

NO. 66857-9-I

COURT OF APPEALS, DIVISION 1,
OF THE STATE OF WASHINGTON

WASHINGTON STATE NURSES ASSOCIATION,

Plaintiff / Respondent,

v.

KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2 DBA
EVERGREEN HOSPITAL MEDICAL CENTER,

Defendant / Respondent

and

DEBRA PUGH and AARON BOWMAN,
Third Parties / Appellants

On appeal from Superior Court of King County, No. 10-2-32896-3SEA,
the Honorable Laura Gene Middaugh presiding

BRIEF OF RESPONDENT KING COUNTY PUBLIC HOSPITAL
DISTRICT NO. 2 DBA EVERGREEN HOSPITAL MEDICAL CENTER

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC
James S. Fitzgerald, WSBA No. 8426
Kevin B. Hansen, WSBA No. 28349

121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Telephone: 425-822-9281
Facsimile: 425-828-0908

Attorneys for Respondent King County
Public Hospital District No. 2

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I. INTRODUCTION

Appellants Debra Pugh and Aaron Bowman (“Pugh and Bowman” or “third parties”), strangers to the underlying litigation, ask this Court to set aside the Washington State Nurses Association’s (“WSNA”) voluntary dismissal of its own action while at the same time asserting that the WSNA lacked standing to bring that action in the first place.¹ This appeal is an exercise in futility. If WSNA lacked standing, the Superior Court lacked jurisdiction over the claims brought by WSNA, and third parties’ motion to intervene would fail for lack of jurisdiction over the underlying controversy. Whether or not WSNA lacked standing to bring the claims, WSNA had the absolute right to dismiss its lawsuit. Pugh and Bowman remain free to pursue the separate lawsuit that they brought, but that does not mean that this Court should revive a dismissed action, against the wishes of the actual parties.

Third parties’ motions to consolidate and to intervene, filed *after* Pugh and Bowman learned of Evergreen’s pending settlement with WSNA, and their appeal are nothing more than a misguided attempt to

¹ Third parties also assail WSNA for “[i]nexplicably” not bringing the WSNA action under the terms of the collective bargaining agreement. Appellants’ Br. at 5. The collective bargaining agreement contains a mandatory arbitration clause which would also have deprived the Superior court of jurisdiction over a controversy arising under the agreement.

frustrate the settlement between the two parties to this case. They appear to completely misunderstand the nature of the settlement, which is binding only as to WSNA and those nurses who do not reject the settlement checks sent to them under the terms of the settlement.

II. STATEMENT OF THE CASE

This case, filed on September 15, 2010 by WSNA, was one of two cases against King County Public Hospital District No. 2, d/b/a Evergreen Hospital Medical Center seeking unpaid wages regarding missed rest breaks. Evergreen answered the complaint, denying the allegations.

The second case, *Pugh v. Evergreen Hospital Medical Center*, King County Superior Court No. 10-2-33125-5 SEA (“the *Pugh* lawsuit”), filed on September 17, 2010, further sought unpaid wages regarding missed meal breaks. The *Pugh* lawsuit was filed as a putative class action, but the case has not been certified as such. Third parties Pugh and Bowman are named plaintiffs in the *Pugh* lawsuit.

After engaging in discovery in this lawsuit, WSNA and Evergreen participated in a full-day mediation on January 31, 2011, using Professor Cheryl Beckett of Gonzaga Law School as the mediator. In the week following the mediation, the parties reached a settlement agreement that resolved all of WSNA’s claims. Under the settlement, Evergreen agreed

to pay back wages to the nurses and to revise its procedures for rest breaks. The settlement agreement contained the following provision:

This Agreement is contingent in its entirety upon approval by the King County Superior Court in the Lawsuit as may [be] deemed appropriate and necessary and/or required. The parties agree to fully cooperate to obtain the approval of the Court.

CP 225.

On February 4, 2011, Pugh and Bowman filed a motion to intervene. CP 19. The motion was not accompanied by the complaint Pugh and Bowman sought to file in this action. Evergreen moved to strike the motion because Pugh and Bowman failed to serve the motion six court days prior to the hearing date as required under the local court rules. CP 95-99. The Superior Court granted Evergreen's motion to strike on February 14. CP 203-04

Pugh and Bowman also moved to consolidate their putative class action with this lawsuit on February 4. CP 36, 67-68. Per local court rules, the motion to consolidate was submitted to the Chief Civil Judge, *see* KCLR 40(a)(4), and was set for hearing on February 14. CP 67. In the order granting the motion to strike, Judge Middaugh directed that a renewed motion by Pugh and Bowman to intervene in this action could be filed after resolution of their pending motion to consolidate. CP 204.

