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Division III  
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No. 36907-2

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**COURT OF APPEALS, DIVISION NO. III  
OF THE STATE OF WASHINGTON**

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POORMAN ENTERPRISES, LLC  
Plaintiff/Appellant

v.

RST PARTNERSHIP, et al.  
Defendant/Respondent

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**APPELLANT'S BRIEF**

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**A. INTRODUCTION**

COMES NOW Appellant Poorman Enterprises, LLC, (“Poorman”) by and through the undersigned attorneys of record, and appeals the trial Court’s decisions denying Poorman’s request to consolidate this case and granting summary judgment in favor of RST Partnership (“RST”).

**B. ISSUES FOR REVIEW**

**Assignment of Error:**

- (1) Order granting summary judgment, Finding 3; Finding 6; and Finding 9; *Clerk’s Papers* at 492-506.
- (2) Order denying motion to consolidate, (Conclusion denying; no numbered conclusion included in order). *Clerk’s Papers* at 179-80; 243-47.

**Issues Pertaining to Assignment of Error:**

- (1) Whether the Superior Court erred in refusing to consolidate this case with another suit involving the same parties, facts, and legal issues;
- (2) Whether the Superior Court erred in granting RST’s Motion for Summary Judgment;
  - (a) Whether the Court should have heard the County;
  - (b) Whether the evidence demonstrated a basis for summary judgment;
  - (c) Whether Poorman could have cured defaults;

(d) Whether the trial court erred by failing to apply the severance clause in the lease.

**C. STATEMENT OF THE CASE**

The property at issue in this case is an older structure known as the Collins Fruit Warehouse (the “Warehouse”) at 100 Main St. in Monitor, Washington. RST acquired the Warehouse in 2006. *See Clerk’s Papers (“CP”)* at 41. RST and Poorman have a business relationship concerning the leasing of the Warehouse for marijuana production/processing and related purposes dating back to early 2014. *Id.*

**Commercial Lease History:**

In March of 2014, Poorman obtained a Tier 3 Producer/Processor license to cultivate marijuana; a Tier 3 producer may grow up to 30,000 square feet of plant canopy. *Id.* Poorman’s license was sited at the Warehouse. *Id.* at 42.

As part of the licensing process<sup>1</sup> (also in March of 2014) through the Liquor and Cannabis Board (LCB), Poorman executed a lease with RST for 10,526 square feet on the first and second floors of the Warehouse. *Id.* at 67-76. The same day, the parties also executed a lease for an additional 2,750 square feet of space on the second floor of the Warehouse. *Id.* at 77-

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<sup>1</sup> To have a “licensed premises” an applicant must first submit a property lease to the LCB for approval. *See* WAC 314-55-010(17).

85. These leases were consolidated into one lease effective October 1, 2014 (the “Indoor Lease”), which remained in effect until September of 2018. *Id.* at 86-95.

In May of 2015, RST and Poorman entered a lease for the roof area of the Warehouse so that Poorman could expand its canopy size and production volume. In December of 2015, but with an effective date of April 1, 2016, RST and Poorman extended the lease on a year to year basis. The extended lease is referred to hereafter as the “Roof Lease.” *Id.* at 96-104.

In May of 2016, RST and Poorman entered another lease for approximately 15,837 square feet of outdoor space on vacant ground to the East of the Warehouse (the “Outdoor Lease”). *Id.* at 105-113.

### **Chelan County’s Regulation of Marijuana**

On September 16, 2013, the Chelan County Board of Commissioners enacted Resolution 2013-73, a six month moratorium on applications for permits or licenses related to the production, processing, and sale of cannabis. *Id.* at 209-11. This moratorium was for the purpose of drafting licensing, zoning, and other regulations to implement I-502. *Id.*

On September 29, 2015, the County Commissioners enacted another six month moratorium on the siting of licensed producers, processors, and retailers of cannabis, Resolution 2015-94. *Id.* at 218-19. This moratorium was for the purpose of studying HB 2136 and SB 5052, which altered the

initial state regulations adopted to implement I-502. *Id.* The moratorium was extended to March 27, 2016 by Resolution 2015-102. *See Id.* at 221.

On February 16, 2016, the County Commissioners enacted Resolution 2016-14, the primary catalyst for this suit, which went beyond the prior moratoriums to prohibit the establishment, siting, location, and operation of all cannabis production and processing. *Id.* at 221-27. The same Resolution also prohibited county departments from accepting any permit applications related to cannabis production or processing. *Id.* However, the Resolution contained a grandfather clause, permitting prohibited uses that “were lawfully established and in actual physical operation prior to September 29, 2015” to continue operation as nonconforming uses until March 1, 2018. *Id.* at 225.

