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NO. 72512-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

THOMAS MCLAREN et al.

Appellant

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

Respondent

APPELLANT'S BRIEF

Appeal from the Superior Court of King County

Cause No. 14-2-15217-5 SEA

The Honorable Barbara Lind, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. The superior court erred by dismissing with prejudice a petition to review an administrative decision on the grounds of lack of jurisdiction for failing to comply with statutory service and filing requirements necessary to vest jurisdiction when, instead, the court should have dismissed the petition with*out* prejudice on the wholly different grounds that the petition was premature because the administrative decision was not a "final, full adjudication of the whole controversy" which is necessary to render an administrative decision eligible for review.

2. If (as an alternative to Error No. 1) the administrative decision was final and, therefore, eligible for review, the superior court erred by dismissing the petition on the grounds of lack of jurisdiction for failing to comply with service and filing requirements necessary to vest jurisdiction because the petitioners substantially complied with the requirements.

3. If (pursuant to Error No. 2) the administrative decision was final, and eligible for review, and the superior court dismissed the petition to review for lack of jurisdiction, the superior court erred nevertheless by subsequently granting other relief requested by the respondent despite the court's acknowledged lack of jurisdiction, which jurisdiction is a prerequisite to granting any such relief.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Can the issue of lack of jurisdiction be raised for the first time on appeal where the eligibility of a case for review is at issue?

2. Is an agency decision eligible for review when it is not a final, full adjudication of the whole controversy which is a fundamental prerequisite under applicable law for vesting jurisdiction in the superior court?

3. If the agency decision was final and eligible for review, did the superior court err by dismissing review for lack of jurisdiction because the petitioners substantially complied with the procedural requirements necessary to vest jurisdiction?

4. If the agency decision was final and eligible for review, and the superior court properly dismissed review for lack of jurisdiction, did the court err by subsequently granting additional relief despite the court's acknowledged lack of jurisdiction to grant such additional relief?

C. STATEMENT OF THE CASE

The Department of Natural Resources (DNR) seized vessels belonging to Thomas and (to the extent he holds an interest) Alexander McLaren for trespass on state waters. The McLarens appealed.

Appellants' counsel (unbeknownst to them) agreed to DNR's request to bifurcate the administrative case so the hearing on liability would be followed later by a second hearing on damages.

The administrative court's Prehearing Order of June 3, 2013, reflects the bifurcation arrangement under the "issues" section on page 5.

DNR's Prehearing Brief, at page 26, also reflects the arrangement, and states:

> Since DNR has not completed the removal and disposal process, the total sum of its costs cannot yet be calculated. For that reason, the parties have agreed that **determination of actual costs should be scheduled for a hearing following DNR's sale or other disposal of the Vessels** under RCW 79.100.050. /fn 56/ Accordingly, DNR requests that the Board rule that Thomas McLaren is liable to DNR for all reasonable and auditable costs that have been and will be incurred in removing and disposing of the Vessels, **but reserve a determination of the actual costs for future hearing**.
>
> /fn 56/ Prehearing Order, P.2, lines 17-18.)

And, page 27 of DNR's brief, in the "Conclusion" section, reflects bifurcation of the case by asking the Board to:

> ...find Mr McLaren liable for DNR's reasonable and auditable costs pursuant to RCW 79.100.060, **which costs will be determined at a future date**.

Midway through trial, the McLarens discharged counsel, and retained new counsel.

On April 24, 2014, the admin court rendered its decision in the form of Findings of Fact, Conclusions of Law, and Order. CP 4-33. A cover letter accompanied the decision and stated "This is a FINAL ORDER for purposes of appeal to Superior Court within 30 days". CP 3.

Believing the admin decision to actually be a final order, the McLarens initiated appeal by mailing copies of their petition for review to all concerned parties in sufficient time, allowing 4 days' delivery time, to be received by the 30-day deadline. The petition began King County Superior Court Case No. 14-2-15217-5 SEA.

