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S. Ct. No. 90827-3

Ct. App., Div. III, No. 315193

SUPREME COURT OF THE STATE OF WASHINGTON

D. ANGUS LEE, Grant County Prosecuting Attorney, by and through the Office of the Grant County Prosecuting Attorney,

Respondent,

vs.

JERRY JASMAN, a single person, and CRAIG MORRISON,

Petitioners.

ANSWER TO CONDITIONAL CROSS PETITION FOR REVIEW (Reply to Ans)

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I. IDENTITY OF REPLYING PARTIES

Petitioners Jerry Jasman and Craig Morrison submit this reply to the conditional cross petition for review filed on behalf of Grant County Prosecutor D. Angus Lee. They ask the Court to deny the cross petition and limit the grant of review to those issues raised in their petition for review.

II. RESTATEMENT OF ISSUE ON CROSS REVIEW

In a separate but related lawsuit for reimbursement of costs incurred in defending this lawsuit, a lawyer appointed by Prosecutor Lee argued that *this case is not actually a quo warranto action.* Petitioners submitted the relevant documents from the separate lawsuit to the Court of Appeals below in support of a motion to dismiss this case, on grounds of judicial estoppel and lack of subject matter jurisdiction. The lower court denied the motion, but rejected the contention that it was frivolous.

Now, in response to the petition for review, Mr. Lee claims that the mere submission of documents from the separate lawsuit rendered the motion frivolous—an argument not made below—while appearing to abandon any claim that the substance of motion was frivolous. *See* Ans. to Pet. for Rev. & Cross Pet., at 1-2 (limiting issue presented to submission of extra-record documents); *id.* at 20 (indicating "even if successful," motion would be rendered frivolous by submission of documents).

III. RESTATEMENT OF THE CASE REGARDING CROSS PETITION

In this case, Prosecutor Lee filed a complaint in his official capacity against Mr. Jasman, styled as a "quo warranto" action, alleging jurisdiction and seeking relief under the quo warranto statute, Ch. 7.56 RCW. CP 4 & 8. Mr. Lee initially filed a motion for preliminary injunction. CP 41. However, before ruling on the motion, the superior court disqualified him and the members of his office as counsel for interfering with the defense of the case by giving conflicted advice to the Grant County Commissioners to reverse a prior decision to provide counsel for Mr. Jasman and Mr. Morrison. CP 348-50; CP 351-55. (Mr. Lee remained as the nominal plaintiff.) In the course of addressing the disqualification, Mr. Lee emphasized that this is a quo warranto action. CP 353.

Ultimately, the motion for preliminary injunction was converted to a motion for summary judgment requesting a permanent injunction. CP 252. In the summary judgment briefing, substitute counsel for Mr. Lee stated, "This is an extraordinary writ for quo warranto, filed pursuant to chapter 7.56 RCW." *Id.* The superior court below granted the permanent injunction based on the quo warranto statute. CP 294. On review before

the Court of Appeals, counsel for Mr. Lee acknowledged and confirmed the nature of the action as quo warranto. See e.g., Resp. Br., at 4.

In the meantime, Mr. Jasman filed a separate suit for declaratory judgment and alternative writs of certiorari and mandamus against Grant County and the county commissioners in their official capacities, alleging that Mr. Jasman and Mr. Morrison are entitled to defense costs for this lawsuit, and that the commissioners' reversal of their decision to authorize funds for counsel was arbitrary and capricious in light of their simultaneous authorization of funds to defend Mr. Lee in connection with disciplinary charges filed against him by the Washington State Bar Association.[1]

Following his disqualification in this case, Prosecutor Lee appointed a special deputy prosecutor to defend the separate lawsuit. The special deputy filed a motion for summary judgment, seeking dismissal of the lawsuit, and, in support of the motion, included extensive argument regarding the nature of this case, including multiple statements to the effect that *it is not actually a quo warranto action.*

Based on the statements made in the separate lawsuit, Mr. Jasman and Mr. Morrison filed a motion with the Court of Appeals to dismiss this case on grounds of judicial estoppel and lack of subject matter jurisdiction.

[1] Proceedings in the separate lawsuit have been stayed pending the outcome of this case.