#### **The County’s Action Against RST/Poorman**

On September 21, 2016, the County issued a notice to RST, stating that it was permitting cannabis production at the Warehouse in violation of Resolution 2016-14. *Id.* at 14-20. As a result, on September 27, 2016, RST delivered a notice to Poorman that RST was canceling the Roof and Outdoor Leases. *Id.* at 134. The leases contain a provision allowing for cancellation of the lease upon default or breach of the lease (§18(a)). *See Id.* at 91, 101,

110, 119. However, another provision in the Leases (¶16(d)<sup>2</sup>) requires notice and a demand to cure default or breach. *Id.* at 90, 100, 109, 118. RST did not send Poorman a 10-day notice and demand to cure.

This action touched off two other cases that are of import here. The first case was a Land Use action filed by RST against the County (17-2-00549-0), where RST argued that its Tenants' (including Poorman's) use of the Warehouse was not in violation of County Code. The second case was Poorman's suit against the County (17-2-00348-9), where Poorman argues that the County acted unlawfully in refusing to issue the building permits and inspection.

In the land use petition, RST argued:

The appropriate permits (electrical, plumbing, etc.) were secured by the Tenants to satisfy requirements from the Liquor and Cannabis Board. As such, the decision of the Hearing Examiner to consider Petitioners' Tenants use of the Property as violating Chelan County Code and a nuisance is not supported by substantial evidence, is a clearly erroneous application of the law to the facts, and is an erroneous interpretation of law.

*Id.* at 205; *see also Id.* at 21; 319-20. But in Answering this case, RST counterclaimed against Poorman, alleging that RST was damaged by Poorman's failure to obtain permits and comply with County codes. *Id.* at

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<sup>2</sup> The paragraph is numbered 29, but appears between ¶15 and 17. We refer to it as ¶16 for clarity due to the position in the document and because the final paragraph of the lease is also (properly) numbered ¶29.

29-30. When the County Answered Poorman's suit, the County counterclaimed against both RST and Poorman, alleging noncompliance with County codes.

This quickly snowballed into a situation where the County, Poorman, and RST were locked in a pair of suits alleging and counterclaiming the same legal arguments on the same set of facts. *See Id.* at 57 (answer to counterclaim and third-party complaint for contribution); and 144 (County's answer and fourth-party complaint).

#### **Poorman Seeks Consolidation**

On December 11, 2018, Poorman sought consolidation of the *Poorman v. RST* (the "191 case" or "191") and *Poorman v. Chelan County* (the "348 case" or "348") suits. *Id.* at 157-59. As the parties staked positions in the two cases, the legal nexus emerged. When the County alleged that Poorman failed to comply with County codes and permits, RST used that as a basis to evict Poorman and later raised it as a defense to Poorman's wrongful eviction suit. RST also counterclaimed against Poorman, alleging damages from unpermitted activities; Poorman implead the County, asserting that the County unlawfully prohibited Poorman from applying for permits.

Consolidation therefore seemed appropriate, and at the hearing on Poorman's Motion to Consolidate, the Court observed that "...the Court's

thinking is that it seems like the parties pretty much, maybe to one extent or another, agree that there's common issues and law and fact..." *RP* at 30:11-13.

RST opposed consolidation on two bases: first, that RST would face increased expenses from consolidation (*RP* at 15, 17) and second, that RST's counsel would be disqualified. *RP* at 20:24-21:22); *See also CP* at 163-67. The first reason is confusing because RST was already a counterclaim defendant party in Poorman's suit against the County and would be required to defend regardless of consolidation. The second reason was even more confusing. For some reason, the County "...took exception to [Jeffers Danielson Sonn & Aylward<sup>3</sup>] representing RST in 348, but not in 191," referring to Poorman's case against the County and Poorman's case against RST, respectively. *See RP* at 20-21; *CP* at 167. However, it was not fully explained how this could pose a bona fide conflict. *See Id.* Because of the posture of both the 191 and the 348 cases, the County and RST were already adverse parties in both matters.

Ultimately, the Court declined to consolidate the matters. *CP* at 179-80. The Court's decision noted that: "There are clearly common questions

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<sup>3</sup> Hereafter, "JDSA."

of fact and law in both cases. However, consolidating these matters would cause a substantial and unnecessary delay” in the 191 case. *Id.* at 180.

### **Procedure Prior to Summary Judgment**

On February 22, 2019, Counsel for RST indicated the intent to dismiss their counterclaims against Poorman. *RP* at 54:22 *et seq.* These were the same counterclaims for which Poorman impleaded the County asserting a contribution action, for which the County then in turn filed a fourth-party complaint against Poorman, RST, and Evergreen (RST’s other tenant in the Warehouse). But the County’s fourth-party complaint in the 191 case was the same cause of action as its counterclaim in the 348 case. *See RP* at 57-58.

Poorman and RST entered a stipulation (in the 191 case) that dismissed both RST’s counterclaims against Poorman and Poorman’s contribution claim against the County. *CP* at 474-78. As a result, and as argued herein, the County’s fourth-party complaint was thereby mooted.

### **Summary Judgment**

RST sought summary judgment, arguing that the leases between RST and Poorman were unlawful and unenforceable; that the leases had been frustrated by Resolution 2016-14; and that the leases were properly terminated. *CP* at 40-52.

