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STATE OF WASHINGTON

SUPREME COURT NO. 84632-4
BY: DENISE M. CARPENTER

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS; SCOTT COLLIN; THE
CENTER FOR ENVIRONMENTAL LAW AND POLICY; and SIERRA
CLUB,

Appellants.

v.

STATE OF WASHINGTON; WASHINGTON DEPARTMENT OF
ECOLOGY; and EASTERDAY RANCHES, INC.,

Respondents.

RESPONDENT/CROSS APPELLANT EASTERDAY'S REPLY ON
CROSS-APPEAL

William L. Cameron No. 5108
LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street, Suite 1800
Seattle, WA 98101-3929
(206) 624-7990
wlc@leesmart.com

R. Crane Bergdahl, No. 741
THE LAW OFFICE OF R. CRANE
BERGDAHL
6610 West Court Street
P.O. Box 2755
Pasco, WA 99302-2755
(509) 545-4950
cranelaw@msn.com

ORIGINAL

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I. INTRODUCTION

Easterday Ranches replies to Five Corners' response concerning standing and attorneys' fees for the costs of obtaining a change of venue. Easterday withdraws its claim for reasonable attorneys' fees under the Right to Farm Statute, RCW 7.48.300.

II. ASSIGNMENTS OF ERROR

Easterday Ranches withdraws its Assignment of Error No. 5 and issue pertaining to the Assignment of Error No. 7.

III. ARGUMENT

A. Five Corners and the environmental defendants lack standing.

In our opening brief we alleged the trial court erred in admitting the declarations of the plaintiffs, because they contained inadmissible evidence. Ralph Jones, Scott Collins, Patricia Sumption and Sheila Poe, CP 845-61, 922-34, all presented hearsay, conjecture, lay opinion and irrelevant evidence trying to avoid Easterday's motions to dismiss for want of standing and for summary judgment. CP 501-28, 1062-79. If this inadmissible evidence were withdrawn, the individual plaintiffs would have no argument to present either as to standing or as to potential injury under the Declaratory Judgment Act. Easterday made the same argument as to Dr. Osborn's declaration, CP 885-921. His declaration attempted to

show that there was some basis for the environmental organizations to participate. CP 833-38

Five Corners' allegation about Easterday's "misunderstanding of the law of standing" is based on its own erroneous claim the affidavits "must be taken as true." For this proposition the Appellants cite a number of Federal cases, most prominently *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). These cases do not support Five Corners contention at all. Quite the contrary, they support Easterday's position.

In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true.

Lujan, 504 U.S. at 561.

Fed. R. Civ. Proc. 56(e) is substantively identical to CR 56(e). The Federal Rule provides that "a supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence and show that the affiant is competent to testify in the matters stated." The plaintiffs' declarations do not contain admissible evidence to support their standing argument. If excised of the inadmissible matters, there is nothing left to show standing. We do not need to take as true inadmissible evidence in these declarations, and the trial court erred in

failing to strike the declarations insofar as they contained inadmissible evidence.

If a party makes a motion for summary judgment to dismiss a case because the other party lacks standing, that motion places the burden on the party claiming standing to present admissible evidence of standing. If the party asserting standing raises an issue of fact, the resolution of those facts is left for trial. Any other conclusion would leave the court in the anomalous position of having two trials, one to decide whether the parties had standing to litigate and then a trial on the merits of the case. *Lajun* is nothing more than saying there will only be one trial.

There is no basis for Five Corners' theory that inadmissible allegations can support standing. In fact, Five Corners has not contested Easterday's claims of inadmissibility. Easterday's opening brief addressed these in detail, and they are now uncontroverted on this appeal.

B. Attorneys' fees under the State's Right to Farm laws.

While the plain language of RCW 7.48.300 *et. seq.* applies to this action, the holding in *Buchanan v. Simplot Feeders Limited Partnership*, 134 Wn.2d 673, 952 P.2d 610 (1998); and its narrow interpretation of the statute appears to foreclose the application of the statutes between agricultural interests as opposed to suits brought by late coming urban land users. Under those circumstances, and in the absence of any reason

to suggest that the court should overturn its holding in *Buchanan*, Easterday withdraws this assignment of error.

C. Easterday should be awarded its costs and expenses incurred in obtaining a change of venue.

Five Corners starts its argument by making the assertion that venue was not incorrect in Thurston County. Resp. p. 41. That is not the question. There are two questions. The first is, “Was venue proper in Franklin County?” The second question is, “Could Five Corners have determined Franklin County was the county of proper venue with reasonable diligence?” No party has suggested that Franklin County does not have jurisdiction or that it is not a proper venue to hear this case.