The motion attached documents from the separate lawsuit evidencing the statements that this case is not actually a quo warranto action, and cited authority supporting the proposition that these statements should preclude Mr. Lee from invoking the courts' subject matter jurisdiction under the quo warranto statute.[2]

In response, Prosecutor Lee did not contest the authenticity of the documents submitted to the lower court, nor did he contest the description of the positions taken in the separate lawsuit. Instead, he argued (in pertinent part) that the documents from the separate lawsuit were not part of the appellate record under RAP 9.1, that the record could not be supplemented under RAP 9.11, and that they were not susceptible to judicial notice.[3] While Mr. Lee sought sanctions under CR 11 and RAP 18.9, the sanctions request was related to the substance of the motion and unsupported allegations of delay, not the materials cited in support of the motion (see pages 11-12).

In reply, Mr. Jasman and Mr. Morrison responded to these arguments by citing authority supporting the proposition that it is appropriate to consider extra-record materials relating to judicial estoppel

[2] A copy of the motion, including exhibits, is included in the Appendix to this brief.
[3] A copy of the response to the motion is included in the Appendix. See especially pages 6-8.

and subject matter jurisdiction.[4] The Court of Appeals denied the motion but also denied Mr. Lee's request for sanctions, finding the motion was not frivolous or filed for the purpose of delay. *See Lee v. Jasman*, — Wn. App. —, 332 P.3d 1106, 1126-27 (2014).

IV. ARGUMENT IN REPLY TO CROSS PETITION

A. Prosecutor Lee has not preserved the issue raised by the cross petition, involving a request for sanctions for submitting documents from a separate but related lawsuit in support of a motion to dismiss based on judicial estoppel.

Prosecutor Lee is aggrieved only to the extent that the Court of Appeals denied his request for sanctions. However, the basis for sanctions urged in the Court of Appeals is not the basis for sanctions urged in this Court. In the Court of Appeals, Mr. Lee argued that sanctions under CR 11 were warranted on grounds that judicial estoppel was inapplicable to the circumstances presented by this case. *See* Appendix (Resp. to Mot. to Vacate & Dismiss, at 11-12). He further argued that sanctions under RAP 18.9 were warranted on grounds of delay. *See id.* He did not argue that sanctions were warranted based on the extra-record documents attached to Mr. Jasman's and Mr. Morrison's motion. *See id.*

In this Court, Mr. Lee has abandoned his claim that the substance of the underlying motion was frivolous or that the motion was filed for the

[4] A copy of the reply in support of the motion is included in the Appendix. See especially pages 5-8.

purposes of delay. Instead, he argues that the submission of documents from the separate but related lawsuit renders the motion frivolous. *See* Ans. to Pet. for Rev. & Cross Pet., at 1-2 & 17-20. A request for sanctions on this basis has not been preserved for review, does not satisfy any of the exceptions to the normal preservation-of-error requirements, does not constitute an alternate basis to affirm, and should not be considered. *See* RAP 2.5(a).

B. The Court of Appeals' denial of Prosecutor Lee's request for sanctions does not satisfy the criteria for review by this Court.

Prosecutor Lee contends that the decision below "conflicts with this Court's precedent and presents an issue of substantial public interest," alluding to the criteria for review in RAP 13.4(b)(1) and (4). *See* Ans. to Pet. for Rev. & Cross Pet., at 18. Under RAP 13.4(b)(1), review is warranted "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court," and, under RAP 13.4(b)(4), review is justified "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." (Brackets added.) Here, there is no conflict, and there is no issue of substantial public interest.

Initially, Prosecutor Lee cites *State v. McFarland*, 127 Wn. 2d 322, 899 P.2d 1251 (1995) (no pin cite), and *State v. Riley*, 121 Wn. 2d 22, 31, 846 P.2d 1365 (1993), for the proposition that a challenge to jurisdiction

under RAP 2.5(a)(1) "must be supported by the record on appeal." *See* Ans. to Pet. for Rev. & Cross Pet., at 18. However, neither *McFarland* nor *Riley* involves a challenge to jurisdiction under RAP 2.5(a)(1). Both cases involve RAP 2.5(a)(3), allowing "manifest error affecting a constitutional right" to be raised for the first time on appeal. *See McFarland,* 127 Wn. 2d at 333-34; *Riley*, 121 Wn. 2d at 31. Under this subsection (a)(3), the error must be contained within the record in order for it to be considered "manifest." *See McFarland,* at 333-34; *Riley,* at 31. No similar requirement exists under subsection (a)(1), and, as a result, the decision below does not conflict with *McFarland* or *Riley*.