Poorman responded, arguing that the leases were lawful and enforceable; that the parties anticipated, accepted, and contracted around potential government regulation; that RST did not properly terminate the lease because the violations were curable, based on incidental regulations, and estoppel; but also that because of the 348 case, RST's claim that the lease was properly terminated could not be adjudicated on summary judgment without deciding the issues in the 348 case – i.e. whether the County acted unlawfully in failing to issue the permits that RST claimed as a basis for eviction. *Id.* at 197-207.

The Superior Court decided the issues on a different basis. *Id.* at 487-500. The Court held that Poorman had not lawfully established its use prior to September 29, 2015 “because Poorman had not obtained required permits before it began its cannabis production and processing facility.” *Id.* at 490. The County notably did not assert this issue until September of 2016 and took no action in the interim upon Poorman's supposedly unlawful marijuana operation. The required permit at issue was related to a change in occupancy or use of the Warehouse. *Id.* at 14-20.

The Superior Court went on to hold that because Poorman was not in lawful operation prior to September 29, 2015, the leases were unenforceable because they were for an unlawful purpose. *Id.* at 496. The

Court therefore determined that RST's failure to provide notice to cure was academic and did not reach the issue. *Id.* at 491.

### **Purpose of the Leases**

The primary purposes of these leases was to facilitate the production and processing of marijuana, but the leases also include as a primary purpose "related activity" to the cultivation of cannabis. *CP* at 87, 96, 106, 114-15. The leases also indicate that certain leased areas are usable for storage. *Id.* (All Leases state "Storage Space Lease Agreement" across the top and refer to "Outside ground storage" and "Interior Building storage.")

There are many perfectly lawful "related activities" to the cultivation of cannabis that do not require regulatory oversight from the LCB and are not subject to Chelan County moratoriums either. For example, and as argued to the trial Court, Poorman could use the entire premises to construct, package, store, and ship specialty hydroponic equipment for the cultivation of cannabis without running afoul of the lease, the LCB, or the County regulations. As another example, Poorman could use the Warehouse for the purpose of storing or staging its own equipment and supplies for operations elsewhere.

Poorman was RST's commercial tenant. While Poorman was primarily engaged in the business of cannabis production, there were other viable uses for the space that Poorman leased.

#### **D. SUMMARY OF ARGUMENT**

The Superior Court should have consolidated this case with *Poorman v. Chelan County*. The two cases share a nexus of law and fact, and the parties are the same. The reasons and grounds for the Trial Court's decision were not tenable, and the Court abused its discretion by not consolidating the matters for trial. Consolidation would have saved the parties considerable time and expense, as well as permitted a more orderly presentation of the legal issues to the Trial Court.

The Superior Court also erred in granting RST's Motion for Summary Judgment. The Court should not have entertained evidence from the County in response to summary judgment because the County no longer had proper standing. Poorman was lawfully established when it was initially sited in 2014, and the County cannot lay in wait for more than two years with no intervention before asserting that Poorman was not lawfully operating the entire time.

Regardless of whether Poorman's cannabis production and processing operation was lawfully established, Poorman was still entitled to use the commercial space for purposes related to the cultivation of cannabis. The Leases had a severance clause that saved these other lawful activities; the Lease was valid and enforceable. This issue, along with the question of

whether RST's alleged breaches were curable, were disputed material facts that precluded summary judgment.

**E. ARGUMENT & AUTHORITY**

**1. Scope of Issues**

One issue argued to the trial court (*CP* at 206) was that RST's Motion for Summary Judgment could not be adjudicated because Poorman had pending claims against the County for declaratory and mandamus relief in the 348 case. In other words, Poorman was trying to compel the County to deliver the inspections and permits that RST used as a basis to evict Poorman.

There is good reason to review the decision not to consolidate. First, the record is adequately developed for appeal. See *CP* at 157-80; *RP* at 5-38. Second, the consolidation ruling prejudicially affects the motion for summary judgment. To have prejudicial effect, "[t]he issues in the two orders must be so entwined that to resolve the order appealed, the court must consider the order not appealed. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn.App. 813, 819, 21 P.3d 1157 (2001). *RAP* 2.4(b)(1). Where the County is bringing its counterclaim against Poorman in the 348 case as a fourth party claim in the 191 case, resolution of RST's summary judgment motion on the basis that Poorman was not lawfully established has an immediate, prejudicial effect on Poorman and

the outcome of the 348 case. Had summary judgment been resolved on different grounds, this may not be at issue.

The particular way in which the trial court resolved the summary judgment issue resolved contested issues between Poorman and the County (i.e. the lawfully established issue) by going beyond the scope of RST's motion for summary judgment. The reasons these actions should have been consolidated prior to entertaining a summary judgment motion and particularly hearing evidence from the County thereon is apparent in the record. *RP* at 97:19-99:10.