On June 14, 3013, DNR moved the superior court to dismiss review for lack of jurisdiction for failing to serve the administrative court with a copy of the petition for review within 30 days. CP 45-108. DNR also moved for the additional relief of dismissing Alexander McLaren as an appellant for lack of standing and for failure to exhaust administrative remedies. CP 45-108.

On August 8, 2014, the court granted an order dismissing review of the case for lack of jurisdiction. CP 152-5. The court also granted the

additional relief of dismissing Alexander McLaren as an appellant requested by DNR. CP 152-5. McLarens' new counsel's attempt to seek a continuance was denied. CP 109-135.

The McLarens moved for reconsideration and submitted evidence they mailed copies of their petition for review to the superior court, the administrative board, and counsel for the opposing party. CP 156-164.

The court denied their motion for reconsideration. CP 165.

This appeal followed.

D. SUMMARY OF THE ARGUMENT

Petitioners received an adverse admin ruling and initiated the process to have it reviewed. They filed and served their petition for review on all parties by U.S. mail, allowing more than the required 3 days for mail delivery to meet the 30-day deadline. The superior court got a copy on time, the opposing party 1 day late, but the admin court never received a copy (whom they sent another copy after learning of non-delivery). There is good evidence of record they mailed *all* copies *4* days before the deadline.

Respondent moved to dismiss review for lack of jurisdiction for failing to meet the service and filing deadline necessary to vest jurisdiction in the superior court. The court entered an order dismissing review with prejudice for failing to timely meet the service and filing requirements.

The order was wrong for reasons appearing, and *not* appearing, in the order. Under applicable law, a superior court is allowed to review only a "final decision of the whole controversy" but this case is not yet final and, thus, not yet eligible for review. Pleadings and orders in the admin case clearly state the hearing was limited to "liability" only and damages would be reserved for a "second, later hearing". Even as of this date, that hearing has not yet occurred.

So, when petitioners sought superior court review, their attempt was premature because the admin case was neither final, nor eligible for review. Thus, their attempt must be dismissed without prejudice and they should be allowed to initiate review at a later date if they so choose.

Finally, after declining review for lack of jurisdiction, the superior court then granted additional relief sought by respondent after acknowledging it had no jurisdiction to accept the case.

This appeal now argues (1) the superior court review of the administrative decision should be dismissed, not with prejudice due to lack of jurisdiction for failing to timely serve and file as ordered by the superior court, but rather without prejudice because the case was not yet final and not yet eligible for review, (2) alternatively, the superior court should not have dismissed review for failing to timely serve and file their petition because the petitioners substantially complied with the service and filing requirements, and (3) after dismissing review for lack of jurisdic-

tion, the superior court then had no power to grant the additional relief requested by respondent.

E. ARGUMENT

1. Can the issue of jurisdiction be raised for the first time on appeal where the eligibility of a case for review is at issue?

The Washington State Supreme Court has held, as an exception to the general rule that issues may not be raised for the first time on appeal, that a new issue may be raised "when the question raised affects the right to maintain the action". *Bennet v. Hardy*, 113 Wn.2d 912, 784 P.2d 507 (1990); *Maynard Inv. Co. v. McCann*, 77Wn.2d 616, 621 465 P.2d 657 (1970); *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984).

Here, the issue is whether the petitioners had yet gained the right to maintain a review before the superior court when the admin decision they were attempting to appeal was not yet final and, therefore, not yet eligible for review under applicable law (as discussed below). Under this exception, petitioners have the right to raise this issue for the first time on appeal.

2. Is an administrative decision eligible for review when it is not a final, full adjudication of the whole controversy which is a fundamental prerequisite under applicable law for vesting jurisdiction in the superior court?

The appellants jumped the gun and began appealing a case not yet eligible for review. The right to administrative review is limited to final administrative action. *Citizens for Clean Air v, City of Spokane*, 114 Wn.2d 20, 27-33, 785 P.2d 447 (1990); *R/L Assocs. v. City of Seattle*, 61 Wn. App. 670, 674-78, 811 P.2d 971 (1991). An agency action is final for purposes of judicial review if it is one which "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as the **consummation** of the administrative process". *State Dept of Ecology v. City of Kirkland*, 84 Wn.2d 25, 29-30, 523 P.2d 1181 (1974); *Wells v. Olsten Corp.*, 104 Wn. App. 135, 145, 15 P.3d 652 (2001).

