Board of Governors Meeting
Olympia Hotel at Capitol Lake, Olympia, WA
March 10-11, 2022

WSBA Mission: To serve the public and the members of the Bar, to ensure the integrity of the legal profession, and to champion justice.

PLEASE NOTE: ALL TIMES ARE APPROXIMATE AND SUBJECT TO CHANGE
ALL ITEMS ON THIS AGENDA ARE POTENTIAL ACTION ITEMS

To participate: Join via Zoom or Call 1.888.788.0099
Thursday, March 10th , Meeting ID: 884 6708 4268 Passcode: 539083
https://wsba.zoom.us/j/88467084268?pwd=N2F4Q09aMStaL3ErckVOWStqYlo3QT09

Friday, March 11th, Meeting ID: 854 3956 6115 Passcode: 699911
https://wsba.zoom.us/j/85439566115?pwd=OE1WUk1ZYXBHZDRscUhyOFBTL1N0dz09

THURSDAY, MARCH 10, 2022

8:30 AM – CALL TO ORDER & WELCOME

☐ **CONSENT CALENDAR**

A governor may request that an item be removed from the consent calendar without providing a reason and it will be discussed immediately after the consent calendar. The remaining items will be voted on *en bloc*.

- Approve January 13-14, 2022 Board of Governors meeting minutes 6
- Approve Client Protection Board Gift Recommendations..... 18, CM
- Approve Labor and Employment Law Section Bylaw Amendments 19
- Approve Senior Lawyers Section Bylaw Amendments 34

☐ **MEMBER AND PUBLIC COMMENTS** (30 minutes reserved)

Overall public comment is limited to 30 minutes and each speaker is limited to 3 minutes. The President will provide an opportunity for public comment for those in the room and participating remotely. Public comment will also be permitted at the beginning of each agenda item at the President's discretion.

STANDING REPORTS

☐ **PRESIDENT'S REPORT**

☐ **EXECUTIVE DIRECTOR'S REPORT** 54

☐ **REPORTS OF STANDING OR ONGOING BOG COMMITTEES**

The WSBA is committed to full access and participation by persons with disabilities to Board of Governors meetings. If you require accommodation for these meetings, please contact Ana LaNasa Selvidge at anas@wsba.org.

Committees may "pass" if they have nothing to report. Related agenda items will be taken up later on the agenda. Each committee is allocated, on average, 3-4 minutes.

Executive Committee, Pres. Brian Tollefson, Chair
APEX Awards Committee, Gov. Hunter Abell, Chair
Personnel Committee, Gov. Carla Higginson, Chair
Legislative Committee, Gov. Brent Williams-Ruth, Chair
Nominations Committee, Gov. Lauren Boyd, Chair
Diversity Committee, Gov. Sunitha Anjilvel, Co-Chair
Long-Range Strategic Planning Council, Pres. Brian Tollefson, Chair
Member Engagement Workgroup, Treas. Bryn Peterson and Gov. Francis Adewale, Co-Chairs
Budget & Audit Committee, Treas. Bryn Peterson, Chair
Equity & Disparity Workgroup, Gov. Alec Stephens, Chair
Supreme Court Bar Licensure Task Force, Gov. Williams-Ruth, BOG Rep.
TAXICAB, Immediate Past Pres. Kyle Sciuchetti

SPECIAL REPORTS

ABA MID-YEAR MEETING REPORT, ABA Delegates Kyle Berti and Rajeev Majumdar 78

NEW BUSINESS

GOVERNOR ROUNDTABLE (Governors' issues of interest)

AGENDA ITEMS & UNFINISHED BUSINESS

DIVERSITY COMMITTEE REQUEST TO SUBMIT COMMENTS IN SUPPORT OF PROPOSED AMENDMENTS TO RPC 8.4 AND OTHER COURT RULES, Gov. Sunitha Anjilvel, Diversity Committee Co-Chair 99

FAMILY LAW SECTION PROPOSED COMMENTS TO SUGGESTED CHANGES TO THE CODE OF JUDICIAL CONDUCT, Nancy Hawkins, Family Law Executive Committee LM-6

APEX AWARD COMMITTEE PROPOSAL TO RENAME THE AWARD OF MERIT TO THE CHIEF JUSTICE MARY E. FAIRHURST AWARD OF MERIT, Gov. Hunter Abell, Outreach Specialist Mike Kroner, and Chief Communications Officer Sara Niegowski 382

PERSONNEL COMMITTEE'S PROPOSED PROCESS FOR EXECUTIVE DIRECTOR EVALUATION, Gov. Carla Higginson and Director of Human Resources and Chief Culture Officer Glynnis Klinefelter Sio 392

12:00 PM – RECESS FOR LOCAL HEROES LUNCH

REVIEW AND REVISE WSBA ROLES AND RESPONSIBILITIES DOCUMENT..... 441

The WSBA is committed to full access and participation by persons with disabilities to Board of Governors meetings. If you require accommodation for these meetings, please contact Ana LaNasa Selvidge at anas@wsba.org.

