The Honorable Hollis R. Hill

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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 MANDELL; 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 SEA PETITIONERS' OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION OF THE COURT'S DECEMBER 19, 2016 ORDER

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I. INTRODUCTION & RELIEF REQUESTED

Youth Petitioners respectfully submit this Opposition to Ecology's Motion for Reconsideration of this Court's December 19, 2016 order. Because the Court's decision granting the Youth *sua sponte* leave to amend their pleading was well within this Court's discretion and does not change the CR 60(b) order that is under appeal, the Youth respectfully request that Ecology's motion for reconsideration be denied. RAP 7.2(e). The granting of the amendment is consistent with the Court's ability to enforce its orders. Ecology's argument that *it* has somehow been prejudiced is absurd in light of the direct and immediate harms being inflicted on these Youth, who seek only to protect their lives and their rights, and those of future generations. Leave to file a supplemental and amended pleading is simply a necessary step towards addressing the unresolved constitutional protections needed by the Youth and recognized by this Court. Thus, the Court should grant the Youth leave by its own *sua sponte* order and based upon the Youths' motion for leave to file an amended and supplemental pleading.

II. STATEMENT OF FACTS

The factual background of this case is set forth in the earlier filings and pleadings submitted by the parties in this matter, and in this Court's prior orders. In response to the Court's questions raised at the show cause hearing, on December 6, 2016, the Youth filed a motion seeking leave to file a supplemental brief in support of its motion for order to show cause re: contempt, *and* separately, permission to file an amended and supplemental petition for review. The motion was noted for hearing on December 15, 2016. On December 7, 2016, Ecology filed a motion for a three-week extension to respond to the Youth's motion, which was granted by the Court on December 9, 2016. The Court's decision granting Ecology's

motion for a continuance allowed them to file a response to the Youth's motion on January 4, 2017.

Before Ecology filed their response and without notice of the Youth's pending motion for leave to file a supplemental brief and supplemental and amended pleading (for the reasons set forth in this Court's January 10, 2017 order), this Court entered an order denying the Youth's motion for order re: contempt, and granting *sua sponte* leave for the Youth to file an amended petition for review and declaratory judgment. December 19, 2016 Order. "[D]ue to the emergent need for coordinated science based action by the State of Washington to address climate change before efforts to do so are too costly and too late," the Court found that it "is fully advised in the matter thus far it retains jurisdiction to implement this ruling and proceed as expeditiously as possible." *Id.* at 5. On December 29, 2016, Ecology filed a motion for reconsideration of the Court's December 19, 2016 order on the grounds that this Court lacked jurisdiction to issue the ruling because of the pending appeal of the Court's CR 60(b) order, and that issuance of the ruling prior to Ecology's filing its response somehow deprived it of fair hearing under CR 59(a)(1) and (9). In this filing, Ecology also responded to the Youth's motion for leave to supplement and amend their pleadings pursuant to CR 15.[1]

On January 6, 2017, counsel for the parties received an email from the Court Clerk asking, "[w]hat is the status of Petitioners' motion for leave to file supplemental brief? Do the Petitioners still want J. Hill to rule on the motion today or should it be stricken? The Court has not received Respondent's response pleading." Declaration of Andrea K. Rodgers in Opposition to Ecology's Motion for Reconsideration of Court's December 19, 2016 Order

[1] Ecology did not respond to the Youth's motion for leave to file a supplemental brief, presumably because of the Court's denial of the contempt motion.

("Rodgers Decl.") at Exh. A. Counsel for Ecology responded that in light of the December 19, 2016 Order and its pending motion for reconsideration, they "assumed today's hearing had been stricken." *Id.* at Exh. B. Counsel for the Youth similarly responded that it was their "understanding that the motion for leave to file a supplemental brief is now moot in light of her ruling on the contempt motion." *Id.* At the time of this email exchange, the parties were unaware that the Court had not received notice of the filing of the Youth's motion for leave to file a supplemental brief and supplemental and amended petition for review or of Ecology's motion for a continuance. *Id.* at ¶ 5. In light of the Court's January 10, 2017 Order, the Youth hereby provide notice to the Court of their intent to renew their December 6, 2016 motion for leave to file a supplemental brief and supplemental and amended petition for review and declaratory judgment, if necessary to resolve the issues at hand.