Here, the administrative case had been bifurcated so that a determination of liability would be followed by a separate hearing at which there would be a determination of damages.

In the Department of Natural Resources' Pre-Hearing Brief, at CP 26-27, DNR states:

> Since DNR has not completed the removal and disposal process, the total sum of its costs cannot yet be calculated. For that reason, the parties have agreed that **determination of actual costs should be scheduled for a hearing following DNR's sale or other disposal of the Vessels** under RCW 79.100.050. /fn 56/ Accordingly, DNR requests that the Board rule that Thomas McLaren is liable to DNR for all reasonable and auditable costs that have been and will be incurred in removing and disposing of the Vessels, **but reserve a determination of the actual costs for future hearing**.
>
> /fn 56/ Prehearing Order, P.2, lines 17-18.

And on the next page of its brief, in "Conclusion", DNR requests the Board:

> ...find Mr McLaren liable for DNR's reasonable and auditable costs pursuant to RCW 79.100.060, **which costs will be determined at a future date**.

The June 3, 2013, Prehearing Order (cited in footnote 56) of the admin court also reflects the bifurcation arrangement under the "issues" section on page 5 of that order.

To date only the first hearing on the matter of liability has been conducted. The second hearing has not yet occurred . . . *even as of this date*. Therefore, there has been no consummation of the administrative process, no final decision of the whole controversy.

By jumping the gun, the appellants merely appealed an interlocutory order. There is no right to judicial review for an interlocutory order. An interlocutory order is an agency order issued during a controversy deciding "some point or matter, but [it] is not a final decision of the **whole** controversy". *Samuel's Furniture, Inc. v. State Dept of Ecology*, 147 Wn.2d 440, 453, 54P.3d 1194, 63 P.3d 764 (2002).

Here, because the first hearing decided only the matter of liability, it is merely an interlocutory order and not a final decision of the whole controversy. The administrative decision was only a partial decision on

liability, not a final decision of the whole controversy, and the matter of damages remains yet to be heard and decided.

The appellants jumped the gun because the administrative court erroneously labeled its decision as "final" although it was not final for the purpose of judicial review. Whether or not the requirement of finality is satisfied in any given case depends not on the label affixed by the administrative court but rather upon a realistic appraisal of the consequences of such action. *Isbrandtsen v. U.S.* 211 F.2d 51, 55.

Here, although the administrative court labeled its decision which was only a partial decision on liability in a bifurcated case as final, it misled appellants to believe the whole case was consummated and they began their appeal. However, the label was incorrect and it was inconsequential for the purpose of judicial review as the decision was not a final decision of the whole controversy and, thus, not eligible for judicial review.

3. If the administrative decision was a final, full adjudication of the whole controversy and eligible for review, did the superior court err by dismissing review for want of jurisdiction where the petitioners substantially complied with the requirements necessary to vest jurisdiction?

The August 8, 2014, order of the superior court granted Respondent Dept of Natural Resources' motion to dismiss McLarens' petition for review with prejudice for failing to serve a copy of their

petition on the agency that rendered the decision as required by RCW 34.05.542(2).

As authority in their motion DNR cited *Sprint Spectrum, LP v. State Dept of Revenue*, 156 Wn. App. 949 (2010), in which petitioner's appeal was dismissed because petitioner never even attempted to serve the agency that made the decision. DNR also cited *Banner Realty, Inc. v. Dept of Revenue*, 48 Wn. App. 274, 738 P.2d 279 (1987), in which petitioner's appeal was dismissed because service on the agency was not attempted until three days after the deadline had expired.

But this case is distinguishable in its facts from both *Sprint Spectrum* and *Banner Realty*. Here, unlike those cases, the McLarens initiated service in advance so all copies would be received on time. They took pains to comply in all respects with the statute.

The *Banner Realty* court (despite dismissing the appeal it was reviewing at the time) said that under the right circumstances an appeal should not be dismissed if the petitioner actually complied in essence with the purpose of the statute. The court, quoting *In re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702 (1981), said:

> **Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of the statute.** It means a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.

