94083-5

COURT OF APPEALS, DIVISION II

OF STATE OF WASHINGTON

MMH LLC, and GRAYBEARD HOLDINGS, LLC

Appellants

DOWNTOWN CANNABIS COMPANY, LLC, MONEY GRASS FARMS, LLC, AND JAR MAGT, LLC d/b/a Rainier on Pine,

Intervenors/Appellants

vs

CITY OF FIFE,

Respondent

AND

ROBERT W. FERGUSON, Attorney General of State of Washington,

Intervenor –Respondent

NO. 46723-2-II

PETITION FOR DISCRETIONARY REVIEW

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Cases

Pursuant to RAP 13.1 Intervenor-Appellants seek discretionary review by the Washington State Supreme Court of the Court of Appeals' decision terminating review and its denial of Appellant-Intervenors' motion for reconsideration.

This petition involves an issue of substantial public interest in that the Court of Appeals dismissed Intervenor-Appellants' appeal either apparently not recognizing, or in complete disregard of, the Rules of Appellate procedure that govern dismissals. This appeal involves public policy implications under the state constitution involving state preemption issues. This appeal involves the specific issue of whether local jurisdictions have the authority under I-502 to prohibit retail sales of marijuana. Finally, this appeal involves an appellate court applying, or not applying, procedural rules to intervening parties as it would to a non-intervening party.

The Court of Appeals dismissed the Appellant-Intervenors' appeal without providing any justification or any analysis in its dismissal. Instead, the Court of appeals simply stated:

> After further review, this court's order dismissing the above appeal stands. Accordingly, it is SO ORDERED.

Intervenor-Appellants moved the Court of Appeals to reconsider its decision because it had no authority to dismiss the Intervenor-Appellants' appeal. On December 28, 2016 the Court of Appeals denied

the motion to reconsider tersely: "After review of the record, this court denies Intervenor-Appellant's Motion for Reconsideration." No analysis or explanation was provided.

Intervenor-Appellants request this Court to accept discretionary review.

I.
IDENTITY OF PETITIONERS

Petitioners are the three Intervenor-Appellants: Downtown Cannabis Co. LLC, Monkey Grass Farms, LLC. and Jar Management, LLC dba Rainier on Pine.

II.
CITATION TO COURT OF APPEALS DECISION

Intervenor-Appellants seek review of the Court of Appeals' "Order Granting Motion to Withdraw Appeal" dated October 4, 2016, the Court of Appeals' decision entitled "Order Denying Intervenor-Appellants' Motion to Allow Appeal to Continue After Dismissal of Appellants' Appeal" dated November 3, 2016, and the Court of Appeals' "Order Denying Intervenor-Appellants' Motion for Reconsideration" dated December 28, 2016.

III.
ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals violate RAP 17.4(3) when it did not allow Intervenor-Appellants 10 days in which to file a response to Appellant's motion to withdraw its appeal and instead issued an order the

day after the motion was filed not only allowing the Appellant to withdraw its appeal but also terminating Intervenor-Appellants' appeal?

2. Did the Court of Appeals violate RAP 18.2 by dismissing the entire appeal when the Intervenor-Appellants never stipulated that their appeal could be withdrawn?

3. Did the Court of Appeals improperly deny the Intervenor-Appellants' motion for reconsideration?

IV.
STATEMENT OF THE CASE

A. The trial court level

On July 8, 2014 the City of Fife enacted Ordinance 1872 prohibiting all marijuana production, processing, and retail businesses in all zoning districts within the City of Fife. (CP 43.)

On July 15, 2014 MMH filed this lawsuit in Pierce County Superior Court seeking injunctive and declaratory relief that Ordinance 1872 is preempted by state law, i.e., I-502. (CP 1.)

On July 31, 2014 the Washington State Attorney General moved to intervene. The trial court granted the motion on August 1, 2014.

On August 7, 2014 Intervenor-Appellants moved to intervene in the lawsuit. (CP 1552.) Defendant Fife opposed the motion to intervene. (CP 1160.) No other party opposed the Intervenor-Appellants' motion to intervene.

Defendant Fife, in its opposition, never asserted that Intervenor-Appellants lacked standing to intervene. Fife did raise, as one of its arguments, that the Intervenor-Appellants would neither gain or lose by any judgment that would be entered. (CP 1660.)

