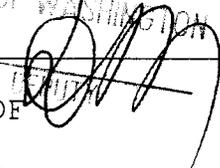


FILED
COURT OF APPEALS
DIVISION II

10 FEB -5 PM 2:19

STATE OF WASHINGTON

BY 

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

DANIEL O. GLENN and CARLEEN
L. GLENN, husband and wife,

Appellants,

vs.

THURSTON COUNTY BOARD OF
HEALTH, and DIANE OBERQUELL,
KATHY WOLFE, and ROBERT
McCLOUD, in their
representative capacities
as members of the BOARD OF
HEALTH,

Defendants.

NO. 39272-1-II

**APPELLANTS'
RESPONSIVE BRIEF**

APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR THURSTON COUNTY

RESPONSIVE BRIEF OF APPELLANTS

DANIEL O. GLENN, of
Attorneys for Appellant
WSBA #4800
2424 Evergreen Park Drive S.W.
P. O. 49
Olympia, Washington 98507-0049

TABLE OF CONTENTS

Responsive Argument 4

The Board of Health Was the Appropriate
Party to Be Named in this Matter
Given the Breadth of its Authority
and Duties 4

An Attempt to Amend the Complaint
to Add Thurston County as the
Respondent Would Have Met with an
Objection under the Provisions of
RCW 36.70C.040(2)(a) 8

The Appellants Have Not Abandoned
Their Appeal 10

The Appeal Is Not Frivolous 11

Conclusion 12

TABLE OF AUTHORITIES

Cases:

*Foothills Development Co v Clark
County Board of County Commissioners,
et al*, 46 Wn. App 369, 730
P.2d 1369 (1986) 6

*Griffin v. The Thurston County Board of
Health*, 137 Wn App 609, 154 P3d 296 (2007) . 7, 12

*Griffin v. The Thurston County Board
of Health*, 165 Wn.2d 50; 196 P3d 141
(2008) 7, 12

*Matheson v. Gregoire, as Governor,
et al*, 139 Wn. App. 624,
161 P.3d 486 (2007) 11

*Quality Rock Products, Inc., et al.
v. Thurston County*, 126 Wn. App. 250;
108 P3d 805 (2005) 9

Ramirez, et al, v. Dimond, et al,
70 Wn. App. 729; 855 P2d 338 (1993) 11

Suquamish Indian Tribe v. Kitsap County,
92 Wn. App. 816, 965 P.2d 636 (1998) 9

Statutes:

RCW 36.32.120(6) 5, 6

RCW 36.32.120(7) 5

RCW 36.70C.040(2)(a) 8, 10

RCW 70.05 10, 12
RCW 70.05.040 4
RCW 70.05.060 4, 6
RCW 70.46 10, 12

I.

RESPONSIVE ARGUMENT

A. THE BOARD OF HEALTH WAS THE APPROPRIATE PARTY TO BE NAMED IN THIS MATTER GIVEN THE BREADTH OF ITS AUTHORITY AND DUTIES.

As has been true since the filing of its initial motion to dismiss at the trial court level, the Respondent contends the Board of Health, which is composed of the Board of Commissioners, was not the appropriate party due to the lack of the ability to take legal action. As was indicated in the opening brief, this ignores the plain language of RCW 70.05.060. That statute sets out the powers and duties of the Board. The pertinent subsections of RCW 70.05.060 provide as follows:

"(1) Enforce through the local health officer or the administrative officer appointed under RCW 70.05.040, if any, the public health statutes of the state and rules promulgated by the state board of health and the secretary of health; . . .

"(3) Enact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof; . . ."

Thus, the Board of Health has the explicit authority to not only enact, but to enforce the rules and regulations which it enacts. It was a decision arising from one of those rules from which this appeal arose. In short, the action of a separate, statutorily created agency.

The Respondent's Brief does not deal with what the Appellants perceive to be the inconsistency between an independently created agency being given the duty and authority to enforce its actions and its inability to be the proper named party in a legal action challenging its action. As has been noted, the provisions of RCW 36.32.120(6) indicate that County Commissioners have the authority to ". . . in the name of the county prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law; . . ." As the Respondent recognizes, the authority set forth in subsection (7) of that statute is concurrent with that given to the Board of Health. Unlike the situation

presented in *Foothills Development Co v Clark County Board of County Commissioners, et al*, 46 Wn. App 369, 730 P.2d 1369 (1986), there is no limitation in the language of RCW 70.05.060 that mandates the Board of Health may take enforcement action only under the provisions of RCW 36.32.120(6). If that were to be the situation, the statutory grant would be irrelevant. Rather, the enforcement authority is specifically given to the Board. Thus, the naming of the Board in a challenge to a decision it made and within which it is enforcing its rules and regulations was necessary and appropriate. As set out in the copy of the Board's decision attached to the Respondent's Brief, the Board laid out "required" actions setting forth time frames for compliance.

