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NO. 66857-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEBRA PUGH & AARON BOWMAN

Appellants,

v.

WASHINGTON STATE NURSES ASSOCIATION & EVERGREEN HOSPITAL

Respondents.

APPELLANT'S JOINT REPLY BRIEF TO RESPONSES OF RESPONDENTS PUBLIC HOSPITAL DISTRICT NO. 2 D/B/A EVERGREEN HOSPITAL AND WASHINGTON STATE NURSES ASSOCATION

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ORIGINAL

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I. INTRODUCTION

In its Response, Evergreen Hospital concedes the essential predicate of Pugh and Bowman's appeal, which is that if the Washington State Nurses Association lacked standing to sue Evergreen for the wages owed its nurses, then the court lacked jurisdiction to hear the case and *every* ordered entered by it is void. Brief at 1. That being so, the trial court had no right to enter the order dismissing with prejudice WSNA's lawsuit based on the settlement between Evergreen and WSNA. The court's order, which was the final order in the case, was void for lack of subject matter jurisdiction and should be vacated.

Instead, the trial court should have considered WSNA's lack of standing on February 14, 2011, when it was first brought to the court's attention through Pugh's motion to intervene. That motion "suggested" to the court, under CR 12(h)(3), that it lacked jurisdiction over the case. Had the court properly considered its subject matter jurisdiction over the case at that time, as it was required to do under CR 12(h)(3), Pugh would have been granted the very relief Pugh seeks in this Court. An order would have been entered at that time dismissing with prejudice WSNA's lawsuit for lack of jurisdiction because WSNA had no standing to bring it.

Nor do Evergreen and WSNA challenge Pugh's contention in her opening brief that WSNA lacked standing to sue in the first place. Opening Brief, Sec. D. As noted, Evergreen assumes that Pugh is correct and responds that it does not matter if the court lacked jurisdiction over the case because WSNA had an absolute right to dismiss the case on its

own terms. WSNA does not even respond to Pugh's argument. It does not contend that it had standing to sue or that the trial court had jurisdiction.

Because Respondents make no argument that WSNA in fact had standing to sue Evergreen and that the trial court had subject matter jurisdiction to enter any of the orders it entered, this Court may accept as uncontested Pugh's assertion that WSNA lacked standing to sue and that the trial court lacked jurisdiction to hear the case in the first place. This Court should remand with a direction that the trial court dismiss with prejudice WSNA's case for lack of jurisdiction.

As Pugh made clear in her opening brief such a finding is necessary to prevent Evergreen and WSNA from interfering with the rights of the absent class member nurses in Pugh's lawsuit against Evergreen, in which WSNA has now filed its own motion to intervene. As a practical matter, unless the issue of WSNA's standing to sue on behalf of the nurses is determined by this Court, WSNA and Evergreen will be free exploit their settlement as a purported compromise and release of the claims of the absent class member nurses in Pugh's pending class action case in defiance of the notice and approval requirements of CR 23(e). For this reason Pugh seeks a proper order dismissing WSNA's case for lack of standing and subject matter jurisdiction.

II. FACTS

Initially, it should be noted that neither Evergreen nor WSNA dispute any of the facts asserted by Pugh in her opening brief. Specifically, they do not dispute Pugh's facts showing that WSNA had no associational

standing to sue and present no facts or argument that WSNA did. They do not dispute that they entered into a settlement agreement that would pay the nurses roughly one-half the amount Evergreen *admitted* in deposition it owed its employees as back pay for missed rest breaks and nothing for missed meal breaks. Nor do they dispute that Evergreen sent checks to the nurses pursuant to the settlement that would pay them less than the employer admitted was owed for rest breaks alone in exchange for a release of both their rest break and meal break claims without court approval or notice. Nor do they deny that Evergreen is attempting to use the absent class member's acceptance of the check as an affirmative defense that *bars* their claims in the Pugh lawsuit rather than as a mere *set-off* from the total amount owed to these employees on their claims.