The trial court granted the Intervenor-Appellants' motion to intervene. (CP 1440.) Fife moved for reconsideration of the trial court's ruling allowing intervention. (CP 1440.) On September 8, 2014 the trial court denied Fife's motion for reconsideration. (CP 1440.) On that same day the trial court granted Fife's motion for partial summary judgment ruling that I-502 did not preempt local jurisdictions' abilities to prohibit retail sales of marijuana. (CP 1440.)

B. The appeal

On September 18, 2015 MMH sought direct review in the State Supreme Court. (CP 1463.)

On September 29, 2014 Intervenor-Appellants filed their notice of appeal seeking review by the Court of Appeals, Divs. II, of the Order Granting Partial Summary Judgement entered September 8, 2014. (CP 1484.) On September 30, 2014 Intervenor-Appellants filed an amended notice of appeal. (CP 1499.) By a letter dated October 28, 2014 the Supreme Court Deputy Clerk acknowledged the appeal and noted that it was assigned the same cause number of 46723-2. The Clerk noted:

> Pursuant to RAP 5.3(g), if a notice of appeal is directed to the Court of Appeals and a notice is filed in the same case which is directed to the Supreme Court, the case will be treated as if all notices were directed to the Supreme Court. Therefore, the Court of Appeals is requested to forward to this Court the notice of appeal and other documents received as to the second notice of appeal for consideration in Supreme court No. 90780-3.

On November 13, 2014 Intervenor-Appellants filed their Statement for Grounds for Direct Review with the State Supreme Court. On February 5, 2015 Intervenor-Appellants filed their opening brief with the State Supreme Court.

The State Supreme Court did not accept direct review. The Washington Supreme Court entered an Order dated June 3, 2015 transferring the case to the Court of Appeals, Div. II.

All briefing had been submitted by all parties to the State Supreme Court. However, after the case was transferred to the Court of Appeals, Div. II, Intervenor-Respondent Attorney General Ferguson requested permission for the parties to file supplemental briefing. In a letter dated July 21, 2015 the Clerk of the Court of Appeals, Div. II, granted the motion.

On August 15, 2015 Intervenor-Appellants filed their supplemental brief as did the City of Fife and the Attorney General.

The Court of Appeals held oral argument on January 22, 2016. Both Appellant and Intervenor-Appellants presented oral argument.

On Monday, October 3, 2016 MMH filed a motion entitled "Appellants' Motion for Voluntary Withdrawal of Review." MMH in their brief stated that they were seeking dismissal of the proceedings in this appeal pursuant to RAP 18.2.

MMH apparently had two bases for their motion. The first was a citation to a newspaper article dated September 8, 2016. MMH quoted from the article: "Puyallup tribe aims to become first in state to grow, test, sell cannabis." (Appellants' brief, p. 2, fn. 1.) Without any citation whatsoever MMH then stated: "The Tribe's proposed location is on Pacific Highway near MMH's proposed location. The location is on tribal land within city limits and not subject to Ordinance No. 1872." MMH then asserted, without any reasoning or analysis, that "The Tribe's decision to sell marijuana in the City has rendered Ordinance No. 1872 meaningless and this appeal is moot."

The second basis the Appellants asserted was that they have reached a settlement with the city of Fife.

What MMH failed to state was that Fife has not rescinded Ordinance 1872.

On October 4, 2016, one day after MMH filed their motion, the Court of Appeals not only granted their request to withdraw their appeal but also dismissed the entire appeal – including Intervenor-Appellants' appeal.

On October 10, 2016 Intervenor-Appellants filed their objection to this Court's dismissal of the entire appeal pointing out that the Court granted MMH's motion one day after they filed the motion and also that under RAP 18.2 all parties have to agree for the dismissal of an appeal before an appeal can be withdrawn.

After the Intervenor-Appellants filed their opposition Fife filed a reply brief. Fife was not entitled under the Rules of Appellate procedure to file such a brief. Fife argued that the Intervenors lack standing to be a party in this lawsuit. However, as noted above, Fife never raised this issue at the trial court level and never appealed the trial court's order granting the Intervenors the right to intervene.

The Attorney General filed a response to MMH's motion to withdraw its appeal but addressed issues regarding the Intervenor's appellate rights. The Attorney General asserted that the Intervenor-Appellants had no standing. However, as pointed out above, the Attorney General did not object to the Intervenor-Appellants' motion to intervene at the trial court level and did not appeal the trial court's ruling granting intervention.

