

CLALLAM COUNTY
COURT OF APPEALS
DIVISION II
FILED
BY *KSA*

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 37654-7-II

CORNELL HOHENSEE,

Appellant,

vs.

CLALLAM COUNTY COMMISSIONERS, STEPHEN P THARINGER,
MICHAEL C CHAPMAN, HOWARD V DOHERTY JR., SELINDA
BARKHUIS, RICH SILL, DOES 1,2,3,4,5,6,7,8,9,10,

Respondents.

Clallam County Superior Court Cause No. 07-2-00644-6

RESPONDENTS' OPENING BRIEF

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I. COUNTER ISSUE STATEMENT

- A. Did the trial court possess authority to dismiss Hohensee's civil actions based upon the failure to join indispensable parties, the failure to allege any injury or action which is ripe for adjudication before a jury, and the failure to demonstrate standing to sue? (Appellant Assign. of Error No. 1, 3 and 4).
- B. Did the trial court properly deny Hohensee's motion to disqualify counsel, based upon a lack of showing of actual conflict? (Appellant Assign. of Error No.2).
- C. Did the trial court properly award statutory costs and fees? (Appellant Assign. of Error No.5).

II. COUNTER STATEMENT OF THE CASE

On June 29, 2007, Cornell Honensee, the appellant hereunder, served one-or-more of the named County respondents under his original filings with Summons and Complaint. CP 70. On July 16, 2007, counsel for Respondents filed and served a Notice of Appearance. CP 147. On August 10, 2007, Respondents filed and served their Answer and Defenses. CP 67.

On August 15, 2007, and after Respondents filed their Answer, Honhensee filed for Default. On August 24, 2007, Honhensee docketed the Motion, and on August 31st mailed Respondents a copy of the Docket Notice. CP 65. On September 7, 2007, at hearing, the Court denied the Motion for Default and cautioned Honhensee that proper procedures (i.e., filing and serving docket notices) need to be followed. CP 146.

On September 27, 2007, Honhensee filed a Motion "to Bar" the Prosecuting Attorneys Office from representing Respondents. CP 63. On

November 2, 2008, Respondents filed their Response to the motion to bar. CP 141. On November 9, 2007, Respondents filed a Motion to Dismiss, based upon Honhensee's failure to join an indispensable party. CP 115. On November 16, the Court heard both motions, denying the former. CP 61. As to the latter, the Court reserved ruling and continued the matter to December 21, 2007, to allow Honhensee to amend his pleadings and join the necessary parties—and if not so amended by that date, the Court would direct that the matter would be dismissed. CP 114.

On November 26, 2007, Honhensee filed a Motion for Reconsideration on the denial of the Motion “to Bar”. CP 58. On November 27, 2007, without argument of the parties, the Court issued an Order denying reconsideration. CP 57.

On December 21, 2007, Honhensee filed his [First] Amended Complaint, with the above-captioned Respondents. CP 51. On January 24, 2008, Honhensee motioned to Strike Respondents' Motion to Dismiss. CP 48. On February 12, 2008, Respondents filed their Response to Honhensee's Motion to Strike. CP 44.

On February 15, 2008, at hearing, the Court took all of these matters under advisement. CP 112. On February 21, 2008, the Court issued a Memorandum Opinion noting that Honhensee (once again) failed to name all indispensable parties. CP 41. However, the court Opinion also indefinitely inactivated Honhensee's action until and unless Honhensee joined a specifically-named party. *Id.*

On March 12, 2008, after the trial court consigned the proceeding to an indeterminate resolution, Respondents filed a motion for Judgment, and filed a Memorandum in Support, with attachments and Declaration. CP 40, 81. On March 28, 2008, after hearing and argument of the parties, the Court signed the Order and Judgment and awarded the Respondents statutory attorneys fees and costs. CP 31, 80. The Court adjudged that Hohensee had failed to cure his pleadings, re: necessary and indispensable parties, had failed to present a claim which was either ripe for adjudication or justiciable, had failed to establish both individual or representative standing, and had failed to establish any jurisdiction for the court. *Id.*

On April 8, 2008, Hohensee filed a motion for reconsideration. CP 12. On April 9, 2008, Respondents filed a Motion and Memorandum in Support of Striking said Reconsideration. CP 13. On April 10, 2008, the Court denied reconsideration. CP 12.