On January 8, 2017, the Youth filed their response to Ecology's opening brief in their appeal of the CR 60(b) order and simultaneously moved to dismiss the appeal as moot. *Id.* at ¶ 6, Exh. C. The Youth argued that Ecology's appeal of the CR 60(b) order is moot because the Court of Appeals can no longer provide effective relief since Ecology has already issued the final Clean Air Rule and made a recommendation to the legislature to update the GHG emission limits contained in RCW 70.235.020, the only two agency actions mandated by this Court in its CR 60(b) order. *Id.*; Ecy. Mtn. for Reconsideration at 2; Shirey Decl. in Support of Ecy. Mtn for Reconsideration at ¶ 4, Exh. D. A decision from the Court of Appeals as to whether Ecology's appeal of the CR 60(b) order should be dismissed as moot is forthcoming.

On January 10, 2017, the Court issued an order granting Ecology's motion for reconsideration and directing the Youth to respond to Ecology's motion for reconsideration no later than January 16, 2017. January 10, 2017 Order. The Court explained that it issued the

December 19, 2016 order without knowledge of the Youth's filing of the motion for leave to file a supplemental brief and supplemental and amended petition for review and without knowledge of the Court order granting Ecology's motion for extension of time to respond to the Youth's motion. *Id.* "Due to the misunderstandings and due to the issues raised, the Court has granted the motion to reconsider" and directed the Youth to respond to Ecology's motion by January 16, 2017. *Id.*

In support of its motion for reconsideration, Ecology submitted the testimony of William Drumheller, an Ecology employee. ("Drumheller Decl."). Mr. Drumheller testified that the Washington Clean Air Rule "measures up to the gold standard in state-based climate regulation, the California cap-and-trade program." I*d.* at ¶ 11. While the Drumheller declaration is totally irrelevant with respect to the legal issues raised in Ecology's motion for reconsideration,[2] it is also wholly incorrect, misleading and mischaracterizes not only California's cap and trade program, but the "ambition" of Washington's Clean Air Rule. *See* Declaration of Matt McRae ("McRae Decl."). The fact of the matter is that twenty states have reduced their energy-related carbon dioxide emissions by more than Washington and the record in this case is clear that the Clean Air Rule (along with all of Washington's other policies and programs to address climate change) will not result in emission reductions to achieve compliance with RCW 70.235.020, the Washington Constitution or the public trust doctrine, including reductions called for by best available science. *Id.* at ¶¶ 7, 14.

[2] As such, it should be stricken or disregarded because it does not address the question before the court.

III. STATEMENT OF ISSUES

Whether the Court should deny Ecology's Motion for Reconsideration of its December 16, 2016 Ruling, or in the alternative grant the Youth's leave to file a supplemental and amended pleading, or both.

IV. EVIDENCE RELIED UPON

This brief is supported by the attached declarations of Andrea K. Rodgers and Matthew McRae, and the exhibits attached thereto.

V. AUTHORITY

A. This Court Has Jurisdiction To Allow *Sua Sponte* The Youth To File An Amended Pleading.

The Court's January 10, 2017 Order makes it clear that its December 19, 2016 order was not a ruling on the Youth's motion for leave to file an amended and supplemental pleading, but rather was an exercise of the Court's *sua sponte* authority. Jan. 10, 2017 Order at 2. A trial court's *sua sponte* authority is based on the court's inherent, "discretionary authority to manage its own affairs so as to achieve the orderly and expeditious disposition of cases." *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995); *Wagner v. McDonald*, 10 Wn. App. 213, 217, 516 P.2d 1051 (1973) (same). A trial court "has even greater discretion in determining if it should amend a pleading *sua sponte*," than its discretion to determine whether to grant a motion to amend a pleading. *In re: Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 510, 29 P.3d 1242 (2001). Under CR 77(k), "the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions." Here, the Court properly exercised its discretionary authority to grant the Youth leave to file their amended pleading and "to have

their day in Court" for the reasons set forth in the order which are amply supported by the record, pleadings and previous orders in this case.[3] December 19, 2016 Order at 5.