## **2. The Trial Court Erred by Refusing to Consolidate**

A trial court has significant latitude to process the cases before it, including discretion with respect to consolidation of common questions of law or fact. *W.R. Grace & Co.-Conn. v. Dept. of Revenue*, 137 Wn.2d 580, 590, 973 P.2d 1011 (1999). A trial court's ruling consolidating cases is reviewed under the abuse of discretion standard, but the moving party must also show prejudice. *Id.*

The applicable Court Rule states:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

CR 42(a). In this case, the trial court recognized that common questions of law and fact existed. RST argued that consolidation would cause unnecessary delay, but, somewhat ironically, the failure to consolidate was the cause of delay.

RST amended its Answer and counterclaimed against Poorman on September 18, 2018. Poorman answered the counterclaims on September 27, 2018 and implead the County as a third-party defendant via contribution action. The County answered the third party complaint on November 21, 2018 and asserted a fourth-party complaint against Poorman, RST, and Evergreen. Poorman brought the Motion to Consolidate the matters on December 11, 2018. The Court's memorandum opinion denying consolidation was issued on January 31, 2019. But the County did not file its summons on the fourth party complaint until February 13, 2019.

The reason the failure to consolidate generated unnecessary delay was because the County had already asserted the fourth-party *claim* against RST, Poorman, and Evergreen in the 348 case. Consolidation of the matters would have collapsed these claims into a single suit with three basic claims: Poorman against RST; Poorman against the County; and the County against RST/Poorman/Evergreen. There would be no need for complex contribution and fourth-party claims. The Court's order denying consolidation noted that trial on the issue of liability in the 191 case was set

for March 25, 2019. *CP* at 180. But at the time, the County had asserted a fourth-party complaint, failed to summon the parties, and no party had answered the fourth-party complaint. In that landscape, the matter was not ready for trial on March 25, 2019 (less than two months after the denial of consolidation).

The trial court went on to state: “[I]f the court joined these matters, it would necessitate an unnecessary and substantial delay of the trial in case number 17-2-00191-5. Under these circumstances, the court will not join these matters for trial.” *Id.* A delay of trial was already necessary because of the County’s fourth-party complaint. Consolidation of the two cases would have collapsed the claims, resulting in no extra delay beyond that required for the County’s fourth-party complaint.

This Court should not lose sight of the fact that, in the absence of consolidation, the parties would still need to litigate the 348 case. The legal battle over the common questions of law and fact will not be complete until the 348 case is done; delaying the 191 case to consolidate the matters would not have delayed the ultimate resolution of the claims between the parties. Thus, the issue of delay is moot in relation to the question of whether to consolidate.

Consolidation would have saved all parties, *and the court*, time and expense. This is why the trial court abused its discretion in failing to

consolidate two matters that “clearly” involved common questions of law and fact. *Id.* Consolidation would have also fulfilled the purposes of CR 42. Our state courts have not passed extensively upon CR 42, but our courts have noted that “federal cases interpreting Fed.R.Civ.P. 42(a), which is identical to CR 42(a), are instructive.” *American Mobile Homes of Wash., Inc. v. Seattle-First Nat. Bank*, 115 Wn.2d 307, 313, 796 P.2d 1276 (1990). Such instructive authority provides:

The paramount objective of consolidation is the accomplishment of great convenience and economy in the administration of justice. The rule seeks to avoid overlapping duplication in motion practice, pretrial and trial procedures...

*Barcelo v. Brown*, 78 F.R.D. 531, 536 (D. Puerto Rico, 1978). This is precisely the goal that Poorman sought to achieve, and the need for consolidation cannot be clearer where the counterclaim from one case is also a fourth-party complaint in another.

RST also argued that consolidation would cause RST to suffer prejudice *qua* disqualification of counsel. *See CP* at 166-67. This argument is difficult to parse and makes little sense. RST argued that because JDSA represented the County in other matters, it could not oppose the County in a consolidated action. But at the time RST raised this argument the County was already an adverse party in the 348 case because the County counterclaimed against RST. Similarly, the County asserted a fourth-party

complaint against RST in the 191 case. Thus, in *both* matters, RST and the County were already adverse parties at the time Poorman sought consolidation. RST's argument that consolidation would lead to a conflict does not hold water – the conflict already existed<sup>4</sup>.

Poorman is prejudiced by the failure to consolidate in two ways. First, as with the other parties, Poorman will be forced to litigate both cases in separate trials, leading to unnecessary costs. Second, Poorman is prejudiced because the Court's decisions in the 191 case (involving the same parties, subject, and legal issues) will bind Poorman in the 348 case. In other words, without consolidation, the County is able to litigate the 348 case by introducing evidence in the 191 case, which is what *actually transpired* here, and one of the reasons that the Court erred in granting summary judgment.