III. ARGUMENT

- A. Did the trial court possess authority to dismiss Hohensee's civil actions based upon the failure to join indispensable parties, the failure to allege any injury or action which is ripe for adjudication before a jury, and the failure to demonstrate standing to sue? (Appellant Assign. of Error No. 1, 3 and 4).

Failure to join is inexcusable neglect. Despite repeated orders by the trial court to Hohensee to join the County (as the municipal corporation which enacted the disputed legislation) the appellant steadfastly refused to join the County throughout the litigation. CP 114, 112, 41. Inexplicably, the trial court continued to mischaracterize the refusal of Hohensee to join

Clallam County as “misjoinder” rather than “inexcusable neglect” in nonjoinder, and refused to dismiss.¹ See, *Gideon v. Simon Prop. Grp. Inc.*, 158 Wn.2d 483, 490 fn.5, 145 P.3d 1196 (2006), noting CR 15(c) and *N. St. Ass'n v. City of Olympia*, 96 Wn.2d 359, 368-69, 635 P.2d 721 (1981) ovrrl in prt other grds, *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991). The more the trial court extended an olive branch on the pleadings, the stronger became Hohensee’s resolve he would ONLY join the parties ‘he’ believed violated common and commercial law, regardless of court rulings.² See e.g., CP 48 (Plntff .Mtn. to Strk. Def. Mtn. to Join, filed after the Amended Complaint (CP 51) and after the November court order on joinder (CP 114), to wit: “Defendants’ argument as presented ... is not applicable...since Plaintiff maintains no grievance against Clallam County...[t]herefore, your Plaintiff believes that neither the County or the State must *necessarily* be a party to this suit...” [unnumbered] p. 2); and CP 33 (Plntff Mtn. to Clarify filed (3) days prior to Judgment, to wit: “Since the County Corporation is not at present a party to this action, it has no standing in court. Consequently, its’ attack on Plaintiffs’ [sic] legitimate standing in court is otiose.” P. 2)

There was no justiciable action before the trial court. It is well settled in Washington that a legislative enactment is presumed constitutional

¹ CP 41, p.2, lns. 21-26.

² See, CP 41, p. 2. Equally inexplicable was the open-ended timeline to satisfy joinder, granted on February 21, 2008, with the trial court seemingly acknowledging that Hohensee was resolute in NOT joining the County (and would in all likelihood never join the County). Instead, Respondents were forced to bring a motion for entry of judgment.

unless its unconstitutionality is proven "beyond a reasonable doubt." *State v. Maciolek*, 101 Wn.2d 259, 262-63, 676 P.2d 996 (1984). Stated differently, "[t]he party asserting that an act violates the state constitution 'bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt'; any reasonable doubts are resolved in favor of constitutionality." *Washington State Grange v. Locke*, 153 Wn.2d 475, 486, 105 P.3d 9 (2005), quoting, *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003) (quoting *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000)); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003). Municipal ordinances are to be interpreted and reviewed under the same rules as the State statutes. *City of Spokane v. Fischer*, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988).

As eloquently exhibited in the *Washington State Grange* case, this initial burden upon the plaintiff to actually identify and adequately articulate an 'unconstitutionality' (which then forms the legal basis for relief) is sometimes lost on populist pontificators of "divinely conveyed"³ constitutional rights and entitlements. In this case, Honhensee challenged the constitutionality of County police power legislation based upon alleged common and commercial law protections to his property interests. Despite a graphic recitation of allegations and accusations by Hohensee of "...the oppressive aspects of enabling a patently unconstitutional ordinance to lie

³ CP 51, Amended Complaint, p. 4, "AND WHEREAS Divinely conveyed rights are secured by the U S [sic] and State constitutions . . .]

against the people [small ‘p’] in morbid repose”⁴, Honhensee failed to articulate any action, claim or controversy which entitled him to declaratory and injunctive relief from the trial court, and failed to allege any bases upon which to claim a violation of the Washington State Constitution.