SPECIAL REPORTS CONTINUED

TRAINING

AGENDA ITEMS & UNFINISHED BUSINESS CONTINUED

5:30 PM – RECESS

FRIDAY, MARCH 11, 2022

9:00 AM – RESUME MEETING

MEETING WITH WASHINGTON SUPREME COURT

BOARD OF GOVERNORS ANNUAL MEETING WITH WASHINGTON SUPREME COURT

Update Discussions Re WSBA's Structure
Update on Task Force Team Administering Xenial Involvement with Court Appointed Boards
Report on February 2022 Bar Exam
Report on Membership Survey
Report on Board & Executive Leadership Team Building Retreat
Discussion RE How WSBA Could Better Serve its Members

12:00 PM – ADJOURN

INFORMATION

The WSBA is committed to full access and participation by persons with disabilities to Board of Governors meetings. If you require accommodation for these meetings, please contact Ana LaNasa Selvidge at anas@wsba.org.

2021-2022 Board of Governors Meeting Issues

MAY (Spokane)
Standing Agenda Items:

- Legislative Report/Wrap-up
- Interview/Selection of WSBA At-Large Governor
- Interview/Selection of the WSBA President-elect
- WSBA APEX Awards Committee Recommendations
- Financials (Information)
- Office of Disciplinary Counsel Report (ED Report)

JULY (Tacoma)
Standing Agenda Items:

- Draft WSBA FY2023 Budget
- WSBA Treasurer Election
- Court Rules and Procedures Committee Report and Recommendations
- WSBA Committee and Board Chair Appointments
- BOG Retreat
- Financials (Information)
- Office of Disciplinary Counsel Report (ED Report)

SEPTEMBER (Bellevue)
Standing Agenda Items:

- Final FY2022 Budget
- 2021 Keller Deduction Schedule
- WSBF Annual Meeting and Trustee Election
- ABA Annual Meeting Report
- Legal Foundation of Washington Annual Report
- Washington Law School Deans
- Chief Hearing Officer Annual Report
- Professionalism Annual Report
- Report on Executive Director Evaluation
- Office of Disciplinary Counsel Report (ED Report)
- Financials (Information)

Family Law Section

Family Law Section of the Washington State Bar Association

March 7, 2022

FLEC Officers
Jacqueline L. Jeske
Chair - Woodinville

Elizabeth Helm
Chair-Elect - Seattle

Patrick Rawnsley
Past Chair &
Legislative Liaison
Olympia

Elizabeth Loges
Secretary - Seattle

Shelley Brandt
Treasurer - Olympia

Nancy Hawkins
BOG Liaison -Seattle

Alan Funk
Webmaster – Seattle

Board of Governors
Washington State Bar Association
VIA EMAIL TRANSMISSION ONLY

SUBJECT: Comment to CJC 2.2, 2.3 & 2.6

Governors:

Please consider the following as the comments of the Family Law Executive Committee regarding the proposed changes to CJC 2.2, 2.3 and 2.6 for which it seeks approval for submission to the Supreme Court.

As a preliminary matter, FLEC supports the proposed rule change to CJC 2.3 and has no additional commentary to provide. With respect to CJC 2.2, it is the position of FLEC that there should be a reference to current caselaw holding that self represented parties are held to the same standard as attorneys. *See e.g. Edwards v. LeDuc*, 157 Wn.App. 455, 238 p.3d 1187 (Div. II, 2010). A potential solution would be to provide at the end of the first sentence the following language: "... to be heard effectively notwithstanding the judge's obligation to hold self represented parties to the same standard to which it holds attorneys." Attached hereto is a courtesy copy of *Edwards*.

With respect to CJC 2.6, FLEC has the following comments on its several subparagraphs:

[4] This opening paragraph utilizes different terms than those used in CJC 2.2. CJC 2.2 addresses an unrepresented litigant's "right to be heard" as opposed to having a "fair opportunity to participate in proceedings." These terms should be harmonized to the extent they are not intended to be mutually exclusive. Additionally, the use of the term "accommodation" as used in the proposed changes to CJC 2.2 should be included: "...following list of non-exhaustive steps or accommodations consistent with..."

1. This subparagraph may provide more effective guidance if specific examples were included, e.g. law clinics, WSBA list of pro/low bono attorneys, seek the advice of counsel, etc. To the extent that a non-exhaustive list of examples are included, none should include a reference to a specific provider so as to avoid the appearance of impropriety under CJC 1.2.

