *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 578-79, 754 P.2d 1243 (1988); *see State ex rel. Sheehan v. Reynolds*, 111 Wash. 281, 284-85, 190 P. 321 (1920). Howell filed an affidavit of prejudice and was granted a new judge. Thereafter, Howell had no right to the automatic replacement of the second judge based on her affidavit of prejudice. We hold that the trial court properly denied Howell's second affidavit.

III. Guardian ad Litem

Howell argues in passing that the trial court erred when it appointed a guardian ad litem to investigate her competency. Plotner's estate argues that Howell (1) cites no authority discussing the appropriate standards for appointment of a guardian ad litem and (2) cannot show that the trial court caused her any harm when it appointed the guardian ad litem to investigate whether Howell "was competent to represent herself at trial." Br. of Resp't at 7.

Just as we review the appointment of a guardian and the "determination of the need for a guardian ad litem for an abuse of discretion," we see no reason to alter the standard of review where the trial court appoints a guardian ad litem to ascertain a party's competence. *Tai Vinh Vo v. Le Ngov Pham*, 81 Wn. App. 781, 784, 916 P.2d 462 (1996); *In re Guardianship of Mignerey*, 11 Wn.2d 42, 49-51, 118 P.2d 440 (1941). A trial court may appoint a guardian to manage the estate or personal affairs of an incompetent person and the authority extends to appointing a guardian for a limited purpose because the incompetent person may be one "who by reason of [his or her] incapacity has] need for protection and assistance, but who [is] capable of managing some of [his or her] personal and financial affairs." RCW 11.88.010(1)-(2). As trial courts have an "inherent power to appoint a guardian ad litem for a litigant upon finding that he or she is incompetent," it logically follows that a trial court has inherent power to appoint a guardian ad litem to assist in its determination of competence. *Tai Vinh Vo*, 81 Wn. App. at 784-91. And at least one Washington trial court has assessed the competence of a party arguing pro se and then appointed a guardian to manage litigation. *See, e.g.*, *Russell v. Catholic Charities*, 70 Wn.2d 451, 453, 423 P.2d 640 (1967).

The record available to this court about the guardian ad litem's appointment is limited. Apparently the trial court had a concern about Howell's competence to proceed pro se and

appointed a guardian ad litem to assess her competence. The sparse record does not supply us enough information to evaluate the trial court's decision; and after a review of the record, we cannot say that the trial court's decision was based on untenable grounds, was made for untenable reasons, or was manifestly unreasonable.

Even if the trial court's decision was flawed, Howell was found competent and ultimately had the opportunity to represent herself at trial. Although the proceedings were delayed for three months while the guardian ad litem completed the appointed task, from this record we cannot discern any harm to Howell caused by this delay. And we can find no other indication of harm in the record. Although Howell was unhappy with this arrangement, her displeasure is not sufficient to afford her a remedy.

We hold that the trial court did not abuse its discretion when it appointed a guardian ad litem to assess Howell's competence.

IV. Out-of-State Deposition

Howell contends that the trial court erred when it denied her request to perpetuate an out-of-state deposition of a former treating physician. We disagree.

We review a trial court's decision to deny admission of a deposition under CR 32 for an abuse of discretion. *See Hammond v. Braden*, 16 Wn. App. 773, 776, 559 P.2d 1357 (1977). CR 32(a)(3) provides that when certain defined instances of unavailability exist, a trial court may admit a witness's deposition as a substitute for his testimony. *Hammond*, 16 Wn. App. at 774-75. Under CR 32:

> The deposition of a health care professional, even though available to testify at trial, taken with the expressly stated purpose of preserving the deponent's testimony for trial, may be used if, before the taking of the deposition, there has been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i),

> 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

CR 32(a)(5)(B).

The trial court found that Plotner's estate was not able to cross-examine Howell's out-of-state deponent. Furthermore, the trial court noted (1) that the deponent's testimony did not connect Howell's medical condition with reasonable medical probability to the accident involving Plotner and (2) that the deponent discussed exhibits not available to the trial court. Given these circumstances, we hold that the trial court did not abuse its discretion when it denied admission of the deposition under CR 32.