Neither Evergreen nor WSNA dispute that after submitting a stipulated order to Judge Middaugh that set a briefing schedule by which the absent class member nurses in Pugh's lawsuit would be given the opportunity to contest WSNA's standing and the reasonableness of the settlement, they hastily withdrew their motion for approval of the settlement the day after Pugh took Evergreen's deposition through its designated representative and discovered that Evergreen believed at the time it mediated with WSNA that it owed its employees $600,000 in back pay for missed rest breaks alone. But instead of paying what it believed it owed its employees, Evergreen got WSNA to agree to a settlement where it would only be paying the employees $325,000, or roughly half the amount it owed them. Neither Evergreen nor WSNA dispute that through

this settlement, Evergreen would be depriving its employees of half the amount it believed it owed them, while at the same time it would be paying WSNA $50,000 for WSNA's attorneys fees and costs.[1]

Nor do Evergreen and WSNA deny that the trial court struck Pugh's motion to intervene and conditioned her *right* to intervene under CR 24(a) on the outcome of a discretionary decision by the chief civil judge to consolidate the cases, or that the judge's order denying consolidation was expressly based on Evergreen and WSNA's representation that a hearing had been set for Pugh and the nurses to contest the reasonableness of its settlement. Nor do Evergreen and WSNA contest Pugh's assertion that the issue of WSNA's standing and hence the trial court's own jurisdiction was raised in Pugh's February 7 motion to intervene that was reviewed by the court, as noted in its February 14 order, well before the court entered the stipulated order of dismissal at issue. [2]

III. ARGUMENT

A. Pugh's Appeal is Not Futile, the Dismissal Order is Void

Evergreen argues that Pugh's appeal is futile because WSNA had an absolute right under CR 41(a) to dismiss its case. But its argument is

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[1] While not denying that it withdrew its motion for approval of the settlement on March 3, the day after Pugh deposed Evergreen in her case and discovered that it admitted owing its employees roughly twice the amount it was paying them under its settlement with WSNA, Evergreen states that it withdrew the motion after a February 25 conference with the trial court. Brief at 4. It does not explain why it waited a week after that conference to do so , but less than 24 hours after the deposition.

[2] In its Response, WSNA concedes that the trial court never addressed its standing to sue. WSNA Response Brief at 4.

misplaced on the very grounds it recognizes in its introduction, i.e. if the trial court lacked jurisdiction because WSNA had no standing to sue, then all of the court's orders were improperly entered. Indeed, a final order or judgment terminating a case must be vacated if the court lacked jurisdiction. See, *Allstate Ins. v. Khani,* 75 Wn. App. 317, 323 (1994) ("[a] court has a nondiscretionary duty to vacate a void judgment...A motion to vacate under CR 60(b)(5) 'may be brought at any time.'") *See*, also, *Thompson v. Apple, Inc.,* 2011 U.S. Dist. Lexis 73861 (W.D. Arkansas, July 8; 2011) (Court will not consider plaintiffs' Rule 41(a) voluntary dismissal motion because court has determined it lacks jurisdiction over the case).

So, Evergreen is clearly wrong in arguing that Pugh's appeal is futile because the order should be vacated. See, *In re Marriage of Leslie,* 112 Wn. 2d, 612, 618 (1989) ("[A] court may relieve a party from a final judgment, order or proceeding if that judgment order or proceeding is void. A vacated judgment has no effect. The rights of the parties are left as though the judgment had never been entered."). WSNA did not have an absolute right to a CR 41 order. It had no right to any order because it lacked standing to sue and the court lacked jurisdiction. The only appropriate order terminating the case was a CR 12(h)(3) order dismissing the case for lack of standing and jurisdiction. Any other order was void.

Evergreen further argues that the issue of WSNA's standing was not brought to Judge Middaugh's attention because Pugh had not filed a motion to dismiss. Evergreen is wrong. The motion to intervene expressly

argues that WSNA lacked standing and that WSNA's standing was an issue the trial court had to address. See, Mot. at 9 -10, CP 11 at pages 27-28 stating:

> Finally, there exists a real question about whether the WSNA has standing to sue on behalf of its members in this case. Here, the WSNA insists that because Evergreen has no records, it will be difficult to prove who did not get rest breaks and how often. Breskin Decl. at ¶24. Based on its own admission, it appears that calculating damages may require individual participation. Associational standing is not permitted when individual participation by an association's members is necessary. *See Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports,* 146 Wn.2d 207, 216-217 (2002). Individual participation is generally necessary when the amount of monetary damages sought on behalf of those members is uncertain, not easily ascertainable, and not within the knowledge of the defendant. *Id.*

A court has an affirmative duty to determine its jurisdiction "whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction over the subject matter." CR 12(h)(3). If the court concludes that it lacks jurisdiction, then it "*shall dismiss the action.*" Id. (emphasis added.) There is no discretion involved. Its duty is mandatory. Pugh's motion to intervene clearly suggested that the trial court lacked subject matter jurisdiction over the action because, as Evergreen concedes in its brief, if WSNA had no standing to sue, then the trial court had no jurisdiction over the subject matter of the suit.