3. The proposed language is potentially problematic from an *Edwards* perspective. While *Edwards* was a particularly egregious set of facts concerning the conduct of a judicial officer within the context of a jury trial, the providing of information, brief or otherwise, regarding evidentiary and foundational requirements implicates the same issue irrespective of whether a trial is by bench or jury.

4. The proposed language, at least facially, implies that this accommodation would not be made available to attorneys. More importantly, this language would be an impermissible overreach on the involvement of the court in litigant's cases and therefore violative of *Edwards*.

5. This provision is superfluous per ER 614(b).

12. FLEC has particular and significant concerns regarding this proposed language such that it has the potential to undermine a court's ability to determine credibility through effective direct and cross-examination. Even though the proposed rule attempts to address this issue, the risk of prejudice to the other party remains inappropriately significant and serves to undermine the rules of evidence. Neither declarations nor pleadings are evidence and this proposed language would promote trial by ambush.

13. FLEC again reiterates its concerns regarding this proposed language in light of the holdings of *Edwards*.

FLEC recognizes that if the Supreme Court adopts the current proposed GR 40, then perhaps some of the concerns that the proposed changes to CJC 2.6 attempt to address may very well be alleviated. However, this recognition should not be construed to suggest that FLEC is supportive of the promulgation of a blanket rule providing for the presumption of an informal trial in the event there are two self represented parties. Moreover, FLEC recognizes a need for a centrally developed and available packet of information for self represented litigants separate and distinct from judicial dissemination.

///

///

///

As always, FLEC stands available for additional technical commentary, discussion and/or involvement regarding proposed rule changes if desired.

Sincerely,

Sent without signature so as to avoid delay

Jacqueline Jeske, Chairperson
Patrick W. Rawnsley, Immediate Past Chair/Legislative Liaison

FAMILY LAW SECTION
WASHINGTON STATE BAR ASSOC.

Edwards v. LeDuc

157 Wash.App. 455
Court of Appeals of Washington,
Division 2.

Colleen EDWARDS and Dennis Edwards, husband and wife, Respondents,
v.
Barbara LE DUC and John Doe Le Duc, and the marital community composed thereof, Appellants.

No. 38699–2–II.
|
July 7, 2010.
|
Publication Ordered Sept. 8, 2010.

Synopsis
Background: Motorist in leading vehicle which was struck from behind and her husband brought personal injury action against driver of following vehicle. Following jury trial in the Superior Court, Pierce County, Frederick Fleming, J., judgment was entered against driver for $100,000. Driver appealed.

[Holding:] The Court of Appeals, Van Deren, C.J., held that trial court abused its discretion by denying driver's motion for new trial.

Reversed and remanded for new trial.

See also 93 Wash.App. 1011, 1998 WL 804815.

West Headnotes (8)

[1] **Constitutional Law**⇐Resolution of non-constitutional questions before constitutional questions

If a case can be decided on nonconstitutional grounds, an appellate court should decline to consider the constitutional issues.

[2] **Appeal and Error**⇐New Trial in General
Appeal and Error⇐De novo review
Appeal and Error⇐Discretion of Lower Court; Abuse of Discretion

Appellate courts normally review the grant or denial of a new trial for an abuse of discretion, but they review it de novo if the motion for a new trial is based on an allegation of legal error.

6 Cases that cite this headnote

[3] **Appeal and Error**⇐Abuse of discretion

Trial court abuses its discretion when its decision is manifestly unreasonable, is exercised for untenable reasons, or is based on untenable grounds.

3 Cases that cite this headnote

[4] **Appeal and Error**⇐Deference given to lower court in general

Appellate courts afford greater deference to a decision to grant a new trial than a decision to deny one.

[5] **Appeal and Error**⇐Defects, objections, and amendments

Passing treatment of an issue in a brief or lack of reasoned argument is insufficient to merit judicial consideration. RAP 10.3(a)(6), (b).

[6] **New Trial**⇨Conduct of trial in general

Irregularity in the proceedings for which court should consider granting new trial include instances of a trial court's lack of impartiality that has a prejudicial effect on the fact finder. CR 59(a)(1).

1 Cases that cite this headnote

[7] **New Trial**⇨Conduct of trial in general

Trial court appeared to overstep bounds of impartiality by repeatedly assisting pro se, brain-injured motorist during trial of her personal injury action and, thus, it abused its discretion by denying defendant's motion for new trial; court assisted motorist by laying foundation for expert testimony, repeatedly allowed motorist to direct witness to answer questions posed by court, virtually took over questioning key witnesses at pivotal points, answered defense counsel's objections in manner which suggested motorist's proper response, unduly assisted her in admitting exhibits, and did not inform jury that it could not draw any conclusions about merits of case from its assistance. CR 59(a)(1).