B. The Court Retained Jurisdiction To Grant Youth Leave To File An Amended Pleading.

Contrary to Ecology's blunderbuss arguments, the Court retained jurisdiction to allow the Youth to file an amended pleading at this stage of the litigation. After an appeal is filed, under RAP 7.2(e), "[t]he trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision." The rule specifies that "[t]he postjudgment motion or action shall first be heard by the trial court, which shall decide the matter." RAP 7.2(e). Here, the motion to amend the pleadings pursuant to CR 15(a) and (d) is explicitly authorized by the civil rules. *See Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 445, 423 P.2d 624 (1967) ("A motion to amend a pleading after the pleadings have closed is governed by . . . CR 15(a) . . . and is addressed to the sound discretion of the trial court."). Furthermore, the court granted leave to amend the pleadings while it was considering the contempt motion, a matter over which this Court has clear jurisdiction. RAP 7.2(c). Ecology admits that the trial court has the discretionary authority to allow amendment of the pleadings after an appeal is filed and cites to cases that have done this before. Ecy. Mtn. for Reconsideration at 4, n.2 (citing *Zachman v. Whirlpool Acceptance Corp.*, 120 Wn.2d 304, 315, 841 P.2d 27 (1992), which affirmed the trial court's

[3] The Court's decision to grant the Youth leave to amend their pleading is also justified for the reasons set forth in the Youth's motion for leave to file a supplemental and amended pleading filed on December 6, 2016, arguments which are incorporated herein by reference.

discretion to allow amendment of the pleadings after the Court of Appeals granted discretionary review).

Ecology's attempt to distinguish the *Zachman* case is unconvincing. Ecy. Mtn. for Reconsideration at 4, n. 2. The fact that the Court of Appeals granted discretionary review of a summary judgment order as opposed to an appeal as of right is of no consequence for purposes of RAP 7.2(e), which is why the court never mentioned that distinction in its decision. And in the *Zachman* case, Court of Appeals' permission was needed under RAP 7.2(e) because the pleading amendment alleged "an alternative ground" supporting the decision that was on appeal, and the trial court's ruling on the motion to amend would have changed the decision on appeal for purposes of RAP 7.2(e). Here, on the other hand, Court of Appeals' permission is not needed because amending the pleadings will not change or alter in any way the CR 60(b) motion that is under appeal. RAP 7.2(e).

Only if a trial court's ruling on a postjudgment motion "will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the entry of the trial court decision." RAP 7.2(e). Under RAP 7.2(e), "a postjudgment motion is presented to the appellate court *only if* the trial court is inclined to grant the motion and grant of the motion will affect the decision under review." *Alpine Indus. v. Gohl*, 101 Wn.2d 252, 256, 676 P.2d 488 (1984) (emphasis added). "[T]he procedure set forth in RAP 7.2(e) was intended to grant more authority to the trial court with regard to postjudgment motions." *State v. J-R Distributors, Inc.*, 111 Wn.2d 764, 769, 765 P.2d 281 (1988). The Court's decision granting the Youth leave to file an amended pleading does not change the Court's CR 60(b) ruling in any substantive way. Moreover, Ecology would ultimately have the right to appeal separately the court's order granting leave to file the amended pleading pursuant

to RAP 2.2(a), should it choose to do so. Finally, because Ecology has completed the timing requirements of the CR 60(b) order, Ecology's appeal of that order should be dismissed as moot and the requirements of RAP 7.2(e) will no longer be relevant.[4] Rodgers Decl, Exh. C. Ecology continues to ignore the critical fact of the case, as it has throughout these proceedings, that the Court found that Ecology was violating the law in its November 19, 2015 order. Those legal violations are ongoing and Ecology wishes to construct yet another procedural barrier to ensure that the Youth are unable to vindicate their constitutional rights.

The federal cases that Ecology cites are unavailing and contradict the state law precedent that clearly affords the trial court the discretion to permit an amendment of the pleadings at this stage in the litigation. *See* RAP 7.2(e); *Zachman*, 120 Wn.2d at 315. In *Droppleman v. Horsley*, the Tenth Circuit Court of Appeals upheld the trial court's *discretion* to deny leave to file an amended complaint after the original complaint was dismissed for failure to state a claim upon which relief could be granted and a timely appeal was filed. 372 F.2d 249, 250 (10th Cir. 1967). The procedural posture of this case is very different and leave to amend the pleading was granted while the contempt motion was pending, a matter over which this Court clearly had jurisdiction. RAP 7.2(c). Similarly, the overruled Ninth Circuit case of *Merritt-Chapman & Scott Corp. v. City of Seattle,* 281 F.2d 898 (9th Cir. 1960), *overruled by Ruby v. Sec'y of U.S. Navy*, 365 F.2d 385 (9th Cir. 1966), stands for the unremarkable proposition that an appeal of a final trial court order transfers jurisdiction to the appellate court. Neither federal case cited by Ecology, however, interprets or applies RAP