### **3. The Trial Court Erred in Granting Summary Judgment**

#### **a. The court should not have heard the County.**

As noted above, Poorman and RST entered stipulations on February 22, 2019 dismissing RST's counterclaims and Poorman's contribution claim against the County. However, the County filed a response to the

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<sup>4</sup> Counsel for RST from JDSA explained this issue. *See RP* at 20-21. Apparently, the County notified JDSA that they took exception to JDSA representing RST in the 348 case, but not the 191. This goes to whether *consolidation* would have caused a delay in trial. Because the parties were already adverse, any resulting delay would be because the County waived one conflict, but not the other.

Motion for Summary Judgment on March 11, 2019. The trial court should not have considered the County's response.

Once Poorman's contribution claim was dismissed, the County lost standing in the 191 case, even though it did not dismiss the fourth-party claim. In *State v. Stevens County District Court Judge*, 7 Wn.App.2d 927, 436 P.3d 430 (2019) (*rev. granted*, 193 Wn.2d 1018), the Court discussed the priority of action doctrine, which is analogous to this issue. If there is identity of parties, subject matter, and relief sought, then the court which first gains jurisdiction of a cause retains exclusive authority to deal with the action until the controversy is resolved. *Id.* at 933.

In this case, while both actions are pending before the same court, the issue is not so much jurisdiction as it is the scope of the actions. The priority of action doctrine has underpinnings in *res judicata*, as does the argument Poorman makes here. The County brought the same claim in two separate actions; whichever claim is brought first is the claim that should survive, unless the matters are consolidated. Absent a CR 24 motion to intervene, the County's participation in this case should have ended on February 22, 2019.

**b. The County did not demonstrate a basis for summary judgment.**

Instead, the trial court heard from the County what RST did not, and because of their position in the land use case, could not argue: that Poorman was not lawfully established prior to September 29, 2015 because it had not obtained the necessary permits to move into the Warehouse. *Compare CP* at 48-51 & 257-263. The County would have received notification of Poorman's application for a marijuana producer/processor license. *See* RCW 69.50.331(7). The County could have also responded and objected if they believed Poorman did not have the right to operate at the Warehouse. *Id.*; WAC 314-55-020(1). Poorman's license was issued in May of 2015. *CP* at 14. But the County did nothing about this supposedly illegal marijuana grow until sending a letter to RST in September of 2016. *Id.* What the County is doing is testing their legal theory for the 348 case in the 191 case.

Moreover, the argument made by the County illustrates why summary judgment was improper. The code violations occurring after September 29, 2015 are immaterial; the only relevant permits are those mentioned in the County's letter. *CP* at 18 (IBC §§105.1 and 111.1). The grammar of these sections is important; the first is in the active voice, imposing an affirmative duty. The latter is in the passive voice, prohibiting

occupancy (and also presumes that an application was made to the building official). The duty imposed by the first is as to “Any **owner or owner’s authorized agent...**” *Id.* (emphasis added). RST, as the building owner and landlord, is the party that “intends” to change the use or occupancy of the structure and is thus the party that must secure a permit. *Markley v. General Fire Equipment Co.*, 17 Wn.App. 480, 484, 563 P.2d 1316 (1977) (tenant is only an agent of the lessor if the lease *requires* improvements).

If RST rented to Poorman without securing the proper permits, then Poorman is entitled to argue that RST damaged Poorman thereby. The trial court should not have granted RST’s Motion for Summary Judgment on the basis of use and occupancy permits because the County’s response tends to show RST’s liability, not defeat Poorman’s claims.

**c. Poorman could have cured the other defaults.**

Assuming, *arguendo*, that Poorman was in default for issues related to unpermitted<sup>5</sup> fencing, electrical, remodeling, or other activities, these defaults could have been cured. More importantly, however, the question of whether Poorman could have cured is for a jury. *DC Farms, LLC, v. Con-Agra Foods Lamb Weston, Inc.*, 179 Wn.App. 205, 224, 317 P.3d 543 (2014).

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<sup>5</sup> Returning briefly to the consolidation issue – the County’s refusal to issue permits is one of Poorman’s claims against the County in the 348 case.

What RST and the County ignore is that every single lease between the parties reads: “**Storage Space Lease** Agreement” and has options to check: “THIS LEASE is for Outside Ground **storage** only,” and “THIS LEASE is for Interior Building **Storage** only.” *See, e.g., CP* at 67 (emphasis added). This, along with the explicit language, “LESSEE shall use the premises exclusively for the cultivation of cannabis and related activity and no other purpose” (*CP* at 106) permits uses that do not require LCB oversight and do not violate County Codes. For example, Poorman could use the space for storage, particularly of items related to the cultivation of cannabis – perhaps a staging ground for growing equipment, lights, assembly thereof, or fertilizer for use in the cultivation of cannabis elsewhere.

RST argued below that it was discharged from the duty to give a ten-day notice to cure, citing an unpermitted fence as an example. *CP* at 51. In short, the County regulations require a permit for a fence, and LCB regulations require a fence around outdoor marijuana growing operations. RST argues that Poorman could not have complied with both regulations. But Poorman could have simply stopped outdoor cannabis production and removed the fence, curing the default and obviating the need for a fence.