1 Cases that cite this headnote

[8] **Attorneys and Legal Services**⇨Compliance with Standards and Rules

Trial court must hold pro se parties to the same standards to which it holds attorneys.

22 Cases that cite this headnote

Attorneys and Law Firms

****1188** Marilee C. Erickson, Michael Neil Budelsky, Reed McClure, Seattle, WA, for Appellants.

Stephanie Bloomfield, Gordon Thomas Honeywell, John Stratford Mills, Law Offices of David Smith PLLC, Tacoma, WA, for Respondents.

Opinion

VAN DEREN, C.J.

[1] ***456** ¶ 1 Barbara Le Duc appeals a jury verdict awarding $100,000 in damages to Colleen Edwards, arguing, among other things, that the trial court abused its discretion in refusing to grant a new trial under CR 59(a)(1).[1] Because of significant irregularities at trial, we reverse and remand for a new trial.

***457** FACTS

I. Background

¶ 2 This lawsuit arose from a motor vehicle accident that occurred on November 5, 1995, involving Colleen Edwards and Barbara Le Duc. Le Duc's vehicle hit the back of Edwards's, damaging both vehicles. As a result of this accident, Edwards claimed that she suffered an increase in seizures, pain, and fatigue.

¶ 3 Edwards's medical history is complex and difficult to piece together from the trial record. At birth, she suffered lung and retinal tissue damage in addition to possible brain damage. She grew up legally blind.[2] In 1979, she was involved in a car accident in which she suffered a closed head injury, a cervical nerve root injury, and an injury to her right leg. In the 1980s, she suffered from chronic neck pain.

¶ 4 In 1986, Edwards fell on ice, suffering another head injury that resulted in traumatic brain injury, seizure disorder, and syncopaty.[3] She was treated at the Harborview Medical Center epilepsy clinic for symptoms related to her seizures. For much of the 1980s, she used braces, forearm crutches, and a wheelchair to move around.

¶ 5 In 1990, Edwards was involved in a second car accident. She did not have any permanent injuries from that accident. Over the course of her life, Edwards has worked as a dog trainer, martial arts instructor, bodyguard specialist, rehabilitation therapist, and private investigator.

**1189 *458 II. Trial

¶ 6 Edwards filed a personal injury suit against Le Duc on June 24, 1998.[4] Le Duc admitted liability for the accident and acknowledged that Edwards sustained some temporary back pain as a result of the accident. But Le Duc challenged Edwards's claims that this accident caused additional neurological problems and seizures. On March 31, 2000, the trial court allowed Edwards's attorney to withdraw and continued the scheduled trial proceedings. Ultimately, Edwards represented herself at trial.

¶ 7 In addition to her own testimony, Edwards called six lay witnesses, including her husband and coplaintiff, Dennis; friends; and colleagues in the dog training community. Several health care providers also testified on her behalf, but Edwards did not call any of her treating or consulting neurologists to testify. Throughout the trial, the court assisted Edwards by rephrasing questions, suggesting questions, and helping her admit exhibits.

¶ 8 On March 22, 2001, the jury returned a $100,000 verdict in favor of Edwards. On October 24, 2008, after seven years and multiple unsuccessful attempts, Edwards successfully entered the judgment against Le Duc. Le Duc unsuccessfully moved either for remittitur or for a new trial under CR 59(a).

¶ 9 Le Duc appeals the trial court's denial of her CR 59(a) motion based on procedural irregularities at trial.

*459 ANALYSIS

I. Standard of Review

[2] [3] [4] ¶ 10 We normally review the grant or denial of a new trial for an abuse of discretion, but we review it de novo if the motion for a new trial is based on an allegation of legal error. *Marvik v. Winkelman,* 126 Wash.App. 655, 661, 109 P.3d 47 (2005); *see State v. Jackman,* 113 Wash.2d 772, 777, 783 P.2d 580 (1989); *Schneider v. City of Seattle,* 24 Wash.App. 251, 255, 600 P.2d 666 (1979). A trial court abuses its discretion when its decision is manifestly unreasonable, is exercised for untenable reasons, or is based on untenable grounds. *Lian v. Stalick,* 106 Wash.App. 811, 824, 25 P.3d 467 (2001). We afford greater deference to a decision to grant a new trial than a decision to deny one. *Richards v. Overlake Hosp. Med. Ctr.,* 59 Wash.App. 266, 271, 796 P.2d 737 (1990).