[4] Even if this Court finds that Court of Appeals permission is needed because it is inclined to grant the Youth leave to amend their pleadings, the remedy is not reversal or withdrawal of the December 19, 2016 Order, but rather another order from this Court directing the Youth to seek permission from the Court of Appeals, since the rule contemplates that the matter "shall first be heard by the trial court." RAP 7.2(e).

7.2(e), which clearly allows this Court to grant the Youth leave to file their amended pleading under the circumstances of this case.[5]

C. This Court Has Discretion To Allow The Youth To Amend Their Pleading Under CR 15(a) and (d).

1. The Youth's Motion To Amend & Supplement The Pleadings Is Timely.

On the theory that the Youth's motion for leave to amend and supplement its petition for review is untimely, Ecology claims that "[n]othing 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." Ecy. Mtn. for Reconsideration at 7. This statement underscores Ecology's fundamental misunderstanding of the climate science underlying the Youth's legal claims and is patently false. Most importantly, Ecology's argument is legally insignificant. *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987) ("the fact that the material in the amended pleading could have been included in the original pleading will not preclude amendment, absent prejudice to the party.").

As detailed in the Court's December 19, 2016 Order, since the filing of the petition for rulemaking, "time has marched on" and Ecology, the State and Governor Inslee have continued to pursue policies that lock in dangerous levels of carbon dioxide emissions, making it more difficult to address climate change to protect the constitutional rights of young people. December 19, 2016 Order at 2. Every year of delay means steeper emissions cuts. Scientists are now calling for emissions reductions of about 8% per year in order to stabilize the climate system. Declaration of Andrea K. Rodgers in Support of Petitioners' Motion for Order to

[5] Because this Court has allowed Ecology to respond to the Youth's motion for leave to file a supplemental brief and a supplemental and amended pleading, there is no need to respond to Ecology's argument that the Court's failure to allow it to respond is an "irregularity of proceeding."

Show Cause re: Contempt, Exh. 4 (Youth's Comments on Clean Air Rule) at 19-20 (citing the Declaration of James Hansen) ("[t]o reduce global atmospheric CO2 to 350 ppm by the end of this century, this target would require that if global CO_2 emissions had flatlined with a peak in 2016, Washington emissions be reduced by 8% per year beginning in 2017, alongside Washington's share in achieving 100 GtC of global CO2 sequestration through reforestation and soil protection."). Therefore, the implications of the state's actions and inactions with respect to climate change are much more dire than they were even two years ago.

In addition, the Youth, as is their right, opted to pursue a petition for rulemaking with Ecology, with the hope that Ecology would be held accountable for fulfilling their constitutional and statutory responsibilities to address climate change in the comprehensive manner called for by science. Ultimately, the agency was court-ordered to cap and regulate carbon dioxide emissions to address the deprivation of the Youth's constitutional rights, but Ecology opted to promulgate a Clean Air Rule that, combined with all of the state's other policies and programs to address climate change, admittedly will not protect the legal rights of these petitioners. Even after this long and arduous administrative appeal of Ecology's refusal to undertake comprehensive agency action to address climate change, the violations of the Youth's constitutional rights persist. Ecology is not on track to meet the current, out-of-date greenhouse gas emission limits in RCW 70.235.020, and continues to pursue systemic policies that require very minimal greenhouse gas emission reductions, and, in fact, legalize very dangerous levels of carbon dioxide emissions. McRae Decl. at ¶ 14. The justification for filing the amended pleading now, rather than earlier, is because it is now clear through new facts and state actions and omissions, that neither the state, Governor Inslee, nor Ecology is willing to implement their full legal authority to address climate change in a manner that

protects the fundamental, constitutional rights of young people. It is now time for the judicial branch to uphold and enforce the law. *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988) ("[T]he purpose of pleadings is to enable a proper decision to be made on the merits, and not to erect formal and burdensome impediments to litigation.").