On February 11, 2011, Evergreen and WSNA jointly filed a notice of settlement. Evergreen and WSNA then filed a joint motion on February 18 for the Superior Court to review and approve the settlement agreement. CP 205-16. Pugh and Bowman filed a second motion to intervene on February 24. CP 269-84. During a telephone status conference requested by counsel for third parties regarding the pending motions on February 25,² Judge Middaugh questioned the Court's authority to approve the settlement agreement. CP 371. Due to Judge Middaugh's comments, Evergreen and WSNA determined that court approval of the parties' settlement was not necessary or required and presented a stipulated order of dismissal to the Superior Court on March 2, 2011. CP 371-73. The Court signed the stipulated order the following day. CP 372.

Although the settlement agreement is binding as to Evergreen and WSNA, it is only binding on those employees who do not reject individual settlement checks sent to them:

Within five (5) days of receiving the statement of the amount due per Represented Employee from WSNA, Evergreen will issue checks with release language to the Represented Employees. . . . The release language on the check will include a release of Evergreen for further

² Counsel for Evergreen, WNSA, and third parties participated in the telephone conference, which, interestingly, was initiated and instigated by counsel for Pugh and Bowman.

entitlement to back wages for missed rest breaks. Any Represented Employee who affirmatively refuses and returns the check within sixty (60) days of issuance is not bound by this settlement.

CP 222.

III. ARGUMENT

A. Third parties' appeal is futile because WSNA's right to dismiss its lawsuit under CR 41(a)(1)(A) is absolute.

“CR 41(a)(1)(A) . . . create[s] an absolute right to a stipulated dismissal.” *Spokane County v. Specialty Auto & Truck Painting*, 119 Wn. App. 391, 396, 79 P.3d 448 (2003); *see also McKay v. McKay*, 47 Wn.2d 301, 304, 287 P.2d 330 (1955) (“The plaintiff’s right in this respect is absolute and involves no element of discretion on the part of the trial court.”). Although Pugh and Bowman make much of the distinction between a dismissal *with* prejudice and a dismissal *without* prejudice, it is a distinction without a difference in this case. Through the settlement agreement, WSNA fully resolved its claims against Evergreen and has no right to pursue those claims further, so whether the case was dismissed *with* prejudice or *without* prejudice is irrelevant.

In upholding the absolute right to a dismissal, the Supreme Court has specifically rejected the suggestion that the right to dismiss is restricted when the dismissal may prejudice another party. *See Herr v.*

Schwager, 133 Wash. 568, 572-73, 234 P. 446 (1925). In *Herr*, the defendant argued that:

since he interposed the defense of the statute at a time when under the law it furnished a complete defense to the action, and that since it may not be a defense to a subsequent action, he has acquired thereby some right which vests in the court a discretion to deny a dismissal, even though the right might be absolute under other circumstances.

Id. The Court responded: “Where the right is absolute, we do not understand that it is affected by the nature of the defense interposed.” *Id.* at 573.

Further, “the right to a voluntary nonsuit is fixed at the moment that it is claimed.” *McKay*, 47 Wn.2d at 305. The fact that third parties’ renewed motion to intervene was pending at the time the stipulated order was filed did not affect Evergreen’s and WSNA’s “absolute right to a stipulated dismissal.” *Specialty Auto*, 119 Wn. App. at 396. “A motion to intervene should not affect the plaintiff’s right to dismiss as of right.” 8 MOORE’S FEDERAL PRACTICE, § 41.33[5][c][H] (3d ed. 2008). This case is similar to *Mut. Produce, Inc. v. Penn Cent. Transp. Co.*, 119 F.R.D. 619 (D. Mass. 1988), in which proposed intervenors moved to intervene before a stipulation of dismissal was filed. The court denied the motions:

The intervenors have cited no cases to support their argument that a motion to intervene will stay a stipulation to dismiss under Rule 41(a)(1)(ii) that has been executed by all named parties.

Intervenors were not named parties when plaintiffs and defendants filed their stipulations of dismissal, nor did their filing of a motion to intervene give them party status.

Because the stipulations of dismissal were effective when filed, there is no action in which to intervene and the motions to intervene are moot.