The Attorney General also argued that the issue was now moot. However, the issue raised in this case is whether Fife exceeded its authority in enacting Ordinance 1872. That Ordinance still exists and it would be speculation to assume that it will ever be rescinded. In the

Settlement Agreement between MMH and Fife it is clear that Fife need only consider modifying Ordinance 1872 and is not under any obligation to actually do so.

> 6.3 Upon MMH satisfying the conditions precedent listed in the Agreement Paragraph 4, the City shall cause to be initiated the public process to consider modifying Ordinance 1872.
>
> 6.4 Upon completion of the public process referenced in Agreement paragraph 6.3, the City shall adopt such modifications to Ordinance 1872 as the City Council, it its sole discretion, determines necessary and appropriate as an exercise of its police powers to protect the public health and welfare. If, at the end of the process, the Council does not amend Ordinance 1872, or amends it, but the Retail Marijuana Outlet referenced in Agreement Paragraph 6.2 is not in a location that is permitted by the new ordinance, then said retail outlet shall be considered a non-conforming use, as said term is defined in the Fife Municipal Code, including any subsequent amendments thereto, for all non-conforming uses, and the City shall allow said business to continue to operate so long as it continues to comply with the conditions of a non-conforming use, and also continues to comply with the conditions listed in Agreement section 5.

The Court of Appeals, apparently in an attempt to mask its improper and untimely (the day after the motion was filed) decision dismissing the entire appeal, issued an order entitled "Order Denying Intervenor-Appellants' Motion to Allow Appeal to Continue After Dismissal of Appellants' Appeal" dated November 3, 2016. As the record notes, however, Intervenor-Appellants never moved to "allow" the appeal to continue after the Appellants sought to withdraw their appeal. Instead,

Intervenor-Appellants pointed out to the Court of Appeals that it improperly dismissed the entire appeal.

The Intervenor-Appellants subsequently filed a motion asking the Court of Appeals to reconsider its earlier decision terminating the entire appeal. The Court of Appeals simply denied the motion and failed to explain under what authority it dismissed the Intervenor-Appellants appeal.

The Intervenor-Appellants request this Court to accept review to reverse the Court of Appeals' invalid rulings.

V.
ARGUMENT

The underlying dispute involves a question of broad public interest: under what circumstances may a local jurisdiction, here a city, enact a law that conflicts with a state law. More specifically, the issue below involves whether a local jurisdiction has the authority to ban the retail sales of marijuana. This issue still remains not only in Fife, which is the subject of this litigation, but also in various parts of the state.

This appeal also now involves a court treating an intervenor party differently than an original party. A party intervenor has the full rights of a party. The Intervenor-Appellants here have the full rights as the Appellants. Even after the original plaintiff's action has terminated the intervenor-plaintiff may continue the action. *See State ex rel. Keeler v.*

Port of Peninsula, 89 Wn.2d 764, 575 P.2d 713 (1978). Indeed, one of the primary purposes of the rule allowing intervention is to protect nonparties from having their interests adversely affected by litigation conducted without their participation. *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977). Yet the Court of Appeals disregarded those rights. The Court of Appeals failed to adhere to the Rules of Appellate Procedure by granting a motion one day after it was served on all parties. In addition, the Court of Appeals improperly dismissed the entire appeal instead of simply allowing the Appellants to withdraw their appeal.

A. Intervenor-Appellants had ten days in which to respond to Appellants' motion to withdraw their appeal.

On October 3, 2016 Appellants filed their motion to voluntarily withdraw their appeal. The Appellants had no authority seeking to withdraw, or dismiss, the appeal of Intervenor-Appellants. RAP 17.4 (e) provides that a party has 10 days in which to file a response to a motion. The Court of Appeals ruled on the motion the day after the motion was filed and filed an order terminating the entire appeal on October 4, 2016. This was a violation of the Rules of Appellate procedure and a violation of Intervenor-Appellants' rights.