IV. Pro Se Lien

Finally, Howell contends that the trial court erred when it denied her pro se lien under RCW 60.40.010(1) and that we should grant her this lien. Again, we disagree.

Like other statutes, we review a trial court's interpretation of a lien statute de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001); *see, e.g.*, *Intermountain Elec., Inc. v. G-A-T Bros. Constr., Inc.*, 115 Wn. App. 384, 390, 394, 62 P.3d 548 (2003). We construe statutes to give effect to the legislature's intent, and "[u]ndefined statutory terms must be given their usual and ordinary meaning." *Nationwide Ins. v. Williams*, 71 Wn. App. 336, 342, 858 P.2d 516 (1993); *Cockle*, 142 Wn.2d at 807.

RCW 60.40.010(1), states:

> An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:
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> (a) Upon the papers of the client, which have come into the attorney's possession in the course of his or her professional employment;
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> (b) Upon money in the attorney's hands belonging to the client;
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> (c) Upon money in the hands of the adverse party in an action or

> proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;
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> . . . .
>
> (e) Upon a judgment to the extent of the value of any services performed by him in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

In common usage "attorney" refers to "one who is legally appointed by another to transact business for him" and specifically refers to "a legal agent qualified to act for suitors and defendants in legal proceedings." Webster's Third New International Dictionary 141 (2002). By definition, Howell could not fall within the meaning of "attorney" because she could not act on the behalf of another person when she was acting "pro se," which by definition means "[f]or oneself; on one's own behalf" and refers to "[o]ne who represents oneself in a court proceeding." Black's Law Dictionary 1341 (9th ed. 2009). The language of the statute unambiguously applies to attorneys representing a client and does not apply to pro se litigants representing themselves.[5]

[5] Even if the term "attorney" in the attorney lien statute were ambiguous, Howell's argument fails. When we find statutory ambiguity we look to other sources of legislative intent, including the language of the act as a whole in terms of its object and purpose. *State v. Bash*, 130 Wn.2d 594, 601-04, 925 P.2d 978 (1996); *Strenge v. Clarke*, 89 Wn.2d 23, 29, 569 P.2d 60 (1977). RCW 60.40.010 both encoded the common law's general and retaining liens as applied to attorneys and expanded an attorney's remedies. *Mahomet v. Hartford Ins. Co.*, 3 Wn. App. 560, 567-68, 477 P.2d 191 (1970). At the heart of the common law, and thus the statute, is the right of the legal representative to place a lien on property connected to the attorney-client relationship, so that the client is not enriched at the representative's expense. *See* George Neff Stevens, *Our Inadequate Attorney's Lien Statutes—A Suggestion*, 31 Wash. L. Rev. 1, 1-2, 8-13 (1956). It naturally follows that a party acting pro se could never enrich herself at her own expense, and thus the statute cannot be read to support pro se liens. And even if a pro se litigant could use RCW 60.40.010, the lien does not necessarily take first priority over an earlier attorney's lien and does not extend beyond the value awarded in the judgment or the value of the judicially recognized property rights. *See* RCW 60.40.010.

As Howell is not an attorney and seeks to attach an attorney's lien to assets beyond the limits of the judgment, we hold that the trial court did not err when it denied her lien request.

V. Attorney Fees and Costs on Appeal

Plotner's estate requests attorney fees and costs under RAP 18.9 because Howell filed a frivolous appeal. Under RAP 18.9(a), we may order a party who files a frivolous appeal or who does not comply with the RAP "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). "A frivolous action is one that cannot be supported by any rational argument on the law or facts." *Rhinehart v. Seattle Times, Inc.*, 59 Wn. App. at 340.

As the issues raised by Howell are well settled matters of law and her arguments are without merit, under RAP 18.9(a) we award Plotner's estate reasonable attorney fees and costs for responding to Howell's appeal in an amount to be decided by our commissioner.

We affirm the trial court in all respects.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, J.