As with its statutory construction argument, Five Corners wants to rewrite the venue statute to serve its own ends. RCW 4.12.090, gives a defendant its attorneys’ fees on a change of venue “if the court finds that the plaintiff could have determined the county of proper venue with reasonable diligence.” Five Corners wants to rewrite the venue statute to say a defendant receives attorneys’ fees only if the plaintiff “could have determined ‘a’ county of proper venue with reasonable diligence.” It is not an issue of finding an excuse or arguing legal theories, because there is no question that Franklin County is “the” county of proper venue, and no one has even suggested that it is not.

American courts in general and Washington courts in particular have a long history of ensuring not only jurisdiction but venue in the county or district where the defendant resides. Because the plaintiff is the one who initiates the case, the plaintiff has the right to choose when more than one forum or venue is available, but if the plaintiff chooses the wrong county, the plaintiff pays the costs of changing venue to “the county of proper venue.”

In *Keystone Masonry, Inc. v. Garco Construction, Inc.*, 135 Wn. App. 927, 147 P.3d 610 (2006); a contract clause established venue in Spokane County. The case would normally have been heard in Pierce County, Garco’s place of business. Garco was the general contractor for the construction of the Bonney Lake High School in Pierce County. Keystone, a subcontractor, sued Garco for breach of the subcontract agreement and Travelers Insurance, which held Garco’s contractors bond. Keystone objected to the change of venue asserting that Garco had violated public policy against forum shopping and under the doctrine of *forum non conveniens* venue should remain in Pierce County, because at least 19 witnesses were located there. Garco also claimed that RCW 60.28.030 requires that an action to foreclose against the lien on a retained percentage must be brought in the county where the lien was filed. When Pierce County Superior Court denied Garco and Travelers’ motion for a

change of venue to Spokane County, Garco petitioned for discretionary review. Much like this case, Keystone made logical arguments. The only difference is that Keystone's argument was that Spokane was an improper venue and should not have been selected. Nonetheless the Court of Appeals struck down each of Keystone's arguments. Even though venue for a claim against the retained percentage was statutorily set in Pierce County, the court analogized the situation to Federal cases involving claims under the Miller Act. Federal courts have held that venue clauses in construction contracts trump statutory venue. The court summarized its holding as follows:

P23 Whether a party is entitled to attorney fees is an issue of law which we review de novo. *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). Under RCW 4.12.090(1), "if the court finds that the plaintiff could have determined the county of proper venue with reasonable diligence, it shall order the plaintiff to pay the reasonable attorney's fee of the defendant for the changing of venue to the proper county." . . .

P25 Although no Washington court had addressed whether RCW 60.28.030's venue requirement is overcome by a valid contract's forum selection clause, the singular rule in federal law, to which Washington courts turn in answering such questions under that act, is that a valid forum selection clause governs venue. Keystone could have, with reasonable diligence, determined that Spokane County, not Pierce County, was the county of proper venue. Thus, under RCW 4.12.090, the trial court erred in denying Garco and Travelers' request for attorney fees and costs below.

Keystone, 135 Wn. App. 936-37.

Five Corners raises no public policy argument concerning venue in Franklin County. It claims injury to property in Franklin County and the only statute that Five Corners cites in support of its venue decision is RCW 4.92.010. That statute allows for an action against the state in (1) the residence or principle place of business of one or more of the plaintiffs, Franklin County; (2) the county where the action arose, Franklin County; (3) the county in which the real property that is the subject of the action is situated, Franklin County; and (4) the county where the action might properly be brought by reason of joinder of an additional defendant, Franklin County. A rational person reading this statute would come to the conclusion that Franklin County is the proper place to bring this action.

Thurston County does not have the large scale irrigated agribusiness Franklin County has. The climate, terrain and agricultural activities of the counties are dissimilar. Five Corners selected Thurston County because bringing this action in front of judges and juries who are less likely to be acquainted with large scale, irrigated agricultural operations would be a better forum for them. This is forum shopping at its worst.