Id. at 620-21; *see also Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999) (“Voluntary dismissal . . . moots all pending motions . . .”). Once the parties have filed a stipulation of dismissal under CR 41(a)(1)(A), there is no longer a pending case or controversy into which a non-party may intervene. *See GMAC Commercial Mortg. Corp. v. LaSalle Bank Nat’l Ass’n*, 213 F.R.D. 150, 150-51 (S.D.N.Y. 2003).

Curiously, Pugh and Bowman argue that “[i]t is manifestly unreasonable to dismiss a case with prejudice on the basis that the parties ‘have reached a settlement’ on the eve of a hearing regarding whether one of those parties has standing to settle those claims at all.” Appellants’ Br. at 31 (emphasis in original).³ A settlement of a dispute involves concessions and compromise by both parties, in recognition of the risks of

³ Third parties’ assertion that “a hearing regarding whether one of those parties has standing” was pending is incorrect. Pugh and Bowman did not file a motion to dismiss WSNA’s claims based on lack of standing; the pending motion was their request to intervene.

litigation.⁴ This Court may take judicial notice that many cases settle “on the courthouse steps,” and that dismissal follows. Regardless whether dismissal flows from an adverse determination by a court or by agreement, the effect is the same – the claims of WSNA are dismissed and Pugh and Bowman are able to pursue their claims in the *Pugh* lawsuit. There is no basis for third parties to complain.

Pugh and Bowman further complain that after initially filing a motion seeking court approval of their settlement, Evergreen and WSNA opted for a stipulated dismissal of the lawsuit while the motion for court approval was pending. There was, however, no statutory or contractual obligation to obtain court approval of the settlement. Court approval is generally restricted to certain types of cases, such as class actions, shareholder derivative suits, and actions against joint tortfeasors. *See, e.g.*, CR 23(e); CR 23.1; RCW 4.22.060 (“The statutory scheme adopted by RCW 4.22.030-.060 contemplated the settlement of filed lawsuits

⁴ In this case there were a number of legal issues that, at the time of settlement, were not resolved by courts, including whether the nature of nursing work permits the use of intermittent rest breaks under WAC 296-126-092(5) and whether missed rest breaks are compensable at straight time or overtime rates. Since the settlement, Division III of this Court has addressed one of these issues, determining that missed rest breaks are compensable at straight time rates. *See Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 2011 Wash. App. LEXIS 1999, No. 29366-1-III (August 25, 2011).

involving joint tortfeasors.” *Leader Nat’l Ins. Co. v. Torres*, 113 Wn.2d 366, 373, 779 P.2d 722 (1989)). Apart from such cases, parties to a lawsuit retain the right to negotiate a settlement of claims free from the interference of non-parties or court supervision of the negotiations.⁵

The settlement agreement required court approval only to the extent either party “deemed” such approval “appropriate and necessary and/or required.” CP 225. The express public policy of Washington State is to encourage settlement. *See City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997); *State v. Noah*, 103 Wn. App. 29, 50, 9 P.3d 858 (2000). Settlements can be made both before and after a lawsuit is filed. *See* KARL B. TEGLAND, 15 WASH. PRACTICE § 53.1 (2d ed. 2009). Evergreen’s settlement with WSNA and the stipulated dismissal of this lawsuit was entirely consistent with the State’s strong public policy and real world practice. It is irrelevant whether counsel for Evergreen and

⁵ Pugh and Bowman attempt to re-cast the decision of the parties to file a stipulated order of dismissal as improper and misleading to the Superior Court. It was neither. The pleadings submitted in response to the motion to consolidate and the initial motion to intervene reflected the then-current posture of the case and the parties’ plans. Following the conference call with Judge Middaugh in which she expressed reservations about the Court’s authority to enter an order approving the settlement, the parties opted to forego the expenditure of time and effort (both theirs and the Court’s) required to obtain court approval and to stipulate to dismissal. Pugh and Bowman acknowledge that the Court expressed reservations about its authority to approve the settlement, but insist that Evergreen and WSNA should still have proceeded to seek formal approval. Appellants’ Br. at 28.

WSNA initially thought it advisable to seek court approval of the settlement – the fact is that such was determined to be neither required nor necessary.

Third parties seek a ruling on WSNA’s standing, but any such ruling would merely be advisory, as WSNA’s claims have been dismissed with prejudice. There is no longer any case or controversy for this Court to rule upon.

B. The Superior Court did not abuse its discretion or exceed its authority in striking third parties’ motion to intervene.

Pugh and Bowman assert that the Superior Court erred in striking their initial motion to intervene. This issue is moot because even if the Court erred, there is no longer a lawsuit for third parties to intervene in as a result of the stipulated dismissal. Even if the issue were not moot, third parties’ argument lacks merit.