II. Grounds for New Trial

[5] ¶ 11 Le Duc argues that the trial court abused its discretion by refusing to grant a new trial under CR 59(a).[5] The judiciary has long recognized that "the ordinary juror is always anxious to obtain the opinion of the court on matters that are submitted to [the juror's] discretion, and that such opinion, if known to the juror, has a great influence upon the final determination." *State v. Crotts,* 22 Wash. 245, 251, 60 P. 403 (1900); *see, e.g., Bolte v. Third Ave. R.R. Co.,* 38 A.D. 234, 237, 56 N.Y.S. 1038 (N.Y.App.Ct.1899); *State v. Jackson,* 83 Wash. 514, 523–24, 145 P. 470 (1915); *Jankelson v. Cisel,* 3 Wash.App. 139, 144, 473 P.2d 202 (1970).

[6] ¶ 12 A trial court should consider ordering a new trial in instances of "[i]rregularity in the proceedings of the *460 court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was **1190 prevented from having a fair trial." CR 59(a)(1). Irregularity includes instances of a trial court's lack of impartiality that has a prejudicial effect on the fact finder. *See* CR 59(a)(1); *Morris v. Nowotny,* 68 Wash.2d 670, 673–74, 415 P.2d 4 (1966); *Hanna v. Bodler,* 173 Wash. 460, 462, 23 P.2d 396 (1933); *Brister v. Council of Tacoma,* 27 Wash.App. 474, 486–87, 619 P.2d 982 (1980).

[7] [8] ¶ 13 A trial court must hold pro se parties to the same standards to which it holds attorneys.[6] *Westberg v. All–Purpose Structures, Inc.,* 86 Wash.App. 405, 411, 936 P.2d 1175 (1997). Here, the trial court appeared to overstep the bounds of impartiality repeatedly during the trial. When Edwards questioned her medical expert witnesses, the trial court assisted her in laying a proper foundation for expert testimony and repeatedly interjected the proper standard of proof for admissible medical opinions or conclusions. But Edwards was unable or unwilling to articulate the trial court's suggested

questions, so she repeatedly directed her witnesses to answer court-posed questions, which the trial court permitted. For example, the following exchanges occurred during the testimony of Dr. Sherwood Young, her rehabilitation physician:

> [EDWARDS:] Okay. Now the neuropsychological results, that was-is that considered a medical opinion or a medical fact?
>
> [LE DUC'S COUNSEL]: Your Honor, I'm not sure I understand where we're going here or what the relevance of medical opinion versus medical fact is in a court of law.
>
> THE COURT: Sustained. There's isn't any. *It has to be medically more probable than not a medical certainty, his opinions.*
>
> ***461** [EDWARDS:] ... Is there more medical certainty after neuropsychological testing that I had sustained a brain injury?
>
> [LE DUC'S COUNSEL]: Your Honor, I'm going to object until this witness offers his opinion on a more probable than not basis to a reasonable degree of medical certainty that any of these symptoms were caused by the 1995 motor vehicle accident. This is all a futile exercise.
>
> THE COURT: I'm going to sustain that objection.
>
> ....
>
> THE COURT: Then ask him the question. *Does he have an opinion, based upon reasonable medical probability, to a reasonable medical certainty, whether or not you suffered any injuries as a result of the 1995 automobile accident.*
>
> [EDWARDS:] ... *Could you answer the Judge's question so I don't have to repeat it?*
>
> THE COURT: *On a more probable than not basis.*
>
> [DR. YOUNG]: No. On a more probable than not basis I could not offer an opinion in that regard because again the neuropsychological testing is beyond my area of training.
>
> [LE DUC'S COUNSEL]: I renew my motion to strike and ask the witness be excused and jury be instructed not to consider his testimony in this case.

Report of Proceedings (RP) at 246–48 (emphasis added). In attempting to elicit Dr. Young's opinion about injuries she sustained in the accident with Le Duc, the following occurred:

> [EDWARDS:] On a more probable basis than not would I—based on my history and symptoms, on a more probable basis than not, did you suspect that I had received some kind of injury from the automobile accident in 1995?
>
> [LE DUC'S COUNSEL]: I guess again to the extent that's asking for a more probable than not basis of a suspicion it's improper. The opinion should be is it your opinion, Doctor, more probable than not.
>
> THE COURT: Sustained. *Leave out the word suspicion. On a more probable* ***1191** *than not basis did you suffer injury, brain injury from the 1995 accident. Is that what you want to ask?*
>
> ***462** [EDWARDS:] Yes.
>
> THE COURT: *Without the word suspicion, on a more probable than not basis.*
>
> [EDWARDS:] ... Okay. On a more probable than not basis did I sustain brain injury from the 1995 automobile accident?
>
> ....
>
> [EDWARDS:] ... Dr. Young, when you see seizures increase and increased head injury sequela, would that be the correct term?
>
> [Dr. YOUNG]: Sequela.[7]
>
> [EDWARDS]: Sequela, excuse me. Thank you. What do you suspect?
>
> [LE DUC'S COUNSEL]: Again, the suspicions aren't relevant and are not admissible.
>
> THE COURT: Sustained.
>
> [EDWARDS:] What?
>
> THE COURT: *Just ask very simply in the preparatory aspect of it you've stated what you want to know on a more probable than not basis does he have a [n] opinion as to whether or not you suffered, based on that history, you suffered injury as a result of the accident in 1995.*
>
> [EDWARDS:] ... *Could you answer the Judge's question?*

RP at 258–61 (emphasis added).