> What constitutes substantial compliance with a statute is a matter **depending on the facts of each particular case**.

Applying the above to this case we find the objective of RCW 4.05.542(2) is to have appeals served on the deciding agency within 30 days of the decision. Compliance with that 30-day deadline should be available by any reasonable means including appellant's personal delivery, courier delivery, or mailing via U.S. mail, UPS, etc.

If the federal mail service is deemed to be a reliable means of delivery, the McLarens should be deemed to have met the criteria for substantial compliance. They mailed[1] copies of their appeal via U.S. mail to the agency, adverse party, and superior court. They mailed them in sufficient time (allowing more than 3 days for delivery) for all addressees to receive them by the 30-day deadline. The agency decision occurred on April 24, 2014, and the 30th day fell on Saturday, May 24, pushing the deadline to Monday, May 26. The McLaren mailed copies to all addressees on May 22, 2014, allowing four days mailing time.

[1] The McLarens resorted to using the U.S. mail for delivery because of the distance they would have had to drive to serve them. Thomas McLaren lives on the Oregon coast and a round trip drive to deliver them would have taken 2 days to accomplish. Alexander McLaren lives in Anacortes and a round trip drive would have taken 1 long day to accomplish. As a result, they sent the copies through the U.S. mail.

The superior court received its mailed copy on time. DNR received its mailed copy one day late on May 27. The agency did not receive its mailed copy.

There is proof appellants mailed the copies, and proof they mailed them early. The record on appeal contains the appellant's declaration and exhibits on the matter. Appellant's declaration, at CP 156-7, explains his actions in the mailing matter. Exhibits to his declaration, CP 158-9, show copies of all three addressed envelopes, two of which have stamps and one without a stamp. CP 160 of the record shows a postal receipt dated May 22, 2015, for the purchase of **one** "Forever Swallow PSA" stamp because appellant had only two stamps and needed a third stamp to complete mailing of all three envelopes to all three addressees. The receipt shows he bought the stamp on May 22 from the U.S. Post Office in Anacortes which is where he then mailed all three envelopes.

In conclusion, the evidence shows appellants substantially complied with RCW 4.05.542(2) by mailing copies via federal mail to all addressees in sufficient time to meet the 30-day deadline of the statute. The court should conclude that these appellants substantially complied with the statutory requirements to vest appellate jurisdiction in the superior court.

4. If the agency decision was final and eligible for review, and the superior court properly dismissed review for lack of jurisdiction, did the court err by subsequently granting additional relief despite the court's acknowledged lack of jurisdiction to grant such additional relief?

The August 8, 2014, the superior court order granted respondent's motion to dismiss review for lack of jurisdiction. But the order then went on to grant additional relief of dismissing Alexander McLaren as an appellant on the grounds of lack of standing and failure to exhaust administrative remedies. The court lacked authority to grant such additional relief.

The Washington Supreme Court has stated "the rule is well known and universally respected that a court lacking jurisdiction of any matter may do nothing other than enter an order of dismissal. *Deshenes v. King County*, 83 Wn.2d 714; 521 P.2d 1181 (1974); 21 C.J.S. *Courts* 118 (1940)

Here, after the superior court decided it had no jurisdiction, the only act it could take was to enter an order of dismissal. The court had no authority to dismiss Alexander McLaren as an appellant on the grounds of lack of standing and/or failure to exhaust administrative remedies which was additional relief requested by the respondent.

F. CONCLUSION

For the foregoing reasons, the partial administrative decision on the matter of liability of which petitioners mistakenly sought review should be determined to be ineligible for review until a final decision of the whole controversy has been made at which time petitioners may initiate review without prejudice. The superior court order on this matter should be reversed in its entirety and no prejudice should accrue to petitioners.

Respectfully Submitted and Dated this ____ day of October 2015.

Alexander McLaren Thomas McLaren

A copy of this brief was ~~sent~~ emailed to opposing party/counsel this date.

Alexander McLaren Thomas McLaren