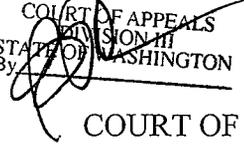


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APR 27 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: 

No. 259471

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WASHINGTON MOTORSPORTS, LTD., by and through Barry W.
Davidson, in his capacity as Receiver and as Acting General Partner,
Respondent,

v.

LARRY D. WYATT, Petitioner, and LEMASTER & DANIELS,
P.L.L.C., a Washington limited liability company, and JANE DOE
WYATT, Defendants.

PETITIONER'S REPLY, RE:
MOTION FOR DISCRETIONARY REVIEW

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I. ARGUMENT

A. **THE TRIAL COURT COMMITTED OBVIOUS OR PROBABLE ERROR AND APPELLATE REVIEW IS APPROPRIATE.**

The Receiver's Response to Wyatt's Motion for Discretionary Review fails to address the trial court's abrogation of the well-established, non-discretionary right to a change of judge afforded a party by RCW 4.12.050. Case law is clear that a timely motion for change of judge presents no question of discretion or policy and must be granted as a matter of right. See State v. Mauerman, 44 Wn.2d 828, 830, 271 P.2d 435 (1954); Marine Power & Equip. Co. v. State, 102 Wn.2d 457, 461, 687 P.2d 202 (1984). As argued extensively in Wyatt's opening brief, the trial court in this case impermissibly and improperly exercised a great deal of discretion in denying Wyatt's Motion for Change of Judge.

The Receiver would like the Court to ignore the non-discretionary right afforded under RCW 4.12.050 and focus exclusively on a strained interpretation of RCW 7.60.160, Washington's receivership statute. The erroneous interpretation of RCW 7.60.160 is necessary to support the Receiver's contingent argument that the two statutes conflict. The Receiver's interpretation of RCW 7.60.160 ignores the actual statutory text, which solely and unambiguously provides that "litigation by or against a receiver is adjunct to the receivership case," and that "[a]ll

adjunct litigation shall be referred to the judge, if any, assigned to the receivership case,” without mention of a prohibition on a change of judge. Thus, the Receiver’s argument wrongly relies on purported legislative purpose to justify the trial court’s re-writing of an unambiguous statute.

In addition, the Receiver’s argument regarding Wyatt’s failure to move for a change of judge in the Receivership Action is a legally misplaced red herring. Wyatt, a non-party, was barred from moving for a change of judge in the Receivership Action. The Receiver’s argument also deflects from the salient point that the relevant inquiry is not whether Wyatt should have (or even could have) moved for a change of judge in the Receivership Action, but whether the trial court could have reconciled Wyatt’s statutory right to a change of judge under RCW 4.12.050 with RCW 7.60.160’s requirement that all actions by the Receiver are “referred” to the receivership judge. The unavoidable answer is that (i) RCW 7.60.160 is not ambiguous, and (ii) there is no conflict between RCW 7.60.160 and RCW 4.12.050, and therefore, the trial court committed obvious error in denying Wyatt his statutory right to a change of judge.

Wyatt respectfully submits that the Receiver has failed to adequately rebut Wyatt’s assertion that the trial court committed obvious and/or probable error, and that Wyatt is entitled to review by this Court.

1. Reliance on the Legislative Purpose of RCW 7.60.160 is In Error Because the Statute is Unambiguous.

The Receiver's argument that RCW 7.60.160 and RCW 4.12.050 conflict is based on the trial court's flawed interpretation of RCW 7.60.160. That statute provides that "[l]itigation by or against a receiver is adjunct to the receivership case," and that "[a]ll adjunct litigation shall be referred to the judge, if any, assigned to the receivership case." RCW 7.60.160(2). Notably, RCW 7.60.160 is silent as to a party's right to seek a change of judge in a receivership action. See RCW 7.60.160. The Receiver argues that certain "black letter rules of statutory construction" support the trial court's interpretation of this statute as prohibiting a change of judge. The method of statutory interpretation employed by the trial court and urged by the Receiver conveniently ignores the foremost rule of statutory interpretation: a court should not subject an unambiguous statute to statutory construction. The Receiver fails to argue that the statutory text is in any way ambiguous.

