

FILED
Court of Appeals
Division II
State of Washington
6/20/2018 2:14 PM

No. 50574-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY, Respondent,

v.

KITSAP RIFLE AND REVOLVER CLUB, Appellant,

APPELLANT'S REPLY BRIEF

Attorneys for the Appellant:

Bruce O. Danielson
WSBA #14018
Danielson Law Office, P.S.
1001 4th Avenue, Suite 3200
Seattle, WA 98154
206-652-4550
bruce@brucedanielsonlaw.com

TABLE OF CONTENTS

	Page
I. ARGUMENT	1
A. The Trial Court Was Without Authority to Enforce, Clarify or Modify a Dissolved Preliminary Injunction	1
B. The Trial Court’s Permanent Injunction was a Modification and Expansion of a Previously Dismissed Preliminary Injunction	3
C. The Permanent Injunction Involved New Issues Which Arose after Entry of the Final Judgment and Required a Trial on the Merits Before a Permanent Injunction Was Issued	5
II. CONCLUSION	7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Kemmer v. Keiski</i> , 116 Wn. App. 924, 68 P.3d 1138 (2003).....	2, 3, 4
<i>McLean v. Smith</i> , 4 Wn. App. 394, 399, 482 P.2d 798, 801-02 (1971).....	6
<i>Seiu Healthcare 775NW v. State, Dep't of Soc. & Health Servs.</i> ,193 Wn. App. 377, 377 P.3d 214 (2016), <i>review denied sub nom. Seiu Healthcare 775 N.W. v. State of WA DSHS</i> , 186 Wn.2d 1016, 380 P.3d 502 (2016)	6
<i>Skyline Contractors, Inc. v. Spokane Hous. Auth.</i> , 172 Wn. App. 193, 200, 289 P.3d 690, 694 (2012).	6
Civil Rules	
CR 56.....	6
CR 59.....	4
CR 60.....	4

I. ARGUMENT

In the following Argument, the Appellant Kitsap Rifle and Revolver Club will be referred to as the “Club.” The Respondent, Kitsap County, will be referred to as the “County.”

A. The Trial Court Was Without Authority to Enforce, Clarify or Modify a Dissolved Preliminary Injunction

On April 7, 2016, the trial court entered an *Order Granting Defendant/Counterclaimant’s Motion to Dissolve Preliminary Injunction*, The Order: “GRANTS Defendant’s Motion to Dissolve Preliminary Injunction.”¹ Clerk’s Sub. #104

On June 28, 2016, trial court entered an *Agreed Order Identifying Documents and Evidence Considered by the Court Prior to Entry of the May 31, 2016, Order on Summary Judgments; and Order Confirming Final Judgments*. (hereinafter referred to as “*Final Judgment*.”) The Order specifically held:

2. The rulings and findings in the May 31, 2016 Order, which Order is incorporated herein by reference, are hereby confirmed and adopted in this *final judgment*. (emphasis added) (CP 32)

and

¹ The Club has filed a Supplemental Designation of Clerk’s Papers

4. There are *no remaining issues* to be resolved by this Court as all the claims and rights and liabilities of the parties have been adjudicated pursuant to the May 31, 2016 and June 28, 2016 Orders.

(Emphasis added) (CP 32)

Section 2 of the *Final Judgment* incorporates, by reference, the May 31, 2016 Order of the trial court. The May 31, 2016 Order, page 4, li 10-11, states: “[T]he County stated that it no longer seeks a permanent injunction, and that it only seeks a declaratory judgment” CP 2184

When the *Final Judgment* was entered on June 28, 2016, the Club was not subject to an injunction and, as stated above, the County waived any claim for a permanent injunction. CP 2184

The argument of the County that the trial court was clarifying or enforcing its prior injunction begs the question: “May a trial court clarify or enforce a prior injunction which has been dissolved and not reinstated?”

When a judgment disposes of all claims and all parties, it is both appealable and preclusive. It remains appealable for 30 days. If not appealed in that period of time, it directly precludes all further proceedings in the same case, except “clarification” and enforcement proceedings, and it collaterally precludes other suits based on the same claim. *Kemmer v. Keiski*, 116 Wn. App. 924, 932, 68 P.3d 1138, 1142 (2003).

