The Honorable Hollis R. Hill
Hearing Date: January 9, 2017

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

ZOE & STELLA FOSTER, minor children by and through their guardians MICHAEL FOSTER and MALINDA BAILEY; AJI & ADONIS PIPER, minor children by and through their guardian HELAINA PIPER; WREN WAGENBACH, a minor child by and through her guardian MIKE WAGENBACH; LARA FAIN, a minor child by and through her guardian MONIQUE DINH; GABRIEL MANDELL, a minor child by and through his guardians VALERIE and RANDY MITCHELL; JENNY XU, a minor child by and through her guardians YAN ZHANG & WENFENG XU,

Petitioners,

v.

WASHINGTON DEPARTMENT OF ECOLOGY,

Respondent.

NO. 14-2-25295-1

DEPARTMENT OF ECOLOGY'S MOTION FOR RECONSIDERATION OF THE COURT'S DECEMBER 19, 2016 ORDER

I. RELIEF REQUESTED

The final decision in this case is currently on appeal. As a result, this Court lacks jurisdiction to issue any rulings other than enforcing its May 16, 2016, order. Nevertheless, on December 19, this Court granted the Petitioners' motion to amend their pleadings without

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giving Ecology a chance to respond even though Ecology had been granted a continuance to file its response on January 4. This constitutes an irregular proceeding that deprived Ecology of a fair hearing. Reconsideration is therefore merited under CR 59(a)(1). Reconsideration is also merited under CR 59(a)(9), which applies when substantial justice has not been done. Ecology requests that this Court reconsider and vacate the portion of its December 19 order that authorized Petitioners to amend their petition for review.

II. STATEMENT OF FACTS

On November 19, 2015, this Court issued an order upholding Ecology's denial of the Petitioners' petition for rulemaking under the Administrative Procedure Act (APA). The Court denied the petition because Ecology had begun rulemaking pursuant to Governor Inslee's directive. While Ecology's rulemaking was ongoing, Petitioners filed a motion for post-judgment relief under CR 60(b). On May 16, 2016, the Court granted Petitioners' motion. The Court's order granting the motion required Ecology to adopt a rule by the end of 2016 and to recommend to the 2017 Legislature updates to the greenhouse gas reductions required in RCW 70.235.020. Order on Petitioners' Motion for Relief Under CR 60(b), May 16, 2016. Ecology appealed this order to the Court of Appeals and briefing is currently underway. Declaration of Katharine G. Shirey Supporting Ecology's Motion for Reconsideration (Shirey Decl.) Exs. A, B.

In September 2016, Ecology adopted the Clean Air Rule, one of the most progressive greenhouse gas reduction rules in the nation. Declaration of William Drumheller (Drumheller Decl.) ¶ 6. This rule is the only economy-wide greenhouse gas cap regulation in the United States other than the cap-and-trade program in California, which is considered the gold standard of state-level climate regulations in the United States. Drumheller Decl. ¶¶ 6, 8. Calculations show that, on a per-capita basis, Washington's Clean Air Rule will result in more greenhouse gas reductions than California's cap-and-trade program. Drumheller Decl. ¶¶ 9, 10. A number of industries and energy providers challenged the Clean Air Rule in Thurston

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County Superior Court. Environmental and climate advocates (Washington Environmental Council, Climate Solutions, and the Natural Resources Defense Council) seek to intervene in this appeal in support of Ecology. Shirey Decl. Ex. C. On December 16, 2016, Ecology submitted a report to the Legislature recommending changes to the greenhouse gas limits in RCW 70.235.020. Shirey Decl. Ex. D.