Pugh's motion to intervene was noted for hearing on February 14, or three weeks *before* WSNA filed its CR 41(a) motion to dismiss based on its settlement with Evergreen. In striking the motion, the trial court stated that it "*reviewed* the Motion to Intervene for *background*

information." Order at 1, CP 39 at p.203 (emphasis added). So clearly, the court knew that Pugh was suggesting that WSNA lacked standing to sue and that, therefore, the court lacked jurisdiction over the case.

Had the trial court followed CR 12(h)(3) by considering WSNA's lack of jurisdiction on February 14, as suggested in Pugh's motion to intervene, then Pugh would have obtained the same relief she seeks in this appeal, i.e., a dismissal with prejudice based on WSNA's lack of standing. The appeal is not futile or frivolous.[3] WSNA's lawsuit should have been dismissed and should have ended on February 14. Because a party's lack of standing may be raised at any time and the court's jurisdiction may be raised on appeal, this Court's ruling on standing would not be merely "advisory" as Evergreen asserts. Brief at 10.

Evergreen also argues that Pugh has no basis to complain, because either way WSNA's claims are dismissed and Pugh can pursue her owns claims in the *Pugh* lawsuit. Evergreen Response Brief at 8. The argument is dishonest and disingenuous at best because Evergreen has asserted as a defense to Pugh's class based claims the payments made pursuant to its settlement with WSNA in this suit. Indeed, WSNA has now moved to intervene in the *Pugh* suit claiming it has an interest in the suit because it

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[3] An appellate court reviews the issue of standing de novo. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). Standing is a jurisdictional issue that can be raised for the first time on appeal. See, *Firefighters, Local 1789,* supra., 103 Wn. App. at 768 (citing RAP 2.5(a); *Mitchell v. Doe*, 41 Wn. App 846, 847, 706 P.2d 1100 (1985)), review granted, 143 Wn.2d 1019 (2001).

has to protect its settlement with Evergreen in this suit.[4] Evergreen supports that WSNA's motion to intervene.[5] See, Evergreen Response, CP __.

Indeed, Evergreen is attempting a "slight of hand." It is trying to simultaneously get the benefit in the *Pugh* case of an affirmative defense based on a "compromise" of the claims asserted in that case for only one-half the amount it calculated it owed its employees, while arguing in this appeal that the payments it made as a compromise of those claims will have no effect on the class action asserted by Pugh. Evergreen cannot have it both ways. If its payments to the absent class member nurses under the WSNA settlement gives it an affirmative defense of accord and satisfaction or waiver of the claims made in the *Pugh* class action, then WSNA's standing to have made that compromise must be decided when challenged.

B. Pugh's Motion to Intervene was Procedurally Proper

Evergreen argues that plaintiffs' motion to intervene was procedurally defective and properly stricken by the trial court because there was no "pleading" submitted showing what Pugh's claims were. First, the trial court did not strike the motion on that ground, but rather struck it because it elected to await the discretionary decision of another

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[4] See, 9/17/11 Mot. to Intervene filed after Pugh's opening brief, CP __.

[5] Pugh has filed a motion asking that this court take judicial notice of WSNA's Motion to Intervene, Evergreen's Response, and the positions taken therein that contradict their position herein.

judge to grant consolidation of the cases. Second, Pugh *did* submit a pleading with the motion that set forth her claims, she submitted the complaint filed in her action which she alleged were identical to the ones that were the subject matter of WSNA's action. See, Ex. C to Declaration of Pugh's counsel, CP 66 at p.288; pp 305-309.[6] Accordingly, Evergreen is factually and legally wrong. It did not have to guess what Pugh's claims were. Pugh's motion was not procedurally defective.

Evergreen also argues that the trial court did not abuse its discretion in striking Pugh's motion despite the fact that WSNA and Evergreen admit they received *actual* notice of the motion in a timely manner, because of Pugh's failure to comply with the technical requirements of Local Rule 7. A court abuses its discretion when its decision is manifestly unreasonable.[7] The trial court's decision to strike the motion rested not merely on the timeliness of the notice given of the motion but more importantly, upon the trial court's decision to limit and condition Pugh's right to intervene on the discretionary decision of another judge on Pugh's motion for consolidation under CR 42. The

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[6] CR24(c) does not specify what pleading setting forth the claims is required. But even if Pugh's motion did not meet the technical requirement of the rule that would not be a basis to deny intervention. *State ex rel. Graham v. San Juan County,* 102 Wn.2d 311, 318 (1984).