¶ 14 By allowing Edwards to refer to the trial court's phrasing of the questions, the trial court virtually took over questioning her key witnesses at pivotal points. *See Bolte,* 38 A.D. at 236–37, 56 N.Y.S. 1038. Ultimately, the trial court stopped requiring that Edwards use the proper standard altogether. After Edwards repeatedly failed to properly frame her questions, the trial court allowed her to thank the trial court—in front of the jury—for helping her question her medical expert witnesses.

¶ 15 When Edwards questioned her chiropractor, Dr. Peter Adkins, the trial court answered defense counsel's ***463** objections in a manner that suggested Edwards's proper response. The trial court also reminded Edwards to ask Dr. Adkins whether the unpaid medical bills were related to his treatment for this particular accident. And the trial court unduly assisted her in admitting exhibits into evidence and stating their purpose in response to defense counsel's objections.

¶ 16 Le Duc was the only witness to testify for the defense and this occurred through her counsel's reading of Le Duc's deposition testimony to the jury. Following this defense testimony, the trial court sua sponte directed Edwards—in front of the jury—to offer rebuttal testimony. *See Bolte,* 38 A.D. at 236–37, 56 N.Y.S. 1038. The trial court then explained the scope of rebuttal and told Edwards specifically that she could address the harm from Le Duc's vehicle's impact.

¶ 17 Subsequently, Edwards argued to the jury that the trial court's assistance demonstrated the extent and genuine nature of her injuries. She used the trial court's assistance to her advantage without the trial court admonishing her, even outside the presence of the jury. The trial court did not instruct the jury to disregard its assistance. In her closing arguments, Edwards stated:

> I would just say taking on a case of this magnitude by myself has been a[n] increased work burden for me, very intensive. Sometimes I can't get everything I want done with this case done. *And the Court has been very helpful to me in helping me do that and realizing that I had a limited amount of time to do this and just knew that for a brain injured person to take a case like this one is quite rare.*

RP at 652 (emphasis added). Again, even following Edwards's reference to the trial court's assistance during closing argument, the trial court failed to inform the jury that it could not draw any conclusions about the merits of the case from its actions.

¶ 18 Under the circumstances, the trial court's actions and words implied to the jury that Edwards's case had more merit than would otherwise be evident. ****1192** ***464** *Bolte,* 38 A.D. at 239, 56 N.Y.S. 1038; *Crotts,* 22 Wash. at 251, 60 P. 403. The trial court's repeated assistance, when Edwards questioned witnesses and introduced exhibits, unfairly emphasized their credibility and weight for the jury. In fact, it is difficult in this record to find one of Edwards's witnesses for whom the trial court did not pose questions, either directly, or for Edwards to repeat.[8]

¶ 19 The scope and extent of trial court's assistance to Edwards placed Le Duc's counsel in an awkward position of either objecting and vexing the trial court or letting the assistance continue. "The court should not place counsel in this position without it becoming absolutely necessary for the furtherance of justice." *Crotts,* 22 Wash. at 248–49, 60 P. 403

¶ 20 We acknowledge that trial courts have a difficult job of overseeing and conducting a trial fairly and efficiently, especially with parties representing themselves, but the trial court must, above all, remain impartial. On this record, it appears that the trial court felt obliged to assist a pro se litigant, but the trial court must treat pro se parties in the same manner it treats lawyers. *Westberg,* 86 Wash.App. at 411, 936 P.2d 1175; *cf. Bolte,* 38 A.D. at 237, 239, 56 N.Y.S. 1038.

¶ 21 Given that improper assistance to Edwards permeated the trial, we conclude that these proceedings contained significant irregularities and hold that the trial court abused its discretion in denying Le Duc's motion for a new trial under CR 59(a)(1).[9]

***465** ¶ 22 We reverse and remand for a new trial before a different trial judge.

¶ 23 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.

We concur: HUNT and PENOYAR, JJ.

All Citations

157 Wash.App. 455, 238 P.3d 1187

Footnotes

1 Le Duc also argues that the trial court's assistance to Edwards and its' remarks throughout trial amounted to a comment on the evidence in violation of article IV, section 16 of the Washington State Constitution. But "if a case can be decided on nonconstitutional grounds, an appellate court should decline to consider the constitutional issues." *HJS Dev., Inc. v. Pierce County,* 148 Wash.2d 451, 469 n. 75, 61 P.3d 1141 (2003). Because we reverse based on CR 59(a), we do not reach Le Duc's constitutional argument.