In November 2016, Petitioners filed a motion asking this court to find Ecology in contempt of court because they believe Ecology's rule is inadequate. On December 6, 2016, Petitioners filed a Motion for Leave to File Supplemental Brief and an Amended and Supplemental Petition for Review in Response to Court's Questions at Show Cause Hearing. Hearing was set for December 15, 2016. On December 8, 2016, Ecology requested a continuance to January 6, to allow sufficient time for a response. Shirey Decl. Ex. E. On December 9, the Court granted Ecology's request. Shirey Decl. Ex. F. On December 19, notwithstanding the continuance, the Court issued its Order Denying Motion for Order of Contempt and Granting Sua Sponte Leave to File Amended Pleading. Ecology now seeks reconsideration.

III. STATEMENT OF ISSUES

1. Should the Court reconsider and vacate its decision granting Petitioners leave to file amended and supplemental pleadings when the Court lacked jurisdiction to do so because this case is on appeal?

2. Should the Court reconsider its decision granting Petitioners leave to file amended and supplemental pleadings when the Court failed to allow Ecology to respond to Petitioners' motion?

3. Should the Court reconsider and vacate its decision granting Petitioners leave to file amended and supplemental pleadings when the new pleadings are untimely and prejudicial to Ecology?

4. Should the Court reconsider and vacate its decision granting Petitioners leave to file amended and supplemental pleadings when the new pleadings do not facilitate resolution of this case on the merits?

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IV. EVIDENCE RELIED UPON

Ecology relies on the pleadings and orders in the court file as grounds for its motion as well as the accompanying declarations of William Drumheller and Katharine G. Shirey with attached exhibits.

V. AUTHORITY

A. This Court Lacked Jurisdiction to Grant Petitioners' Motion Because This Case Is on Appeal

With few exceptions, a trial court loses jurisdiction over a case once the case has been accepted by the court of appeals. RAP 7.2. Ecology appealed this Court's final order as a matter of right on June 15, 2016. RAP 2.2(a)(9), 6.1. The case has thus been accepted for review. None of the exceptions enumerated in RAP 7.2 authorize the trial court to act on amended or supplemental pleadings.[1]

After appellate review is accepted, an action taken by the trial court is a nullity. *Sanwick v. Puget Sound Title Ins. Co*., 70 Wn.2d 438, 445, 423 P.2d 624 (1967) (trial court lacked jurisdiction to rule on the propriety of amended pleadings after case had been accepted for appeal). Here, the appeal is pending, and briefing is under way. Shirey Decl. Exs. A, B. The Court of Appeals has not made any rulings under RAP 8.3 limiting or expanding the trial court's authority to act. Shirey Decl. ¶ 2. The trial court therefore only has jurisdiction to take actions authorized by RAP 7.2. None of the exceptions in RAP 7.2 apply to a motion to supplement or amend the pleadings.[2]

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[1] One of the exceptions authorizes a trial court to enforce its own decisions. RAP 7.2(c). Therefore, this Court had jurisdiction to rule on Petitioners' contempt motion. The other exceptions provide that the trial court may settle the record (RAP 7.2(b)); award attorney fees as allowed by law (RAP 7.2(d)); hear and determine post-judgment motions and actions to change or modify a decision that is subject to modification by the court (RAP 7.2(e)); release a defendant in a criminal case (RAP 7.2(f)); decide questions relating to indigency (RAP 7.2(g)); act on matters of supersedeas, stays, and bonds (RAP 7.2(h)); act on claims for attorney fees (RAP 7.2(i)); enter findings and conclusions in a juvenile offense proceeding (RAP 7.2(j)); supervise discovery proceedings to perpetuate testimony pursuant to CR 27 (RAP 7.2(k)); and, in a case involving multiple parties, claims, or counts, act in the portion of the case that is not being reviewed by the appellate court (RAP 7.2(l)).