B. The Appellants' motion to dismiss the entire appeal was improperly granted.

Appellants sought relief under RAP 18.2 which provides:

> The appellate court on motion may, in its discretion, dismiss review of a case on stipulation of all parties, and, in criminal cases, the written consent of the defendant, if the motion is made before oral argument on the merits. The appellate court may, in its discretion, dismiss review of a case on the motion of a party who has filed a notice of appeal, a notice for discretionary review, or a motion for discretionary review by the Supreme Court. …

Under RAP 18.2 the only way that the entire appellate review could be dismissed was if all parties to the appeal stipulated that it could be dismissed. RAP 18.2. Only two of the parties apparently agreed that the entire appellate review could be dismissed. Under the plain language of RAP 18.2 the Court improperly dismissed the entire appeal.

Second, Appellants' motion to withdraw was not supported by any declarations or affidavits. RAP 17.4(f) requires that a moving party serve and file any supporting papers. The Appellants' factual assertions in their motion were without any support whatsoever. While not fatal to their desire to withdraw their own appeal, such a lack of documentation was fatal to seeking any other type of action by the Court.

Third, nothing changed for the Intervenor-Appellants. Fife Ordinance 1872 is still in effect. This appeal involves Ordinance 1872 and whether I-502 preempted Fife's authority to enact the ordinance. While the Appellants, because they entered into a settlement with Fife, may no longer want to proceed with this appeal that is not true for

Intervenor-Appellants. That is the purpose of allowing a party to intervene: to protect their interests and not have their interests dependent on the actions of the party originally filing the action.

This Court should accept review because the Court of Appeals is not abiding by the Rules of Appellate Procedure apparently because it believes that a party that intervenes is not entitled to the status of a party in litigation. This has broad public policy implications. Once an entity is granted the right to intervene in an action they are to be entitled to the same status as the original parties. A court, whether trial or appellate, does not have the authority to pick and choose which procedural rules it will apply to a party that intervenes. Yet that is what apparently occurred here. That is the only explanation for the Court of Appeals' actions. Yet that practice is a violation of the rules and a violation of an intervening party's rights.

This Court should accept the petition for discretionary review in order to address this issue that has significant public policy consequences.

VI.
CONCLUSION

Intervenor-Appellants properly intervened at the trial court level. Fife objected to the motion to intervene but the trial court granted the motion to intervene. No party appealed the trial court's ruling allowing intervention and that issue cannot be raised on appeal now. (Even if it

were it was a discretionary decision by the trial court and the trial court did not abuse its discretion.)

Intervenor-Appellants never stipulated that their appeal could be dismissed. The Court of Appeals, however, dismissed their appeal. The Court of Appeals effectively reversed the trial court's decision allowing intervention. It had no authority to do so.

This Court should address this issue and provide an opinion so that lower courts will have guidance regarding the rights of intervening parties. This is exactly the type of review that falls within RAP 13.4 (b)(4) for the type of petition this Court will accept.

Dated this 26th day of January, 2017.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By s/ Salvador A. Mungia
Salvador A. Mungia, WSBA No. 14807
Reuben Schutz, WSBA No. 44767
Attorneys for Intervenor-Appellants
1201 Pacific Avenue, Suite 2100
Tacoma, WA 98401
(253) 620-6500

ACLU OF WASHINGTON FOUNDATION

By: s/ Mark Cooke
Mark Cooke, WSBA No. 40155
901 Fifth Avenue, Suite 620
Seattle, WA 98164
(206) 624-2184
Attorneys for Intervenor-Appellants

DECLARATION OF SERVICE

I, Donna P. Hammonds, declare that on January 26, 2017, I caused the foregoing document together with this Declaration of Service, to be served on counsel pursuant to e-service agreement for all parties as follows:

Mark D. Nelson,
mark@markdnelsonlaw.com

Loren D Combs,
Jennifer Combs,
Gregory F. Amann,
Hunter MacDonald,
ldc@vsilawgroup.com;
jbc@vsilawgroup.com;
gfa@vsilawgroup.com;
Hunter@vsilawgroup.com

Noah G. Purcell,
Jeffrey T. Even,
noahp@atg.wa.gov;
jeff.even@atg.wa.gov

Stewart Estes
Christine Linder
sestes@kbmlawyers.com;
CLinder@kbmlawyers.com

Donald B. Scaramastra
Jared Van Kirk
dscaramastra@gsblaw.com;
jvankirk@gsblaw.com

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

s/ Donna Hammonds
Donna P. Hammonds, Legal Assistant
dhammonds@gth-law.com
Gordon Thomas Honeywell