[7] *Dix v. ICT Grp. Inc.,* 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

court's interpretation of the rules was manifestly unjust under CR 1 and unreasonable.[8]

C. The Court Improperly Limited Pugh's Right to Intervene.

CR 24(a) provides a person with an unconditional, mandatory and nondiscretionary *right* to intervene where, as here, the person claims an interest in the "property" or "transaction" that is the subject matter of the pending action. Neither Evergreen nor WSNA dispute that Pugh had an absolute *right* under CR 24(a) to intervene because she claimed an interest in the "property" or "transaction" at issue in the case, i.e. the unpaid wages owed by Evergreen to her and putative class member nurses. Instead, they argue that the trial court could properly limit and condition Pugh's absolute *right* to intervene on the *discretionary* decision of another judge to grant or deny consolidation.[9] But a person's *right* to be a party under CR24 cannot be conditioned on whether her own case is properly joined

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[8] Evergreen also argues, without citation to any authority, that a trial court has inherent power to strike a *motion*, as oppose to a *pleading,* even though Pugh cited federal court cases saying a court has no such authority. Evergreen's argument should not be considered. See, *State v. Helms*, 72 Wn. App. 273, 276, 864 P.2d 23 (1993) (appeal argument unsupported by any authority will not be consideration). Evergreen also argues that Pugh waived her right to assert that the court lacked authority to strike her motion. But the court's lack of jurisdiction is a pure legal question because neither WSNA nor Evergreen dispute the facts on which Pugh bases her argument. The trial court's action denied Pugh her constitutional right to due process. Such issues may be raised on appeal. RAP 2.5(a)(3); see, *State v. Kirkman,* 159 Wn. 2d 918, 926, 155 P.3d 125 (2007).

[9] Consolidation under CR 41 is *discretionary,* whereas intervention under CR 24(a) is *mandatory.*

with that case. Indeed, as WSNA concedes, there was no telling whether the chief civil judge would exercise her discretion to consolidate the case in such a manner has to afford Pugh the *absolute right* she had to intervene under CR 24(a). Judge Middaugh's decision to limit, condition and deny Pugh's right to intervene based on the discretionary decision of another judge on a separate motion to consolidate was clear error which finds no support in the civil rules or case law authority.

While not contesting Pugh's assertion that she met the criteria of CR 24(a) to intervene as a matter of *right,* Evergreen and WSNA argue that her motion was untimely because it was made too close to the entry of the order of dismissal and that its settlement did not impair Pugh's right and those of absent class member nurses to pursue their claims in Pugh's class action.[10] But they are wrong on both counts and their arguments are "two-faced" given their assertions in Pugh's case.

Pugh filed her motion to intervene on February 7, only four and half months after WSNA filed its lawsuit and over six months before trial. The motion was timely as a matter of law. See, *Columbia Gorge v. Klickitat County*, 98 Wn. App. 618, 623 (1999) (a motion to intervene is timely as a matter of law when it is filed before the commencement of the trial). The motion was also filed almost a month before Evergreen and WSNA hastily withdrew their previously stipulated to briefing schedule on approval of their settlement and filed their stipulated order of dismissal,

[10] Evergreen Brief at 15-16; WSNA Brief at 9, 11.

which Evergreen and WSNA concede came without any warning to Pugh. Indeed, as Evergreen concedes, only 7 days before at a February 25 conference, the trial court set the motion to intervene for hearing on March 4. Neither Evergreen nor WSNA assert that they told the court or Pugh that they would be filing a stipulation for dismissal of the case with prejudice to prevent the hearing from going forward. Their argument that the motion to intervene was filed too close to the judgment is baseless.

Nor is their assertion that their settlement did not impair the rights of Pugh and absent class members to pursue their claims in Pugh's lawsuit factually accurate or honest. Both Evergreen and WSNA concede that in WSNA's case, they argued that their settlement would only release and dismiss WSNA's right to sue Evergreen on behalf of the nurses not Pugh's claims on behalf of those same workers. Now that Evergreen asserts in Pugh's case the claims are the same, and WSNA asserts that the nurses' acceptance of the settlement checks tendered by Evergreen acts as a "compromise" of their claims. Brief at 10-11. Evergreen, too asserts that the settlement agreement is "binding" on any absent class member nurse who accepts the check tendered under the agreement. Brief at 16.