In order to ascertain the meaning of a statute, a court must first look to the plain language. "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (citing Killian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)). A court must "decline[]" to add

language to an unambiguous statute, **even if it believes the Legislature intended something but did not adequately express it.**” *Id.* (emphasis added). “Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” *Id.* Thus, when a statute is not ambiguous, “only a plain language analysis of a statute is appropriate.” *Cerillo*, 158 Wn.2d at 20.

RCW 7.60.160(2) unambiguously states that litigation by or against a receiver shall be “referred” to the judge that is assigned to the receivership case and that such litigation be “adjunct” to the receivership case. This is not subject to two interpretations as would render it ambiguous. *See Cerillo*, 158 Wn.2d at 20. The plain language simply requires that all adjunct cases to be initially assigned to the receivership court and ultimately remain associated and subordinate to the receivership action. Nothing in RCW 7.60.160 (or any other part of the receivership statute) expressly requires receivership and adjunct cases to remain with that same receivership judge after referral, especially considering a motion for change of judge.

Thus, the Receiver’s resort to the stated legislative purpose of chapter 7.60 RCW, which is “to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of

creditors and other persons having an interest therein,” cannot be used to disregard the plain statutory directive of RCW 7.60.160. Moreover, the cited statutory purpose, even if considered, is irrelevant because it does not directly or indirectly address the change of judge issue.

2. There is No Conflict Between RCW 7.60.160 and RCW 4.12.050.

The Receiver attempts to justify the trial court’s ruling by re-writing RCW 7.60.160 to create some conflict with RCW 4.12.050’s clear directive of entitling a party the right to a change of judge. Doing so not only violates the controlling canon of statutory construction (as discussed above), but also fails to create a conflict. RCW 7.60.160 and RCW 4.12.050 operate in complete harmony. A party can exercise his right to a change of judge in an adjunct action at the same time that all adjunct matters are referred to the receivership judge. Nothing in either RCW 7.60.160 or RCW 4.12.050 prohibits a new receivership judge being assigned to handle all adjunct matters following a party’s exercise of his recusal rights under RCW 4.12.050.

Instead of highlighting any conflict within the statutes themselves, the Receiver once again turns to the purported legislative purpose of RCW 7.60.160, and asserts that the “streamlined” receivership litigation conflicts with the right to a change of judge. Not only is this assertion

irrelevant under a proper statutory interpretation, but it is also in error. The Receiver argues that because receivership actions involve “literally hundreds of persons in interests, creditors, owners, etc.,” that allowing each a change of judge “would be the absurd, yet logical, result of accepting Wyatt’s arguments.” (Receiver’s Response at 15.)

This argument completely ignores the fact that a non-party cannot move for a change of judge. See RCW 4.12.050 (allowing “any party” to move for a change of judge); see also Riverpark Square, LLC v. Miggins, 143 Wn.2d 68, 899 P.2d 800 (1995) (holding that in order to move for a change of judge, the movant “must be a party to the action.”). Thus, the Receiver’s citation to “hundreds” of persons and creditors in interest is of no consequence because none of these hypothetical persons has the legal right to a change of judge. The Receiver’s hyperbole is further discredited when the actual pending Receivership Action is analyzed. It appears that the Receiver has initiated only one adjunct proceeding naming two additional defendants (Wyatt and L&D). The potential for “hundreds” of persons to exercise their recusal rights simply does not exist. The likelihood of a change of judge is no greater in the instant matter than in any other litigation where additional parties are added. Moreover, the fact that a receiver has been appointed – who simply acts in the capacity of the partnership entity – will not result in endless recusal motions. The same

restriction that allows only one defendant or one plaintiff in any civil case to exercise the right to a new judge also applies to receivership actions. See LaMon v. Butler, 112 Wn.2d 193, 770 P.2d 1027 (1989). Similarly, the Receiver's attempt to read into RCW 4.12.050 a complex litigation exception to a party's right to a change of judge has been squarely rejected by the Washington Supreme Court. See Marine Power & Equip., 102 Wn.2d at 465.

The Receiver's assertion that LaMon supports its position on this issue is also in error. In LaMon, the Court's ruling was limited to deciding that co-plaintiffs in an action constitute one "party" for purposes of RCW 4.12.050. LaMon, 112 Wn.2d at 203. Thus, the Court held that only one plaintiff and one defendant in each action is allowed to move for a change of judge under RCW 4.12.050. Id. Significantly, the Supreme Court in LaMon in no way curtailed the non-discretionary right of a party to move for a change of judge. To the contrary, the LaMon holding reaffirms the supremacy of the right granted to each party – which the Court found is composed of one or more individuals on one side of a lawsuit – to a change of judge. See id. Thus, the Receiver's claim of runaway recusal motions is without merit because Wyatt was the first and last defendant in the Main Receivership Action or the Adjunct Action to move for a change of judge.