2 At some point, Edwards was able to regain enough sight for the state to license her to drive a motor vehicle, though the record does not provide any explanation about how that came about.

3 Edwards testified that doctors diagnosed her with "syncopaty," which she defined as "a distortion of heart rate." Report of Proceedings (RP) at 553.

4 Edwards had previously brought a personal injury action against Le Duc arising out of this same motor vehicle accident. *Edwards v. Le Duc,* noted at 93 Wash.App. 1011, 1998 WL 804815, at *1. Edwards moved to voluntarily dismiss her lawsuit two days into trial during her case in chief. The trial court granted her a voluntary dismissal but imposed terms for Le Duc's reasonable attorney fees. *Edwards,* 1998 WL 804815, at *1. Edwards appealed, and we reversed the trial court's ruling for lack of authority to impose terms. *Edwards,* 1998 WL 804815, at *2.

5 Edwards argues that the panel should incorporate by reference a laches argument that she presented in her motion to dismiss before our commissioner. But a respondent's brief "should contain ... [t]he argument in support of the issues presented for review, together with citations to legal authority." RAP 10.3(a)(6), (b); *U.S. West Commc'ns, Inc. v. Utils. & Transp. Comm'n,* 134 Wash.2d 74, 112, 949 P.2d 1337 (1997). "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma,* 90 Wash.App. 533, 538, 954 P.2d 290 (1998). We make no exception here.

6 Division Three recently noted an exception to this rule "when a *pro se* plaintiff also suffers from a significant mental disability." *Carver v. State,* 147 Wash.App. 567, 575, 197 P.3d 678 (2008). While the record here showed that Edwards had trouble remembering things, there was no evidence that she had a "significant mental disability" on the order of dementia. *Carver,* 147 Wash.App. at 575, 197 P.3d 678. Accordingly, we distinguish *Carver* and apply the traditional rule.

7 Dr. Young explained the medical term "cognitive sequela" as meaning "the things that come after head injury, which is the difficulties in the thought process." RP at 226. This includes, for example, changes in a person's ability to remember information.

8 Following our close review of this record, we agree with Le Duc that "[w]ithout the court's guidance, [Edwards] would likely not have elicited any testimony on the reasonableness or necessity of the treatment" or any testimony "on a more probable than not basis to a reasonable degree of medical certainty." Br. of Appellants at 34. Absent this evidence, Le Duc indeed likely "would have successfully moved for a directed verdict." Br. of Appellants at 34.

9 Furthermore, based on our review of the record, we note that Edwards's case fell far short of proving that the vehicle accident caused any additional seizures or physical injuries and that the jury award far exceeded the evidence of Edwards's medical bills or other damages. Notably, Edwards did not call any of her treating neurologists. Such a scant showing on the record of causation and damages only reinforces the harm arising from the trial irregularities. Were we not to order retrial based on the substantial trial irregularities, we would otherwise rule based on a verdict indicating passion or prejudice or on Edwards's failure to present sufficient causation evidence justifying a finding of liability or damages to the extent awarded by the jury. *See* CR 59(a)(5), (7).

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

FAMILY LAW SECTION
WASHINGTON STATE BAR ASSOC.

Current CJC 2.1-2.6

A JUDGE SHOULD PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

RULE 2.1. Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law,* shall take precedence over all of a judge's personal and extrajudicial activities.

Comments

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

RULE 2.2. Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

Comments

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

RULE 2.3. Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making reference to factors that are relevant to an issue in a proceeding.

Comments

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

[5] "Bias or prejudice" does not include references to or distinctions based upon race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation, or social or economic status when these factors are legitimately relevant to the advocacy or decision of the proceeding, or, with regard to administrative matters, when these factors are legitimately relevant to the issues involved.

RULE 2.4. External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor, or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or authorize others to convey the impression that any person or organization is in a position to influence the judge.

Comments

[1] Judges shall decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family.

RULE 2.5. Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

Comments

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] In accordance with GR 29, a judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

RULE 2.6. Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) Consistent with controlling court rules, a judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces any party into settlement.

Comments

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification or recusal may be appropriate. See Rule 2.11(A)(1).

RULE 2.7. Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification or recusal is required by Rule 2.11 or other law.*

Comment

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve

FAMILY LAW SECTION
WASHINGTON STATE BAR ASSOC.

Proposed CJC 2.2, 2.3 & 2.6

CJC 2.2

IMPARTIALITY AND FAIRNESS

A judge shall uphold and apply the law*, and shall perform all duties of judicial office fairly and impartially*.

Comments

[1]-[3] [Unchanged.]