“Clarifying” a prior Order is limited to working within the framework of an existing order. “As stated in *Rivard v. Rivard*, an order “clarifying” a judgment explains or refines rights already given. It neither grants new rights nor extends old ones.” *Kemmer*, supra at 933 (citations omitted)

The County fails to specify how the Order for Permanent Injunction was a “clarification proceeding” as defined and limited by *Kemmer*. The County fails to acknowledge that the Permanent Injunction granted the County new rights and extended a dissolved injunction.

B. The Trial Court’s Permanent Injunction was a Modification and Expansion of a Previously Dismissed Preliminary Injunction.

The County’s argument that *Kemmer*, supra supports the trial court’s authority to enforce its prior injunction ignores the fact that the preliminary injunction was dissolved and the injunction did not exist for the purposes of enforcement. Per *Kemmer*, it is impermissible for the trial court to extend, let alone create, new rights or restrictions post final judgment.

The actions of the trial court in this case are not unlike the facts in *Kemmer* as related to post judgment orders. In *Kemmer*, the trial court entered a final judgment for a 12-foot easement. In a proceeding post judgment, the trial court entered an Order expanding an easement to 30 feet. The Court of Appeals reversed the post judgment trial court order.

The court in *Kemmer* held the post judgment order “[C]onstituted a substantial and significant modification of the May 2000 judgment, not a mere “clarification” of the May 2000 judgment. It was not accomplished in compliance with CR 59, CR 60, or any other exception to preclusion that we are aware of. We hold that the August 2001 judgment was precluded by the May 2000 judgment.” *Kemmer*, supra at 934.

In the present case, after entry of the *Final Judgment*, the trial court’s Order of Permanent Injunction expanded the scope of a prior (dissolved) injunction and revived the County’s waived claim for a permanent injunction. The ruling in *Kemmer*, supra, makes clear the distinction between enforcing a prior order and modification of a prior order.

The argument that the trial court was empowered to enforce its prior order ignores well-established legal precedence that a final judgment, with exceptions as provided in CR 59 and 60, precludes the trial court from entering further post final judgment orders that materially modify a prior order.

C. The Permanent Injunction Involved New Issues Which Arose after Entry of the Final Judgment and Required a Trial on the Merits Before a Permanent Injunction Was Issued.

To support its argument that the Court was empowered to enter a Permanent Injunction, the County points to the extensive and competing declarations of both parties in support of, and opposition to, the permanent injunction. The contested factual issues and claims arose after entry of the *Final Judgment*.

The *Final Judgment* specifically held: “There are **no remaining issues** to be resolved by this Court as **all the claims and rights and liabilities** of the parties have been adjudicated pursuant to the May 31, 2016 and June 28, 2016 Orders.” (Emphasis added) CP 32

The County filed its Petition for Further Relief approximately four (4) months after entry of the *Final Judgment*. To support its Petition, the County filed nine new declarations, and seven motions, briefs or memorandums of law. CP 2073-2075

In opposition to the County’s Petition, the Club filed three new declarations and five motions, briefs or memorandums of law. CP 2073-2075 The Order Granting Permanent Injunction added thirteen new Findings of Fact and ten new Conclusions of Law.

Despite contravening declarations, the trial court issued a Permanent Injunction involving material issues of fact relying solely upon competing declarations. The trial court denied the request of the Club for

an evidentiary hearing and discovery. CP 2214-2217 The trial court's entry of a Permanent Injunction was handled in the same manner as a summary judgment.

“The purpose of a preliminary injunction is to preserve the status quo of the subject matter of a suit **until a trial can be had on the merits.** Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968). A preliminary injunction should not give the parties the full relief sought on the merits of the action.” (emphasis added) (citations omitted) *McLean v. Smith*, 4 Wn. App. 394, 399, 482 P.2d 798, 801–02 (1971)

“A TRO and a preliminary injunction both are designed to preserve the status quo until the trial court can conduct a full hearing on the merits.” *Seiu Healthcare 775NW v. State, Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 392, 377 P.3d 214, 221 (2016), *review denied sub nom. Seiu Healthcare 775 N.W. v. State of WA DSHS*, 186 Wn.2d 1016, 380 P.3d 502 (2016).