RST needed to issue a notice of default and give Poorman a chance to cure, but RST did not.

**d. The trial court erred by failing to apply the lease's severance clause.**

The Leases at issue here have a severance clause (§28). *CP* at 104,

113. It states:

If any term or condition of this Lease or the application of any term or condition to any person or circumstances be held invalid, the remainder of this Lease and its application to other persons or circumstances shall not be effected [sic] and shall remain in full force and effect.

*Id.* at 113. At issue here is whether the trial court could have excised the unenforceable portion of the Lease without essentially rewriting the contract. *McKee v. AT&T*, 164 Wn.2d 372, 403, 191 P.3d 845 (2008). The Court will give effect to severability clauses if it can “easily excise the [unenforceable]<sup>6</sup> provision without essentially rewriting the contract.” *Id.*

The trial court could have easily done so; these “Storage Space Lease Agreements” that also allow “related activity” to the cultivation of cannabis permit activities that do not run afoul of Resolution 2016-14, the reason the Court found the Leases unenforceable. *CP* at 496. The Court erred because the Court could have excised the language pertaining to the “cultivation of cannabis,” only *one* permissible use of the premises, without rewriting the Lease.

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<sup>6</sup> “Unconscionable” is the original text; the relevant issue in *McKee* was about unconscionable provisions and whether the remainder of a contract could be saved after excising those portions.

While this would have obviously frustrated that purpose of the lease, there are two reasons that this would not essentially rewrite or frustrate the lease. First, the parties anticipated and contracted around the possibility that there would be further County regulation of cannabis. At the time the parties entered the initial leases, and certainly by the time the parties entered the Roof and Outdoor leases at issue here, Chelan County was already engaged in regulation of cannabis and clearly contemplating further regulation. *See CP* at 209-27. To show frustration, the *non*-occurrence of these anticipated regulations must be a “basic assumption” upon which the leases were made. *See Rest. 2d. Contracts* §264, 265.

Second, Resolution 2016-14 requires all cannabis producers to cease and abate production by March of 2018. Poorman and RST both knew that the use of the Warehouse for cannabis production had a limited timeline. Under these circumstances, it may have made good sense for Poorman to use the Warehouse as a staging ground for relocating operations elsewhere.

#### **F. CONCLUSION**

The Superior Court found that the leases were void and unenforceable because they violated Resolution 2016-14. The judge’s memorandum opinion explains that the use and occupancy permits rendered Poorman’s use of the building unlawful.

Those missing permits, however, were RST's responsibility. In RST's motion for summary judgment, these missing permits cannot be a basis to evict Poorman. Whether the other permitting issues could be cured is a jury question involving disputed issues of material fact, but also involves resolution of whether the County acted improperly in refusing to perform inspections and issue permits.

The trial court should have consolidated this matter with 17-2-00348-9 because the claims were inseparable, and in some cases, identical. More importantly, however, consolidation would have worked significant judicial efficiency and saved the parties considerable time and expense.

Regardless, the trial court's summary judgment ruling must be reversed. Even if the trial court correctly determined that the lease was unenforceable under Resolution 2016-14, the court should have followed the severability clause and excised only that portion of the lease pertaining to cultivation of marijuana. Poorman could have used the space for purposes that complied with both the use provisions of the lease and with the County Resolution.

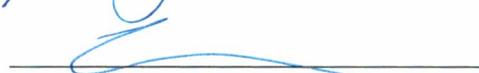
Poorman requests that this Court reverse the trial court's summary judgment ruling and remand the case with instructions to consolidate the cases involving Poorman, RST, and the County.

Respectfully submitted this 25<sup>th</sup> of October, 2019.



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## APPENDIX A

Copy of Foreign Jurisdiction Authority:

*Barcelo v. Brown*, 78 F.R.D. 531, 536 (D. Puerto Rico, 1978)

78 F.R.D. 531

United States District Court, D. Puerto Rico.

Carlos Romero BARCELO, Governor  
of Puerto Rico, et al., Plaintiffs,

v.

Harold BROWN, Secretary of  
Defense, et al., Defendants.

Luis MEDINA et al., Plaintiffs,

v.

Harold BROWN et al., Defendants.

Civ. Nos. 78-323 and 78-377.

|  
April 25, 1978.

### Synopsis

Actions were brought to redress asserted injuries to residents, visitors and environment of Puerto Rican island. On request for class certification and on objections to proposed consolidation and naming of lead counsel, the District Court, Torruella, J., held that: (1) mayor of municipality involved had standing to prosecute action in his official capacity and appearance of Governor of Puerto Rico was at least indicative of "official" stake and interest in present controversy so as to justify his invocation as chief executive of the Commonwealth of court's jurisdiction; (2) presence of Commonwealth plaintiffs in action constituted viable alternative to coping with difficulties inherent in class action device, and (3) where all complaints contained basically identical averments of violations by defendants of certain federal environmental statutes, and relief sought with regard to major claims was substantially the same, appointment of lead counsel would best serve interests of justice and all parties.