For purposes of adjudicating Hohensee’s state constitutional claims, the jurisdiction of the trial court forms if, and only if there is:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Asarco, Inc. v. Dep't of Ecology, 145 Wn.2d 750, 760, 43 P.3d 471 (2002), quoting *First United Methodist Church of Seattle v. Hearing Exam'r*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996) (quoting *First Covenant Church v. City of Seattle*, 114 Wn.2d 392, 398, 787 P.2d 1352 (1990) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973))).

In *Asarco*, the state Supreme Court rejected an attempt by a smelting business to utilize declaratory relief to ‘pre-adjudicate’ constitutionality and regulatory takings aspects of the state toxics control act, prior to the actual application of the act to the smelter’s operations by the Department of Ecology. The Court cryptically observed:

⁴ Appellant’s Brf., p. 4, ¶ 5.

If we find "applied challenges" justiciable before anything has been applied, we risk becoming an advisory court and overstepping our constitutional authority. Further, general constitutional challenges could be disguised as a more limited "as applied" challenge. One should not substitute for the other. *Asarco* at 759-60.

In the present proceedings, Honhensee portended that all manner of unconstitutional injustices would be reaped upon him in the event [unjoined] Clallam County enforced its Junk Vehicle law against his personal and real property. No enforcement had (has) occurred and Honhensee had no case.

Honhensee also alluded to a Fourteenth Amendment issue, by little more than a reference. In *Asarco*, and after unsuccessfully arguing ripeness, the smelter business then attempted to convince the Supreme Court to consider both constitutionality and regulatory takings issues under a the general shroud of substantive due process, as a violation of the Fourteenth Amendment to United States Constitution (which prohibits the many states from "depriving any person of life, liberty, or property, without due process of law"). Again the Court was swift in its response, noting that the Washington 'takings' test under *Presbytery of Seattle v. King Cty.*, 114 Wn.2d 320, 787 P.2d 907, cert. den., 498 U.S. 911, 112 L. Ed. 2d 238, 111 S. Ct. 284 (1990), simply cannot be applied in advance of the actual application of the law to an individual, to allow analysis of the private burden endured and the public benefit incurred.

As a consequence of lack of ripeness, no justifiable controversy existed in this matter to have created or preserved the jurisdiction of the trial court. As noted in *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 330-31, 684

P.2d 1297 (1984):

A "justiciable controversy" is (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *DiNino* (quoting *Clallam Cy. Deputy Sheriff's Guild v. Board of Clallam Cy. Comm'rs*, 92 Wn.2d 844, 848, 601 P.2d 943 (1979)).

Without a true justiciable controversy, “,,the court steps into the prohibited area of advisory opinions.” *Larson v. State*, 107 Wn.2d 444, 460, 730 P.2d 1308 (1986) citing *DiNino v. State ex rel. Gorton*, at 331. None of those elements existed in this case, which was properly dismissed.

Finally, Honhensee had no legal standing to sue the County [provided had been joined], its legislative body or its staff, merely because Honhensee disagreed with the legislation. The standing doctrine prohibits a litigant who is not presently, adversely affected by a public act or statute from asserting the legal rights of another. *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994). “That is to say ‘one who is not adversely affected by a statute may not question its validity.’” *Greater Harbor 2000, et al., v. City of Seattle, et al.*, 132 Wn.2d 267, 288, 937 P.2d 1082 (1997). In some cases, courts have recognized standing to challenge governmental acts based solely upon the litigant's status as a taxpayer. *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985). Nevertheless, in order to maintain an action, the taxpayer must be able to articulate on the face of his Complaint “. . . a unique right or

interest that is being violated, in a manner special and different from the rights of other taxpayers.” *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). And....even in this circumstance, a taxpayer must first have requested action by the Attorney General and that request must have been refused before a private action may be maintained by an individual taxpayer. See, *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Farris v. Munro*, 99 Wn.2d 326, 329, 662 P.2d 821 (1983).

Of course, none of these pre-conditions and requirements existed so as to anoint Hohensee’s case with even the ‘aroma’ of ripeness or of justiciability, or to anoint Hohensee with standing to sue.