IV. CONCLUSION

This Court should sustain the trial court in its decision interpreting the stock watering exemption in its entirety. Any error in the language of

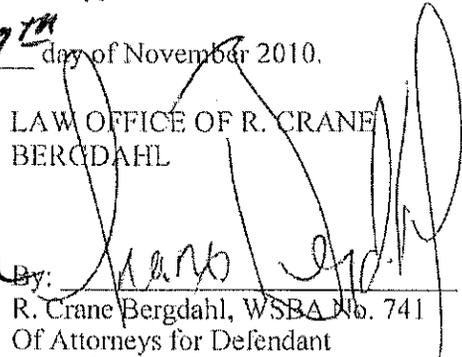
the order was invited by Five Corners and should not now be the basis of any complaint. In the alternative, Five Corners lacks standing for want of a justiciable controversy and their complaint should be dismissed. If at some point the plaintiffs actually suffer injury, they have appropriate remedies. This Court should remand the case for a determination of Easterday's reasonable fees necessary to obtain the change of venue. Easterday is entitled to reasonable attorneys' fees on this appeal.

Respectfully submitted this 9th day of November 2010.

LEE SMART, P.S., INC.

LAW OFFICE OF R. CRANE
BERGDAHL

By: 
William L. Cameron,
WSBA No. 5108

By: 
R. Crane Bergdahl, WSBA No. 741
Of Attorneys for Defendant
Easterday Ranches, Inc

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on November 9, 2010, I caused service of *Reply Brief of Respondents* via ABC First Class Mail and Email to:

Ronald R. Carpenter, Clerk
Washington Supreme Court
Temple of Justice MS AV-11
Olympia, WA 98504-0511

Ms. Kristen Boyles Ms. Janette K. Brimmer Earthjustice 705 Second Avenue, Suite 203 Seattle, WA 98104 E-mail kboyles@earthjustice.org jbrimmer@earthjustice.org	Counsel for Co-Defendant Mary Sue Wilson Senior Assistant Attorney General Ecology Division P.O. Box 40117 Olympia, WA 98504 (360) 586-6743 Email marysuew@atg.wa.gov
James L. Buchal, MURPHY & BUCHAL LLP 2000 SW First Ave., Ste. 420 Portland, OR 97201 Email jbuchal@mbllp.com	Gregory S. McElroy 1808 N. 42nd Street Seattle, Washington 98103 Email gmcelroy@mcelroylaw.com
Jeffrey David Slothower Lathrop, Winbauer, Harrel, Slothower & Denison, LLP Post Office Box 1088 Ellensburg, WA 98926 jslothower@lwbsd.com	Harry Johnsen, WSBA Raas, Johnsen & Stuen, P.S. 1503 E Street PO Box 5746 Bellingham, WA 98227-5746 <i>Co-Counsel for the Lummi Nation</i> harryjohnsen@comcast.net

/s/ Kimberly a. Daniels
Kimberly A. Daniels, Legal Assistant

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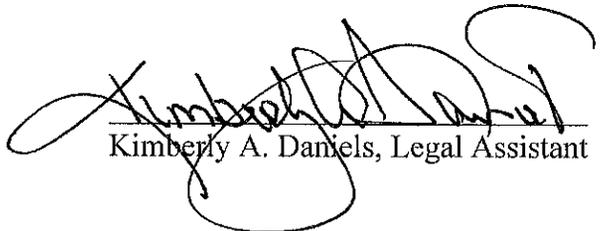
CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

I, the undersigned, certify under penalty of perjury and the laws of
the State of Washington that on November 9, 2010, I caused service of
Reply Brief of Respondents via ABC First Class Mail and Email to:

Ronald R. Carpenter, Clerk
Washington Supreme Court
Temple of Justice MS AV-11
Olympia, WA 98504-0511

<p>Ms. Kristen Boyles Ms. Janette K. Brimmer Earthjustice 705 Second Avenue, Suite 203 Seattle, WA 98104 E-mail kboyles@earthjustice.org jbrimmer@earthjustice.org</p>	<p>Counsel for Co-Defendant Mary Sue Wilson Senior Assistant Attorney General Ecology Division P.O. Box 40117 Olympia, WA 98504 (360) 586-6743 Email marysuew@atg.wa.gov</p>
<p>James L. Buchal, MURPHY & BUCHAL LLP 2000 SW First Ave., Ste. 420 Portland, OR 97201 Email jbuchal@mbllp.com</p>	<p>Gregory S. McElroy 1808 N. 42nd Street Seattle, Washington 98103 Email gmcelroy@mcelroylaw.com</p>
<p>Jeffrey David Slothower Lathrop, Winbauer, Harrel, Slothower & Denison, LLP Post Office Box 1088 Ellensburg, WA 98926 jslothower@lwhsd.com</p>	<p>Harry Johnsen, WSBA Raas, Johnsen & Stuen, P.S. 1503 E Street PO Box 5746 Bellingham, WA 98227-5746 <i>Co-Counsel for the Lummi Nation</i> harryjohnsen@comcast.net</p>


Kimberly A. Daniels, Legal Assistant