3. Wyatt Was Not Permitted Nor Required to Move for a Change of Judge in the Receivership Action.

The Receiver also attempts to persuade this Court to accept the trial court's finding that Wyatt's limited, non-party participation in the receivership action somehow precludes him from moving for a change of judge in the adjunct case. This erroneously assumes that Wyatt was allowed to move for a change of judge in the Receivership Action.

In an attempt to bolster the argument that Wyatt "actively participated" in the Receivership Action, the Receiver repeatedly references non-party actions taken by LeMaster & Daniels, P.S. (hereafter, "L&D"). See e.g., Receiver's Response at 3 ("**L&D's counsel** filed a Declaration in Response to Motion to Compel in the Main Receivership Case...."); Receiver's Response at 4 (emphasis added) ("**L&D** filed a Response Brief and supporting Declaration from its counsel in the Main Receivership Case"); *Id.* ("**L&D** submitted a Proof of Claim against WML to the Receiver in the Main Receivership Case, dated September 9, 2005"); *Id.* ("On December 28, 2005, **L&D** filed a response to the Receiver's Interim Report filed in the Main Receivership Case."). Any alleged participation by L&D is completely irrelevant because L&D did not move for a change of judge, and L&D is not a party to this Petition. Rather, Wyatt individually moved for a change of judge and filed the

current Motion for Discretionary Review. Moreover, L&D's limited participation in the Receivership Case was as a creditor and non-party witness, and thus, had no right to a change of judge as does a party. Thus, all references to L&D's alleged participation should be disregarded.

The Receiver ignores Wyatt's extremely limited role in the Receivership Action, which amounts to: (1) entering a Special Notice of Appearance in the Receivership Action on February 6, 2004, for the stated purpose of receiving all further pleadings regarding the third-party depositions of Wyatt and other L&D employees (Ex. "C" to Motion for Discretionary Review); and (2) responding to requests to produce documents as a non-party. (Ex. "B" to Motion for Discretionary Review at 2-3.) Wyatt's role in the Receivership Action was that of a witness.

It is undisputed that Wyatt was not a party to the Receivership Action. As discussed, only a party can file a motion for a change of judge. See RCW 4.12.050; see also Riverpark Square, LLC v. Miggins, 143 Wn.2d 68, 80, 17 P.3d 1178 (2001) (holding that in order to file a successful motion for change of judge, the applicant "must be a party to the action and establish prejudice by motion, supported by affidavit) (citing RCW 4.12.050) (emphasis added). Wyatt, as a non-party, was not allowed to file a motion for change of judge in the Main Receivership Action. Thus, the Receiver's argument that Wyatt was not procedurally

entitled to relief because he failed to move for a corresponding recusal in the receivership is not well-founded. To the contrary, only when Wyatt became a party in the Adjunct Action did he possess for the first time the right of recusal, which he timely exercised.

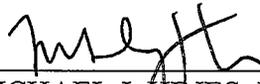
Further, the appeal issue is not whether Wyatt properly moved for a change of judge in the Main Receivership Action. The issue is whether the trial court's statutory interpretation was in error because it failed to give effect to both RCW 4.12.050 and 7.60.160 by recognizing that a change of judge in the Adjunct Action would also require a change of judge in the Receivership Action. As discussed at length, the trial court erred in failing to recognize this reconciliation.

II. CONCLUSION

For the foregoing reasons, Wyatt respectfully requests that the Court grant his Motion for Discretionary Review of the trial court's denial of Wyatt's Motion for Change of Trial Judge under RCW 4.12.050.

DATED this 27 day of April, 2007.

LUKINS & ANNIS, P.S.

By 
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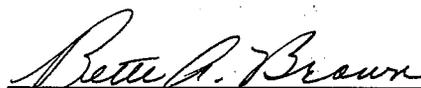
CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2007, I caused to be served via Hand Delivery a true and correct copy of the foregoing Petitioner's Reply, Re: Motion For Discretionary Review addressed to the following:

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Dated this 27th day of April, 2007, at Spokane, Washington.



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