In its Brief, the Respondent acknowledges this authority, but contends the Appellants' argument that the Trial Court's holding would limit the enforcement authority is "illogical". This is a misreading of the discussion contained on this

matter. The Appellants' rationale was laid out in the opening brief. Fundamentally, it is that the enforcement authority carries with it a dual edge. Logically, the authority to enforce granted to an independent entity such as this carries with it the implicit right to a party under its authority to challenge directly its actions.

The Respondent takes the position that *Griffin v. The Thurston County Board of Health*, 137 Wn App 609, 154 P3d 296 (2007), affirmed *Griffin v. The Thurston County Board of Health*, 165 Wn.2d 50; 196 P3d 141 (2008), cited by the Appellants in their opening brief, really had other named parties, specifically the County of Thurston. That is not shown in either of the appellate opinions. While, in the initial caption at the Superior Court level (Appendix, C-1 to Respondent's Brief), the indication is the defendant is "Thurston County, and its Board of Health.", in the actual LUPA petition citing the local jurisdiction, the indication is the "Thurston County Board of

Health", albeit separated on two lines. (Appendix, C-2 to Respondent's Brief) That the Board of Health was recognized by the appellate courts as the necessary, appropriate, and named party respondent is shown in the decisions and captioning of both this Court and the Supreme Court in which the only reference to a named respondent is "The Thurston County Board of Health."

B. AN ATTEMPT TO AMEND THE COMPLAINT TO ADD THURSTON COUNTY AS THE RESPONDENT WOULD HAVE MET WITH AN OBJECTION UNDER THE PROVISIONS OF RCW 36.70C.040 (2) (A)

As is clear, Appellant disagrees the County is an indispensable body in this matter. However, in Respondent's Brief, there is an indication that Counsel for the Respondent recommended ". . . that the Glenns could remedy this fatal error by amending their Petition." However, if such a motion had been filed, there is no question the County's argument would have been that granting such a motion would be contrary to the strict judicial interpretation which has been given to the language of RCW 36.70C.040(2)(a). (See

the discussion of this issue in *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 965 P.2d 636 (1998) cited in the Respondent's brief and the Respondent's position on such a matter as laid out on page 5 of that brief.) The Appellants could not in good faith and conscience claim then and can not do so now that the naming of the Thurston County Board of Health, rather than the more generic Thurston County, was an accident or oversight, in short the type of excusable neglect dealt with by CR 15(c). This Court dealt with the type of situation under which a failure to include a necessary party in a caption was the basis for a trial court's dismissal of a LUPA petition. *Quality Rock Products, Inc., et al. v. Thurston County*, 126 Wn. App. 250; 108 P3d 805 (2005) However, whether the motion would have been granted or denied, if the request had been made, is not relevant to the jurisdictional issue present in this matter.

C. THE APPELLANTS HAVE NOT ABANDONED THEIR APPEAL.

The argument the Appellants have abandoned their appeal is without foundation. The issue upon which the case was dismissed by the Trial Court was whether or not the provisions of LUPA mandated that the County was the only proper party. One of the assignments of error specifically referenced was RCW 36.70C.040(2)(a). Throughout the Appellants' Opening Brief, there were repeated references to LUPA and the Trial Court's ruling based upon its interpretation of that statute. As this Court will note, the briefing naturally focuses, to a certain degree, upon the nature of the bodies created under RCW 70.05 and RCW 70.46. However, it is their nature and the scope of their authority and independence which, in the opinion of the Appellants, are major guides in analyzing the fundamental question.

There is no merit to the argument the Appellants abandoned their appeal. From the nature of the Brief filed by the Respondents, there does

not seem to be any confusion as to the fundamental issue before this Court.

D. THE APPEAL IS NOT FRIVOLOUS

The Respondent seeks fees and costs under RAP 18.9. A similar request was made before this Court in *Matheson v. Gregoire, as Governor, et al*, 139 Wn. App. 624, 161 P.3d 486 (2007). The case was dismissed for failure/inability to name an indispensable party, the sovereign Indian tribe which was a party to the agreement challenged. This Court denied the request. The standards for consideration of such a request that have been developed is that appeal is frivolous if, when the reviewing court, after considering the entire record and resolving all doubts in favor of the appellant, is convinced the appeal presented no debatable issues upon which reasonable minds might differ, and that it is so devoid of merit there is no possibility of reversal. *Ramirez, et al, v. Dimond, et al*, 70 Wn. App. 729; 855 P2d 338 (1993) In this case, the unique nature of the entities

created by RCW 70.05 and RCW 70.46, as well as the characterization of the parties in the *Griffin* cases, supra, when tested against that standard, merit rejection of that request.

II.

CONCLUSION

For the reasons stated in the Briefs filed by the Appellants in the matter, the Trial Court's decision should be reversed.

DATED this 4th day of February, 2010.

GLENN & ASSOCIATES, P.S.

By Daniel Glenn
DANIEL O. GLENN, of
Attorneys for Petitioner
WSBA #4800

***DECLARATION OF MAILING ***

The undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to ELIZABETH PETRICH, and containing a copy of the document to which this declaration is attached. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of February, 2010.

Lakae Erickson

FILED
COURT OF APPEALS
DIVISION II
10 FEB -5 PM 2:19
STATE OF WASHINGTON
BY [Signature]