No case from this Court precludes consideration of extra-record materials in connection with a jurisdictional challenge under RAP 2.5(a)(1). Courts can and should consider materials not included in the record whenever necessary to serve the ends of justice under RAP 1.2(c). *See Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 936-37, 206 P.3d 364 (2009) (indicating documents from separate lawsuit bearing on subject matter jurisdiction properly considered under RAP 1.2(c), even if the requirements to supplement the record under RAP 9.11(a) were not

satisfied; relying on *Washington Fed'n of St. Employees v. State,* 99 Wn. 2d 878, 665 P.2d 1337 (1983)), *rev. denied,* 167 Wn. 2d 1017 (2010).[5]

Next, Prosecutor Lee cites *Adoption of B.T.*, 150 Wn. 2d 409, 414-16, 78 P.3d 634 (2003), for the proposition that it is improper to take judicial notice of pleadings in a separate lawsuit. *See* Ans. to Pet. for Rev. & Cross Pet., at 19. There is no conflict with *Adoption of B.T.* because the case distinguishes judicial notice of the findings and conclusions made in a separate lawsuit from judicial notice of facts contained in the record of another lawsuit. *See* 150 Wn. 2d at 414-16; *see also* 5 Wash. Prac., Evidence Law & Practice §201.9 (5th ed.) (making same distinction). Here, to the extent that judicial notice is required, Mr. Jasman and Mr. Morrison merely seek judicial notice of the fact that Mr. Lee's appointee has taken the position that this case is not a quo warranto action. They do not seek judicial notice of any findings or conclusions made in the separate lawsuit, nor could they, since none have been made and the separate lawsuit has been stayed pending the outcome of this case.

No case from this Court prohibits judicial notice of statements made in separate litigation that form the basis of a claim of judicial estoppel. It is difficult to imagine how a claim of judicial estoppel—or res

[5] RAP 9.11(a) is phrased in terms of "additional evidence on the *merits* of a case" and does not seem to apply to issues of subject matter jurisdiction, i.e., the courts' power to hear the case. (Emphasis added.)

judicata or collateral estoppel, for that matter—could ever be made without taking judicial notice of records from other lawsuits. *See Mastro v. Kumakichi Corp.*, 90 Wn. App. 157, 951 P.2d 817 (applying judicial estoppel based on statements made in oral argument and opening briefing in *separate* appeal), *rev. denied,* 136 Wn. 2d 1015 (1998); *see also In re Coday,* 156 Wn. 2d 485, 501 n.3, 130 P.3d 809 (approving judicial notice of litigation records for purposes of res judicata), *cert. denied,* 549 U.S. 976 (2006). It was entirely appropriate to consider records from the separate but related lawsuit in connection with the motion to dismiss.

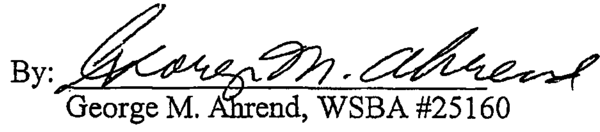
Lastly, Prosecutor Lee does not provide any explanation why the discretionary denial of sanctions by the Court of Appeals in this case raises an issue of substantial public interest. The motion was prompted by claims that this action is not actually a quo warranto action, was supported by citations to authority, and was not contrary to any controlling authority. The denial of sanctions under these circumstances does not merit review by this Court.

V. CONCLUSION

Jerry Jasman and Craig Morrison ask the Court to grant their petition for review, including the relief requested therein, and deny Prosecutor Lee's cross petition for review.

Respectfully submitted this 27th day of October, 2014.

AHREND ALBRECHT PLLC
Attorneys for Petitioners

By: 
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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On October 27, 2014, I served the document to which this is annexed via email and First Class Mail, postage prepaid, as follows:

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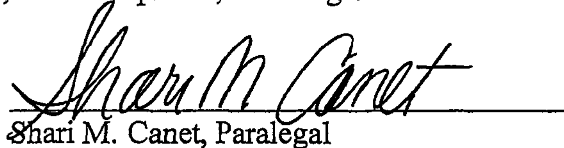

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Attached for filing please find Answer to Conditional Cross Petition for Review. The Appendix exceeds 25 pages and is being transmitted for filing today by USPS delivery.

Thank you.

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