Request for class certification denied; lead counsel appointed.

### Attorneys and Law Firms

\*532 John A. Hodges, Timothy L. Harker, Washington, D. C., Miguel Gimenez Munoz, Secretary of Justice, Commonwealth of P. R., San Juan, P. R., Gerardo A. Carlo, Sp. Counsel to the Governor of Puerto Rico, La Fortaleza, San Juan, P. R., for Commonwealth of P. R.

Pedro J. Varela, Puerto Rico Legal Project, Judith Berkan, Hato Rey, P. R., for Luis Medina, et al.

Pedro J. Saade Llorens, Ana Rosa Biascochea, Patricio Martinez Lorenzo, Puerto Rico Legal Services, Inc., Santurce, P. R., for Carlos A. Zenon, et al.

Wilfredo A. Geigel, Santurce, P. R., for intervenor-Fundacion Arqueologica, Antropologica e Historica de Puerto Rico.

Jose L. Ortega, Environmental Control Bd., Fernando Olivero-Barreto-Mision Industrial, Hato Rey, Lewis A. Rivlin, Peabody, Rivlin, Lambert & Meyers, Washington, D. C., for plaintiffs; Jorge L. Cordova, Jr., Washington, D. C., of counsel.

Julio Morales Sanchez, U. S. Atty., Old San Juan, P. R., Dorothy R. Burakreis, Dept. of Justice, Washington, D. C., for defendants.

TORRUELLA, District Judge.

### OPINION AND ORDER

This cause came to be heard on the matters indicated in our Order of April 5, 1978. Upon hearing the arguments of the parties, the Court has issued various Orders which will be expounded at the present instance.

#### \*533 I. The Standing Issue:

On March 2, 1978 the Court directed the parties to brief on the standing of Carlos Romero Barcelo and Radames Tirado Guevara to appear as Plaintiffs in Civil Number 78-323.

The caption of the complaint indicates that Plaintiff Romero Barcelo is appearing in his capacity as Governor of Puerto Rico. He sues "on his own behalf and on behalf of the Commonwealth of Puerto Rico." Plaintiff Tirado comes before the Court in his official capacity as Mayor of Vieques.

At the hearing, Defendants conceded that there is no serious question as to the standing of Plaintiff Tirado. We agree.

The Mayor of Vieques is statutorily empowered to represent the Municipality in judicial actions, 21 L.P.R.A. 1255, and the Complaint contains sufficient averments of injury to the Municipality of Vieques.<sup>1</sup> Since the Mayor is appearing in his official capacity, it is the Court's view that the threshold requirement of "injury in fact" has been adequately satisfied. See, *Association of Data Processing v. Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Moreover, that the injury asserted by Plaintiff Tirado "arguably falls within the

There is another consideration that militates against the certification of the overall class. In Civ. 78-323 the Plaintiffs set forth a wide variety of claims challenging the activities of the Defendants. Broad injunctive and declaratory relief is requested to redress the asserted injuries to residents, visitors and the environment of Vieques, and a common gist of allegations and prayers for relief is discernible in both complaints.

We think that the presence of the Commonwealth Plaintiffs in this action is a viable alternative to coping with the difficulties inherent in the class action device. See *Stuart v. Hewlett-Packard Company*, 66 F.R.D. 73 (E.D.Mich., 1975); *United States v. City of Chicago*, 411 F.Supp. 218 (N.D.Ill., 1976), *aff'd in part*, 549 F.2d 415 (7th Cir., 1977). In view of this circumstance, it cannot be said, at this juncture, that the purported class would be "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3), F.R.Civ.P.

As to the first sub-class, the representative Plaintiffs have not met their burden of showing extreme inconvenience or \*535 difficulty in the joinder of all members. See *Cash v. Swifton Land Corp.*, 434 F.2d 569 (6th Cir., 1970). At the hearing, counsel for the named Plaintiffs conceded that there may be around one hundred and fifty commercial fishermen in Vieques. Under the particular facts of this case,<sup>6</sup> and considering the liberality embodied in the joinder and intervention provisions of the F.R.Civ.P., resort to Rule 23 appears to be unnecessary. *Lucas v. Seagrave Corp.*, 277 F.Supp. 338 (D.C.Minn., 1967); *Swain v. Brinegar*, 517 F.2d 766 (7th Cir., 1975); *cf. State of Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17 (D.C.Cal., 1969); *City & County of Denver v. American Oil Co.*, 53 F.R.D. 620 (D.C.Colo., 1971). Moreover, certification of this subclass would also transgress the requirements of F.R.Civ.P. 23(b)(3).