[2] *But see Zachman v. Whirlpool Acceptance Corp.*, 120 Wn.2d 304, 315, 841 P.2d 27 (1992) (trial court acted within its discretion in allowing amendment of complaint). *Zachman*, however, involved discretionary

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Federal case law is instructive because RAP 7.2(e)'s provisions regarding post-judgment motions generally conform to federal practice. West, *Washington Court Rules Annotated, Vol. 1* at 1009 (2d ed. 2016–17), task force comment to RAP 7.2(e) (citing 9 J. Moore, *Federal Practice* 734–40 (1973)). Federal cases are clear that once an appeal is filed, the trial court no longer has jurisdiction and cannot reopen judgment to allow amendments to pleadings. *See, e.g.*, *Droppleman v. Horsley*, 372 F.2d 249 (10th Cir. 1967) (appeal deprived trial court of jurisdiction to allow amendments to the pleadings); *Merritt-Chapman & Scott Corp. v. City of Seattl*e, 281 F.2d 896 (9th Cir. 1960) (once appeal was filed, district court lost jurisdiction to rule on plaintiff's determination concerning amendment of the pleadings), *overruled on other grounds by Ruby v. Sec'y of U.S. Navy*, 365 F.2d 385 (9th Cir. 1966).

Because this Court lacked jurisdiction to allow for amendment of the pleadings, reconsideration is warranted and the portion of the December 19 order that authorizes amendment should be vacated.

B. The Court's Failure to Allow Ecology to Respond to Petitioners' Motion Is an Irregularity of Proceedings That Justifies Reconsideration

Our adversarial system is based on the concept that both parties are entitled to be heard before a matter is resolved. Here, the Court granted Petitioners' motion to amend the pleadings without giving Ecology the opportunity to present its arguments on the question of whether Petitioners' amended pleading should be allowed. That irregularity is exacerbated by the fact that Ecology was actively preparing a response to Petitioners' motion based on the December 9 order of continuance which gave Ecology until January 4 to file its response. Under these circumstances, Ecology was prevented from having a fair hearing and substantial justice was thwarted. Reconsideration is therefore justified under CR 59(a)(1) and (9).

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review of an interlocutory decision, not appeal as of right of a final decision. Also, the trial court obtained the appellate court's permission prior to authorizing amendment of the pleading. *Id. See In re Marriage of Hughes*, 128 Wn. App. 650, 654 n.2, 116 P.3d 1042 (2005) (after review is accepted, trial court lacks authority to act without appellate court's permission).

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C. Petitioners' Motion to Amend the Pleadings Should Be Denied Under CR 15

If Ecology had been allowed to respond pursuant to the order of continuance, Ecology would not only have argued that the Court lacks jurisdiction to grant Petitioners' motion but would also have argued that the Petitioners' motion is impermissible under CR 15. The purpose of allowing amended and supplemental pleadings under CR 15 is to "facilitate a proper decision on the merits." *Herron v. Tribune Publ'g Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987) (citing *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983)). A motion to amend pleadings should be denied if it will cause undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). Factors a court may consider in determining prejudice include undue delay and unfair surprise. *Herron*, 108 Wn.2d at 165 (citing *Caruso*, 100 Wn.2d at 349–51; *Foman*, 371 U.S. at 182). A court may also consider whether the amendment to the complaint is likely to result in confusion, or the introduction of remote issues or a lengthy trial. *Herron*, 108 Wn.2d at 165–66. Amendments which pertain to the original claims are more likely to be granted. *Id.* at 166. Appellate decisions permitting amendments have emphasized that the moving parties in those cases were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original pleading. *Id.* (citing *Foman*, 371 U.S. at 182).

Here, Petitioners want to use the existing APA case to assert an entirely new cause of action against new defendants based on new facts that are outside the scope of their original APA petition. Petitioners' new pleading should be rejected because adding these new defendants and this new cause of action introduces remote issues that will confuse the proceedings. In addition, Petitioners' motion is untimely and prejudicial to Ecology. Finally, the amended and supplemental pleadings will not facilitate resolution of this case, because this case has already been resolved and is currently on appeal.

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1. Petitioners' motion is untimely

Petitioners' motion is untimely because, although the declaratory judgment action could have been brought at any time, it is being brought only now, two plus years after the original lawsuit. Petitioners' claim for declaratory judgment matured years ago.[3] Nothing has changed in the interim that makes the declaratory judgment action any more viable now than it was at the time of the original Petition for Review. Petitioners provide no justification for waiting to file the declaratory judgment action now rather than filing it earlier.