Both the original and renewed motions to intervene were defective as a matter of law. Under CR 24(c), a motion to intervene “shall be accompanied by a pleading setting forth the claims or defense for which intervention is sought.” Pugh and Bowman did not include the pleading they sought to file in this case with their motions. CP 19-31, 269-84. Failure to file the required pleading with a motion to intervene is grounds to deny the motion. *See River Park Square, LLC v. Miggins*, 143 Wn.2d

68, 80, 17 P.3d 1178 (2001). Neither Evergreen nor WSNA should have had to guess what claims might have been contained in the proposed pleading required by CR 24(c).

The form of the Superior Court's order granting the motion to strike provides no grounds to set it aside. Unlike CR 56(h), which requires a designation of the documents and evidence considered by the court when ruling on a motion for summary judgment, CR 7 and KCLR 7 do not require a court to list all of the documents it reviews when ruling on a non-dispositive motion. Even in the context of a motion for summary judgment, the failure to list all of the documents considered by the court is harmless error if there is a reasonable probability that absent the error the result would have been the same. *See W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 590-91, 973 P.2d 1011 (1999); *Barker v. Advanced Silicon Materials*, 131 Wn. App. 616, 623, 128 P.3d 633 (2006) (upholding summary judgment decision even though order did not designate the evidence relied on as required by CR 56(h)).

Here, although not required to do so, the Superior Court listed a number of documents that it considered. CP 203. The list includes an ellipsis, which indicates that other documents were considered in addition to the listed documents. There is nothing in the order or anywhere else in the record to indicate that the Court refused to consider third parties'

response to the motion to strike and Evergreen's reply brief, and given that third parties failed to comply with both CR 24(c) and KCLR 7(b)(4)(A), any error in failing to specifically list all of the documents would have been harmless.

Pugh and Bowman also argue that the Superior Court abused its discretion by requiring compliance with KCLR 7(b)(4)(A). They mistake the ability of a court to waive compliance with its rules for a requirement that it do so. Although *Loveless v. Yantis*, 82 Wn.2d 754, 513 P.2d 1023 (1973) held that a deviation from the time limit under CR 6(d) "may be permissible," it did *not* hold that a court must ignore its rules "where the party had actual notice and time to prepare." A court has inherent authority to control litigation before it. See RCW 2.28.010; *In re Firestorm 1991*, 129 Wn.2d 130, 139, 916 P.2d 411 (1996); *State v. S.H.*, 102 Wn. App. 468, 473, 8 P.3d 1058 (2000); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (the court's inherent authority is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"). As such, the Superior Court was not *required* to overlook third parties' failure to comply with its local rules regarding the timing of motions.

Finally, Pugh and Bowman argue that the Superior Court lacked authority to grant the motion to strike because “[m]otions to strike are governed by CR 12(f).” Appellants’ Br. at 22. The Court had the power to strike the untimely and defective motion as part of its inherent authority. If a court has no authority to strike a motion that does not comply with the civil rules, its ability to control litigation and enforce the rules would be significantly hampered. Further, Pugh and Bowman have waived this argument by not raising it before the Superior Court in their response to the motion to strike. CP 151-54. Under RAP 2.5(a), this Court will not review an issue, theory, argument, or claim of error not properly presented to the trial court. *See Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001). One purpose of the rule is to give the court “an opportunity to consider and rule on the relevant authority.” *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990). Another purpose “is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001).

C. The Superior Court did not err in directing third parties to re-file their motion to intervene after the Chief Civil Judge ruled on their motion to consolidate.

Here again, Pugh and Bowman object to the Superior Court's inherent power to manage its crowded docket.⁶ In its order granting Evergreen's motion to strike, the Court determined that "[i]t is in the interest of judicial economy that the Motion to Intervene not be heard until after the Motion to Consolidate has been ruled on." CP 204. According to Pugh and Bowman, the Court exceeded its authority in so ruling. The Court had the authority to manage its own affairs "so as to achieve the orderly and expeditious disposition" of this case. *Chambers*, 501 U.S. at 43.

Had the Chief Civil Judge ordered a consolidation of this lawsuit with the *Pugh* lawsuit, there would have been no need for intervention. The Court properly exercised its discretion in directing third parties to wait until a decision was made on their motion to consolidate. Consolidation of the two cases would obviate the need for the Court to address the merits and demerits of third parties' proposed intervention. The Court properly deferred consideration of a renewed motion that might

⁶ As with the argument that the Court erred in granting the motion to strike, this issue is moot because even if the Court erred, there is no longer a lawsuit for third parties to intervene in as a result of the stipulated dismissal.

be rendered moot because of a motion third parties had pending before the Chief Civil Judge of the same Court.