[4] ~~It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.~~ At times, judges have before them unrepresented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial and to uphold and apply the law does not preclude the judge from making reasonable accommodations to ensure an unrepresented litigant's right to be heard, so long as those accommodations do not give the unrepresented litigant an unfair advantage. This Rule does not require a judge to make any particular accommodation.

CJC 2.3

BIAS, PREJUDICE, AND HARASSMENT

(A)-(D) [Unchanged.]

Comments

[1]-[2] [Unchanged.]

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4]-[5] [Unchanged.]

CJC 2.6
ENSURING THE RIGHT TO BE HEARD

(A)-(B) [Unchanged.]

[4] Judges should endeavor to ensure unrepresented litigants have a fair opportunity to participate in proceedings. While not required, judges may find the following non-exhaustive list of steps consistent with these principles, and helpful in facilitating the right of unrepresented litigants to be heard:

1. Identifying and providing resource information to assist unrepresented litigants. Judges should endeavor to identify resources early in the case so as to reduce the potential for delay.

2. Informing litigants with limited-English proficiency of available interpreter services.

3. Providing brief information about the proceeding and evidentiary and foundational requirements.

4. Using available courtroom technology to assist unrepresented individuals to access and understand the proceedings (e.g., remote appearances, use of video displays to share court rules, statutes, and exhibits).

5. Asking neutral questions to elicit or clarify information.

6. Attempting to make legal concepts understandable by minimizing use of legal jargon.

7. Starting the hearing with a quick summary of the case history and of the issues that will be addressed.

8. Explaining at the beginning of the hearing that you may be asking questions and that this will not indicate any view on your part. It will merely mean that you need to get the information to decide the case

9. Working through issues one by one and moving clearly back and forth between the two sides during the exploration of each issue

10. Inviting questions about what has occurred or is to occur.

11. Permitting narrative testimony.

12. Allowing parties to adopt their written statements and pleadings as their sworn testimony. This provision would not limit opportunities for cross-examination or be permitted in a manner that would prejudice the other party in the presentation of their case.

13. Asking questions to establish the foundation of evidence, when uncertain

14. Clarifying with the parties whether they have presented all of their evidence and explaining that no additional testimony or evidence will be permitted once the evidentiary portion of the case is completed.

15. Prior to announcing the decision of the court reminding the parties that they have presented all of their evidence, that they will be given an opportunity to ask questions once the court has issued its ruling, and that they should not interrupt the court.

16. If unable to do what a litigant asks because of neutrality concerns, explaining the reasons in those terms.

17. Announcing the decision, if possible, from the bench, taking the opportunity to encourage the litigants to explain any problems they might have complying.

18. Explaining the decision and acknowledging the positions and strengths of both sides.

19. Making sure, by questioning, that the litigants understand the decision and what is expected of them, while making sure that they know you expect compliance with the ultimate decision.

20. Where relevant, informing the litigants of what will be happening next in the case and what is expected of them.

21. Making sure, if practicable, that the decision is given in written or printed form to the litigants.

22. Informing the parties of resources that are available to assist with drafting documents, as well as compliance or enforcement of the order. Examples include but are not limited to courthouse facilitator programs, advocates, lists of treatment providers, and child support enforcement.

23. Thanking the parties for their participation and acknowledging their efforts.

WASHINGTON STATE
BAR ASSOCIATION

TO: WSBA Board of Governors

FROM: Terra Nevitt, Executive Director
Paris Eriksen, Volunteer Engagement Advisor

DATE: March 7, 2022

RE: Emergency Bylaw Amendment: Eligibility to Vote (Article VI.C.2)

ACTION: A one-time emergency bylaw amendment to change the date when eligibility to vote is determined from March 1 to March 11.

The WSBA Bylaws currently provide that voter eligibility for both the congressional and at large positions elections is determined on March 1. Due to the impact of Washington's redistricting, an accurate voting list was not available on March 1. The Board of Governors is asked to approve a temporary emergency amendment to the WSBA Bylaws, Article VI.C.2a to change the date in which voter eligibility is determined from March 1 to will to March 11. In doing so, all elections for positions on the Board of Governors may continue uninterrupted.

Amendment:
Currently, the Bylaw state:

2. Voting in the Election of Governors from Congressional Districts will be conducted in the following manner:
   a. Eligibility to Vote. All Active members, as of March 1st of each year, are eligible to vote in the BOG election for their district, subject to the election schedule shown above. [...]

Following Article VI.G regarding the 2020 Elections, approval of the amended additional language is requested:

> **H. 2022 ELECTIONS**
> Due to the delay in obtaining the updated Congressional District map information affecting eligibility of Active members to vote in the BOG election for their district, the 2022 elections conducted by the Board of Governors pursuant to these Bylaws will establish voter eligibility on March 11, 2022.