The motion is also untimely from the standpoint of the case proceedings. The superior court case ended originally on November 19, 2015, when this court issued its order upholding Ecology's decision, then ended finally on May 16, 2016, when the Court entered its order on Petitioners' CR 60(b) motion.[4] In similar circumstances, Washington courts have denied leave to amend under CR 15(a). *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997) (affirming denial of motion to amend to add new claim after entry of final judgment), *cert. denied*, 522 U.S. 1077 (1998); *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 27–28, 974 P.2d 847 (1999) (affirming denial of motion to amend to add new claim brought after summary judgment proceeding, motion to dismiss, and after plaintiff rested his case at trial); *Corp v. Atlantic-Richfield Co.*, 67 Wn. App. 520, 526, 530–31, 837 P.2d 1030 (1992) (trial court did not abuse discretion in denying amendment where summary judgment had been granted, effectively ending the case), *rev'd on other grounds*, 122 Wn.2d 574 (1993); *Doyle v. Planned Parenthood of Seattle-King Cty., Inc.*, 31 Wn. App. 126, 130–32, 639 P.2d

[3] In fact, as this Court noted, a similar action was brought years ago by the same attorneys and rejected by the courts. *Svitak et rel. Svitak v. State*, No. 69710-2-I, 2013 WL 6632124 (Wash. Ct. App. Dec. 16, 2013) (unpublished).

[4] On October 18, 2016, Petitioners filed a motion asking the court to find Ecology in contempt of the court's two orders. It is a "long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *United States v. Rylander*, 460 U.S. 752, 756, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1983) (citing *Maggio v. Zeitz*, 333 U.S. 56, 69, 68 S. Ct. 401, 92 L. Ed. 476 (1948)). Thus the contempt motion did not reopen the case.

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240 (1982) (trial court did not err in denying motion to amend complaint made after summary judgment).

Indeed, a motion to amend or supplement can be untimely even when no final judgment or order has been entered. *See Herron*, 108 Wn.2d at 164–69 (no abuse of discretion in denying leave to file amended pleading when motion filed 10 months after complaint and shortly after defendants moved for summary judgment).

Under either CR 15(a) or CR 15(d), a key consideration is whether the party moving to amend or supplement could have done so earlier in the proceedings. *Doyle*, 31 Wn. App. at 131. Leave to supplement a pleading after a final order is normally denied:

> [W]hen it would have the effect of reopening the case, when the matters alleged in the supplemental pleading could be the subject of a separate action, or *when the content of the supplemental pleading might have been advanced at an earlier time and there is no explanation for the delay*.

6A Wright, Miller & Kane, *Federal Practice & Procedure* § 1509 (Civ. 2d 1990) (emphasis added). Here, Petitioners offer no explanation for their delay in moving to amend their petition. Because Petitioners have been seriously dilatory and filed their motion years after their original petition and many months after final orders had been entered, this Court should grant reconsideration and vacate the portion of its order allowing the amendment.

2. Petitioners' amended and supplemental pleading is prejudicial to Ecology

Petitioners' have supplemented their pleading to add new defendants and an entirely new cause of action. It is not clear that a finding of prejudice is necessary in order to deny a motion under CR 15(d), as opposed to CR 15(a), but even if it is, there is no question Ecology is prejudiced by Petitioners' new pleadings.

Factors a court may consider in determining prejudice include undue delay and unfair surprise, as well as whether the amendment is likely to result in confusion, the introduction of remote issues or a lengthy trial. *Herron*, 108 Wn.2d at 165–66; *Lane v Skamania Cty.*, 164 Wn.

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App. 490 (2011). As discussed above, Petitioners' amended pleadings come after undue delay. They also constitute unfair surprise to Ecology.