The right to jury trial is not absolute. Where, as in the present proceeding, there were no legal or factual issues which require the consideration of a jury, there is no “abridgement’ of Hohensee’s rights to trial by jury. A trial court is required to adjudicate the merits of actions in advance of trial. In addition to deciding issues of law prior to trial, “...certain matters, even though requiring resolution of factual questions, are for the court and not the jury.” *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 76-77, 768 P.2d 462 (1989)(citing *Cheek v. Cicero Smith Lumber Co.*, 197 Okla. 505, 172 P.2d 991 (1946) (court decides issues of fact respecting collateral matters not going to the merits of the controversy between the parties); *American Employers' Ins. Co. v. Crawford*, 87 N.M. 375, 533 P.2d 1203 (1975) (court determines questions of law, including

legal sufficiency of an asserted claim; facts must show legally recognized and enforceable claim); *Miller v. Stout*, 706 S.W.2d 785 (Tex. Ct. App. 1986) (right to jury trial does not extend to preliminary procedures not involving the question of liability; litigation would be interminably prolonged if issues of fact arising in connection with preliminary motions and motions not involving the merits must be determined by the jury).

In the present proceeding, and as discussed above, Hohensee wholly failed to bring a justiciable case or controversy as a prerequisite to asserting his 'right' to trial by jury.

- B. Did the trial court properly deny Hohensee's motion to disqualify counsel, based upon a lack of showing of actual conflict? (Appellant Assign. of Error No.2).

Hohensee provided no cogent argument as to why the deputy prosecuting attorney(s) in this case is disqualified from appearing and defending the named County officials and employees in this action, pursuant to RCW 36.27.020.

- C. Did the trial court properly award statutory costs and fees? (Appellant Assign. of Error No.5).

Hohensee provided no cogent argument as to why Respondents in this case, as the prevailing parties, were not entitled to an award of statutory fees and costs pursuant to RCW 4.84.010.

IV. MOTION AND REQUEST FOR ATTORNEYS' FEES

Respondents motion and request attorneys' fees pursuant to RAP 18.9(a) and their costs. Other than *non sequitur* 'internet pleadings' of

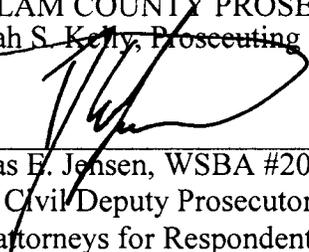
which espouse a collage of constitutional, common and commercial law rights and claims, Hohensee has failed to assert or support a single debatable issue of law or fact in his errors and issues that would entitle him to relief on appeal. *Ramirez v. Dimond*, 70 Wn. App. 729, 855 P.2d 338 (1993) citing *Boyles v. Department of Retirement Sys.*, 105 Wn.2d 499, 506-07, 716 P.2d 869 (1986) (An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal). Respondents are entitled to recover reasonable attorneys' fees and costs expended to defend this appeal.

V. CONCLUSION

For the foregoing reasons Clallam County respectfully requests that the Court uphold the decision of the trial court, and award appropriate fees and costs hereto.

DATED this 27th day of August, 2008.

CLALLAM COUNTY PROSECUTING ATTY
Deborah S. Kelly, Prosecuting Attorney



Douglas E. Jensen, WSBA #20127
Senior Civil Deputy Prosecutor
Of attorneys for Respondents

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS OF
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CORNELL HOHENSEE,

Appellant,

NO. 37654-7-II

vs.

AFFIDAVIT OF SERVICE BY MAIL

CLALLAM COUNTY COMMISSIONERS,
STEPHEN P THARINGER, MICHAEL C
CHAPMAN, HOWARD V DOHERY JR.,
SELINDA BARKHUIS, RICH SILL, DOES
1,2,3,4,5,6,7,8,9,10,

Respondents.

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 27th day of August, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Opening Brief of Respondents, addressed as follows:

Mr. David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Cornell Hohensee
PO Box 2237
Forks, WA 98331

[Signature]
Cathleen L. Dryke

SUBSCRIBED AND SWORN TO before me this 27th day of August, 2008.

[Signature]
(PRINTED NAME:) Cathleen L. Dryke
NOTARY PUBLIC in and for the State of Washington
Residing at Sequim, Washington
My commission expires: 9/29/12

AFFIDAVIT OF SERVICE

ORIGINAL