The holdings in *McLean* and *Seiu*, preserves for the parties a trial on the merits before the trial court enters a permanent injunction.

Because there were material factual issues, the trial court was without authority to make a summary determination of hotly contested facts, that a Permanent injunction should be entered. In conformity with the standards for a summary judgment pursuant to CR 56, a material issue fact precludes entry of judgment. See *Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 172 Wn. App. 193, 200, 289 P.3d 690, 694 (2012).

II. CONCLUSION

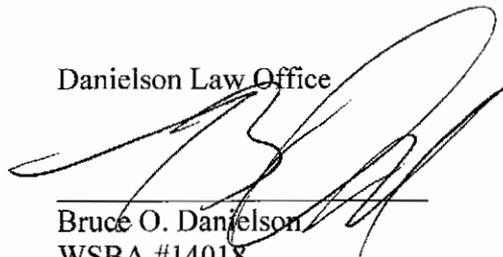
Despite permit application burdens far in excess of the permit application required for the other firearms club in Kitsap County, the Club has submitted a permit application. The application is proceeding forward through the Kitsap County Department of Community Development.

The preliminary injunction sought by the County was dissolved in April of 2016 (CP 104) and the case closed with the *Final Judgment*. CP 32-36 The Order for Permanent Injunction, entered after the entry of the Final Judgment is a modification and expansion of a prior dismissed injunction and dismissed action.

The Club's Appeal should be granted and the Order for Permanent Injunction (CP 2073-2083) should be vacated and set aside.

Dated this 20th day of June, 2018.

Danielson Law Office



Bruce O. Danielson
WSBA #14018
Attorney for Appellant
Kitsap Rifle and Revolver Club

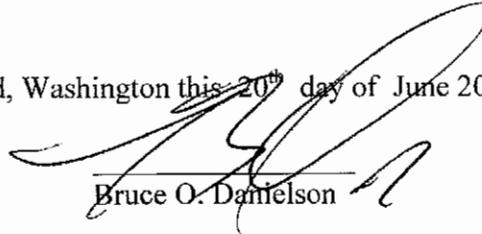
DECLARATION OF SERVICE

Bruce O. Danielson hereby declares, under penalty of perjury under the laws of the State of Washington that on the date given below, I caused to be served the above-entitled document upon the following person(s) as follows:

Kitsap County Prosecutor and its Deputy	<input type="checkbox"/>	U.S. Mail
Prosecuting Attorneys	<input type="checkbox"/>	Facsimile
Christine M. Palmer, WSBA #42560	<input checked="" type="checkbox"/>	Email
Laura F. Zippel, WSBA # 47978	<input type="checkbox"/>	Hand Delivery
614 Division Street, MS-35A		
Port Orchard, WA 98366-4676		

I SWEAR UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Orchard, Washington this 20th day of June 2018



Bruce O. Danielson

DANIELSON LAW OFFICE PS

June 20, 2018 - 2:14 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50574-6
Appellate Court Case Title: Kitsap County, Respondent v. Kitsap Rifle and Revolver Club, Appellant
Superior Court Case Number: 15-2-00626-8

The following documents have been uploaded:

- 505746_Briefs_20180620141414D2228382_2057.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellants Reply.pdf

A copy of the uploaded files will be sent to:

- cmpalmer@co.kitsap.wa.us
- dennis@ddrlaw.com
- kcpaciv@co.kitsap.wa.us
- lzippel@co.kitsap.wa.us

Comments:

Sender Name: Bruce Danielson - Email: bruce@brucedanielsonlaw.com

Address:

1001 4TH AVE STE 3200
SEATTLE, WA, 98154-1003
Phone: 206-652-4550

Note: The Filing Id is 20180620141414D2228382