The cases cited by Ecology in support of its argument that the Youth's motion for leave to amend the pleadings should be denied are distinguishable. The cases merely stand for the proposition that trial courts have broad discretion to grant or deny a motion to amend the pleadings depending upon the specific circumstances of the case. In *Ino Ino, Inc. v. City of Bellevue*, for example, the court affirmed a trial court's discretion to deny amendment of a complaint because adding the claim "would have been futile" and untimely when brought "after the court had entered a final judgment." 132 Wn.2d 103, 142, 937 P.2d 154 (1997); *see also Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 27-28, 974 P.2d 847 (1999) (affirming discretion of trial court to deny motion to amend the pleadings that "involves different facts and evidence than the claims alleged" in the amended complaint). But there are other cases where courts have granted post-judgment amendment of pleadings. *See, e.g., Zachman*, 120 Wn.2d at 315; *Tagliani v. Colwell*, 10 Wn. App. 227, 234, 517 P.2d 207 (1973) (granting leave to file an amended complaint after summary judgment was filed and decided); *Hendricks v Hendricks*, 35 Wn.2d 139, 148, 211 P.2d 715 (1949) ("amendments are properly allowed at any stage of the case, when to allow them will not operate to the prejudice of the opposing party.")

Here, this Court has the discretion to grant an amendment of the pleadings as timely after finding that the remedy originally found (and subsequently ordered) to resolve the Youth's original legal claims (the Clean Air Rule) "is not intended to achieve the requirements

of RCW 70.235.020" and does not correct the substantive legal violations found by the Court in its November 19, 2015 order. December 19, 2016 Order. Moreover, "delay in and of itself is insufficient to deny leave to amend . . . ." *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988). In one case, the trial court's discretion to amend a pleading to add new claims has been upheld when the amendment was granted five years and four months after the original complaint was filed. *Caruso v. Local 690*, 100 Wn.2d 343, 349, 670 P.2d 240 1983). The stage of the proceedings in which leave to amend the pleadings is granted is clearly not dispositive and here it is timely to grant the Youth leave to amend their pleading.

2. Ecology Can Show No Prejudice.

"In all cases, 'the touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.'" *Herron*, 108 Wn.2d at 166 (quoting *Del Guzzi Constr. Co. v. Global NW, Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986)). Here, Ecology can show no prejudice. Ecology has had ample notice, will be able to mount a full defense, conduct adequate discovery, identify and prepare witnesses, and adequately prepare for trial. In its motion, Ecology makes "conclusory assertions [that] do not rise to the level of showing actual prejudice." *Walla*, 50 Wn. App. at 884. Ecology admits that the Youth have the right to file a new lawsuit, Ecy. Mtn. for Reconsideration at 9, and the Youth could simultaneously file a Notice of Related Case with this Court to ensure an efficient and prompt resolution of the case on the merits. To not allow the Youth to amend their pleading would result in extreme prejudice to the Youth whose constitutional rights to a livable future and stable climate system have been continuously trampled.

V. CONCLUSION & REQUEST FOR RELIEF

Youth Petitioners respectfully request that the Court deny Ecology's Motion for Reconsideration and establish a case scheduling order so that the Youth's legal claims can be heard on the merits forthwith. This Court should not condone Ecology's latest attempt to construct yet another procedural hurdle standing in the way of their quest for justice as it relates to climate change. The Court has already recognized the urgency of the climate crisis, a concept that is best expressed by the late Dr. Martin Luther King, Jr., a man being honored on the day this brief is filed:

> We are now faced with the fact that tomorrow is today. We are confronted with the fierce urgency of now. In this unfolding conundrum of life and history, there is such a thing as being too late. Procrastination is still the thief of time. Life often leaves us standing bare, naked and dejected with a lost opportunity. The "tide in the affairs of men" does not remain at the flood; it ebbs. We may cry out desperately for time to pause in her passage, but time is deaf to every plea and rushes on. Over the bleached bones and jumbled residue of numerous civilizations are written the pathetic words: "Too late."

Martin Luther King, Jr., Beyond Vietnam: A Time To Break Silence, Speech at Riverside Church in New York City (April 4, 1967), http://inside.sfuhs.org/dept/history/US_History_reader/Chapter14/MLKriverside.htm.

I certify that this memorandum contains 4134 words, in compliance with the Local Civil Rules.

Respectfully submitted this 16th day of January, 2017.

s/ Andrea K. Rodgers

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