Pugh and Bowman appear to assume that their motion to intervene would have been granted if considered by the Superior Court. Their assumption is in error because their motion to intervene did not satisfy the requirements of CR 24(a), (b), or (c). Specifically, the motion was untimely because they waited until after Evergreen and WSNA settled this lawsuit, the settlement of this lawsuit did not, as a practical matter, impair their ability to protect their interests, and the motion was incomplete.

A motion to intervene is timely only if it does not “work a hardship on one of the original parties.” *Columbia Gorge Audubon Soc’y v. Klickitat County*, 98 Wn. App. 618, 623, 989 P.2d 1260 (1999); *see also Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997) (holding that motion to intervene was untimely because “by the time the Applicants moved to intervene . . . , the district court had already directed the State to pay the fees to the Bands, effectively resolving the dispute”). Being forced to continue litigation that has been settled would work a hardship on both Evergreen and WSNA.

As a result of the settlement of WSNA’s claims and dismissal of the lawsuit, there was no adjudication on the merits that might prejudice Pugh and Bowman from seeking whatever damages they believe they are

owed in the *Pugh* lawsuit. The settlement is only binding on those nurses who do not reject the settlement checks sent under the terms of the agreement. With the settlement of this lawsuit, there is no reason why Pugh and Bowman cannot continue their own separate lawsuit against Evergreen, which they began independently of WSNA in the first place, particularly because they do not need to step into the shoes of WSNA for purposes of a statute of limitations or other reasons affecting the merits.

As noted above in Part III.B, Pugh and Bowman failed to include “a pleading setting forth the claim or defense for which intervention is sought” as required under CR 24(c). They offered no explanation to the Superior Court for their failure to attach their proposed complaint in intervention, and their opening brief to this Court provides no grounds to excuse non-compliance.

D. Evergreen is entitled to an award of fees on appeal.

Evergreen is entitled to fees under CR 11 and RAP 18.9 because third parties’ appeal and arguments are frivolous. An appeal is frivolous if it presents no debatable issues upon which reasonable minds might differ and is “so totally devoid of merit” that there is no reasonable possibility of a reversal. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998). In addition, CR 11 discourages filings that are not “well grounded in fact” and “warranted by existing law or a good faith

argument for the extension, modification, or reversal of existing law or the establishment of new law,” or are interposed for an improper purpose, “such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” CR 11(a)(1)-(3). CR 11 permits a court to award sanctions, including expenses and attorneys’ fees, where a litigant acts in bad faith in instituting or conducting litigation. *See Delany v. Canning*, 84 Wn. App. 498, 509-10, 929 P.2d 475 (1997). Third parties’ appeal, arguing for reversal of a voluntary dismissal under CR 41(a)(1)(A), is clearly frivolous and fees should be awarded to Evergreen.

IV. CONCLUSION

Even a successful appeal would result in no cognizable relief to Pugh and Bowman. Their lawsuit remains separate. WSNA has settled its claims. Even if this Court were to grant all of the relief requested by Pugh and Bowman, there would be no change from the present *status quo*. Whether or not WSNA had standing to assert damages claims on behalf of the registered nurses and whether or not Evergreen might have been liable for those claims, the parties entered into a binding settlement agreement. This lawsuit is over and third parties are free to pursue their claims in the *Pugh* lawsuit. WSNA’s absolute right to dismiss its claims under CR 41(a)(1)(A) should be affirmed.

DATED this 9th day of September, 2011



James S. Fitzgerald, WSBA #8426
Kevin B. Hansen, WSBA #28349
Livengood, Fitzgerald
& Alskog, PLLC
Attorneys for Respondent

121 Third Avenue
P.O. Box 908
Kirkland, WA 98083-0908
Phone: (425) 822-9281
Fax: (425) 828-0908

CERTIFICATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on September 9, 2011, I caused the foregoing to be filed via United States Mail, postage prepaid, with:

Clerk of the Court
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-1176

And a true and correct copy of the same to be delivered via United States Mail, postage prepaid, to:

David Breskin
Annette M. Messitt
Breskin, Johnson and Townsend, PLLC
1111 Third Avenue, Suite 2230
Seattle, WA 98101

David Campbell
Carson Glickman-Flora
Terrance M. Costello
Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

Dated: September 9, 2011



Lee Wilson
Legal Assistant to Kevin B. Hansen