In other words, both WSNA and Evergreen assert that the legal effect of acceptance of the check tendered by Evergreen as part of *WSNA's* settlement of *WSNA's* claim is a compromise and bar of the *class member's* claim in Pugh's case. They do not assert that the payment acts merely as a *set-off* of the *total* amount owed by Evergreen to the nurses and Evergreen admitted in deposition it owes its employees almost twice

the amount paid under the settlement.

D. <u>The Court Erred in Dismissing the Case under CR 41</u>

While Evergreen and WSNA loudly proclaim WSNA's absolute right to dismiss its case with prejudice under CR 41(a), they never address either of Pugh's two arguments. First, a dismissal under CR 41(a) is *without* prejudice and hence the trial court had to use its *discretion* in granting the dismissal *with* prejudice.[11] Hence, the trial court abused its discretion when it granted a dismissal with prejudice without considering WSNA's standing and hence, its own jurisdiction. Indeed, the trial court understood this by scheduling the hearing on the motion to intervene for March 4 at the parties February 25 conference, well in advance of the March 18 hearing on approval of the settlement. <u>See</u>, *Dix*, 160 Wn.2d at 833 ("[A] trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.").

Second, whether or not WSNA was "the master of its own complaint," WSNA Response Brief at 10, it did not have an absolute right to dismissal with prejudice based on a stipulated motion because as Pugh's opening brief points out, if the court lacked jurisdiction it could not entertain the motion and could not grant the relief requested. <u>See</u> *Thompson v. Apple Inc.*, at 13.

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[11]Opening Brief at 29. <u>See</u>, *Spokane County v. Specialty Auto*, 119 Wn. App. 391, 396-397 (2003) (CR 41(a)(1)(A) does not create an absolute right to dismissal without prejudice, which is granted only at the discretion of the trial court.).

Pursuant to CR 12(h)(3), the court had a non-discretionary duty to dismiss the action with prejudice based on lack of jurisdiction.[12] As Pugh's opening brief notes, WSNA has put the cart before the horse. It assumes that it is a proper party plaintiff in the action and is afforded, therefore, the rights of a proper plaintiff under CR 41(a). But if the court lacked jurisdiction, it had no such rights. Rather, it was the duty of the court to dismiss the case with prejudice based on lack of jurisdiction. That was the *only* thing the court had authority to do. *Young,* supra. at 133.

WSNA argues that the Pugh's right to intervene should not affect WSNA's right to dismissal under CR 41(a). Brief at 13. But of course, it is not Pugh's right to intervene that is affecting WSNA's right to dismissal, it is the court's lack of jurisdiction. No case cited by WSNA or Evergreen permits a court to enter a Rule 41(a) dismissal, rather than a CR 12 dismissal, if the court lacks subject matter jurisdiction.

The trial court erred in entering a CR 41(a) order of dismissal when it lack jurisdiction to do so. The order should be vacated and dismissal with prejudice should be ordered instead based on the court's lack of subject matter jurisdiction.

E. Pugh is Entitled to Fees on Appeal Not Evergreen

The trial court's CR 41 dismissal order should be vacated. Evergreen is not entitled to fees on this appeal pursuant to RAP 18.9.

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[12] See, Opening brief at 30-31. *See, also*, *Young v. Clark*, 149 Wn.2d 130, 133 (2003) (When a court lacks subject matter jurisdiction in a case, dismissal is the only permissible action the court may take.).

IV. CONCLUSION

For the foregoing reasons, Pugh respectfully requests that this Court vacate the trial court's CR 41 dismissal order, direct that the trial court enter a CR 12(h)(3) order dismissing WSNA's case with prejudice for lack of standing and jurisdiction, and award Pugh her fees on appeal.

DATED this 13th day of October, 2011.

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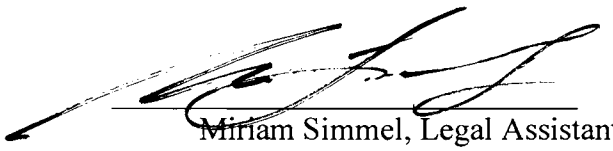
CERTIFICATE OF SERVICE

I, Miriam Simmel, under penalty of perjury under the laws of the state of Washington, hereby certify that on this 13th day of October 2011, I caused the original of the foregoing to be filed with the appellate court and to be served to the following attorneys of record in the manner indicated below.



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