The amendments are unfair because Ecology has appealed this Court's final decision and has submitted its opening brief on appeal. Now Petitioners want to transmogrify their APA appeal into *Svitak: The Sequel.* Rather than file a new lawsuit, which they are entitled to do, they instead try to fundamentally alter the lawsuit that is currently on appeal. However, if plaintiffs were allowed to willy-nilly amend their complaints in order to affect a pending appeal, then defendants would be trapped in an endless do-loop of appeal and trial court litigation, prevented from ever effectively appealing a final decision. The rules do not allow such a result.

In addition, Ecology is prejudiced because the amended petition raises new issues completely different from the current issue in the case, against new defendants and under a different set of legal requirements. The original petition was an APA appeal required to be resolved on the agency record and the briefs of the parties. RCW 34.05.558. In contrast, Petitioners' brand-new lawsuit will require discovery, and may result in an evidentiary trial or at least summary judgment briefing following extensive expert discovery.[5] Tacking this new lawsuit onto the existing (and already resolved) APA review, with its different standards and different evidentiary requirements, will cause confusion, and introduce remote issues.

Petitioners now claim "[t]his case is not about, nor has it ever been about any of the individual rules and policy measures Ecology has or will implement." Petitioners' Supplemental Brief at 4 (Dec. 6, 2016). That is false. The Petitioners filed a petition for review of Ecology's denial of their rulemaking petition. Ecology then adopted a rule. The rule is supported by a nearly 30,000-page rule record that supports Ecology's decisions in the rulemaking process. The Petitioners don't like the rule, but rather than challenge it, they seek

[5] *Svitak* was resolved through a CR 12(b)(6) motion. *Svitak*, 2013 WL 6632124, at *1–2. However, this Court has already indicated that it finds *Svitak* unpersuasive. Dec. 19, 2016 Order at 5.

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to reinvent their lawsuit out of whole cloth. CR 15 does not permit what the Petitioners seek to do. Reconsideration is warranted. The Court's December 19 decision should be vacated.

D. Petitioners' Amended and Supplemental Pleading Does Not Facilitate Resolution of This Case on the Merits

Finally, the ultimate purpose of allowing amended and supplemental pleadings under CR 15 is to "facilitate a proper decision on the merits." *Herron*, 108 Wn.2d at 165. Here, a proper decision on the merits has already occurred. Nov. 19, 2015 Order; May 16, 2016 Order. That decision is on appeal. Petitioners' new pleading ignores the prior decision and the appeal by raising completely new claims and adding new and different defendants. Petitioners' new pleadings will not facilitate a proper decision on the merits of this case. Rather, Petitioners' new pleadings constitute a new case, and should be treated as one.

In addition, Petitioners' new issues are too far afield from their original claim to be considered "supplemental" to their original claim. Petitioners' case is, and has always been, about APA review of Ecology's denial of their rulemaking petition. Petitioners' original petition to this Court sought review of the petition for rulemaking Petitioners filed with Ecology, and Ecology's denial of that petition. Their extensive briefing in all prior filings in this case concerned Ecology's duty to adopt a rule, and nothing more. All of Ecology's response briefing concerned Ecology's duty to adopt a rule. This Court has ruled on Petitioners' APA petition for review. The case is now over in the superior court.[6] Therefore, it is impossible for Petitioners' amended and supplemental pleadings to facilitate resolution of this case on the merits.

VI. CONCLUSION

Reconsideration is justified when, as here, the Court ruled without providing Ecology the opportunity to file a response to Petitioners' motion. As outlined above, this Court lacked jurisdiction to rule on Petitioners' motion to amend the pleading. Moreover, Petitioners'

[6] The motion for contempt does not reopen the case. *Rylander*, 460 U.S. at 756.

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amended and supplemental claims are untimely and prejudicial to Ecology. Therefore, Ecology asks this Court to reconsider the portion of its December 19, 2016, order granting Petitioners leave to file their amended pleading and vacate that portion of the order.

I certify that this motion contains 3,340 words in compliance with local civil rules.

DATED this 29th day of December 2016.

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