The remaining subclass, i. e., those persons allegedly deprived of their property by the United States Navy's acquisition of land in Vieques around 1941, appears to be intimately connected with the first and second claims for relief of Plaintiffs' complaint in Civ. number 78-377. In view of the appointment of plaintiffs' attorney as lead counsel with regard to these particular claims, we will hold the certification of this sub-class in abeyance until the Court is placed in an adequate position to determine whether the requirements of F.R.Civ.P. 23 are satisfied by this sub-class.<sup>7</sup>

Moreover, the Defendants have intimated at the hearing that they will challenge this Court's jurisdiction to entertain the first and second claims for relief in Civ. number 78-377. (See: Defendants' Memorandum in Support of Consolidation of March 21, 1978, p. 2). In light of this announcement, certification of this particular class at the present stage of the proceedings is not proper. See, *Rae v. United Parcel Service of Pa.*, 356 F.Supp. 465 (D.C.Pa., 1973); *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 951 (9th Cir., 1971); *Dullea v. Ott*, 316 F.Supp. 1273 (D.C.Mass., 1970).

The foregoing constitute the reasons for our denial of the request for class certification. The named Plaintiffs may continue the action on an individual basis. See, *Foster v. Mobile County Hosp. Bd.*, 398 F.2d 227, n. 1 (5th Cir., 1968).

### III. Lead Counsel:

Upon a determination that these cases present common questions of law and fact, the Court ordered consolidation pursuant to F.R.Civ.P. 42(a). (See, Order of March 16, 1978). Indeed, the core issues of fact and law in Civ. number 78-323, in the Intervenor's Complaint filed on that same case, as well as in Civ. number 78-377, are the same. All these complaints contain basically identical averments of violations by the Defendants of certain federal environmental statutes.<sup>8</sup> The relief sought with regard to these major claims is substantially the same. It also seems that the evidence to be introduced by Plaintiffs in support of their respective contentions would be similar in each of the cases. All of this tends to indicate that the interests of the various Plaintiffs concerning this subject matter area are one and the same.

Rule 42(a) of the F.R.Civ.P. provides:

"When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make \*536 such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." (Emphasis supplied).

The paramount objective of consolidation is the accomplishment of great convenience and economy in the administration of justice. *Feldman v. Hanley*, 49 F.R.D. 48 (D.C.N.Y., 1969). The rule seeks to avoid overlapping duplication in motion practice, pretrial and trial procedures occasioned by competing counsel representing different Plaintiffs. *Abrams v. Occidental Petroleum Corp.*, 44 F.R.D. 543 (S.D.N.Y., 1968).

As respects the motion for inspection of restricted areas, Plaintiffs shall indicate the specific places to be inspected within the impact zones. The Defendants shall thereupon take all reasonable steps to make the areas safe for inspection on the specified dates. The designated persons are to enter the premises at their own risk. In view of the agreements reached by the parties, no further action is now required concerning the requested inspections.

The Court reiterates that the mechanisms of discovery are to be utilized so as to prevent undue oppression or hardship.

IT IS SO ORDERED.

**All Citations**

78 F.R.D. 531

**Footnotes**

- 1 See, for example, allegations # 54, 75, 78, 128.
- 2 Clearly, this second test of standing is also satisfied by Plaintiff Romero Barcelo, in his official capacity.
- 3 It has not been shown that this Plaintiff has been aggrieved, as an individual, by the activities complained of. See, *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *City of Dairs v. Coleman*, 521 F.2d 661 (9th Cir., 1975).
- 4 Under the Constitution of the Commonwealth of Puerto Rico, the Governor is charged, inter alia, with the duty of executing the laws. Art. IV, Sec. 4. In view of the fact that observance of Puerto Rican laws is required at least by some of the federal statutes invoked in the complaint (e. g. 33 U.S.C. s 1323; 42 U.S.C. s 1857f; 42 U.S.C. s 4903) we are led to the conclusion that Plaintiff Romero is more than a "concerned bystander" for purposes of standing. *SCRAP*, supra, 412 U.S., n. 3 at 687, 93 S.Ct. 2405.
- 5 Plaintiffs have withdrawn their request for a third subclass, as repetitive of the overall class described in the Complaint. (See, Plaintiffs' Memorandum of Points and Authorities, filed on April 10, 1978, n. 1).
- 6 The location of the members of this class within limited geographical confines is an important factor in ascertaining compliance with the requirements of Rule 23(a). *Dale Electronics v. R. C. L. Electronics, Inc.*, 53 F.R.D. 531 (D.C.N.H., 1971); *Williams v. Humble Oil & Ref. Co., Inc.*, 234 F.Supp. 985 (D.C.La., 1964); *Young v. Trailwood Lakes, Inc.* 61 F.R.D. 666, 668 (D.C.Ky., 1974).
- 7 As to this sub-class, Plaintiffs have not yet complied with their burden under F.R.Civ.P. 23.
- 8 At least, the allegations concerning the Federal Water Pollution Control Act; the Marine Protection, Research and Sanctuaries Act; the Resource Conservation and Recovery Act and the Endangered Species Act have been couched in almost identical terms by these three groups of Plaintiffs.

**MILLER & CHASE, PLLC**

**December 02, 2019 - 4:10 PM**

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**Comments:**

Requested Corrections with Appendix attached. No Substantive changes to brief.

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