

NO. 44938-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STEPHEN J. WILSON and TRISH WILSON, husband and wife,

Plaintiffs/Respondents,

vs.

ROBERT RADAKOVICH, SR., and MT. SOLO LANDFILL, INC.,

Defendants,

and

KEYSTONE CONTRACTING, INC.,

Intervening/Appellant.

APPEAL FROM THE SUPERIOR COURT

HONORABLE STEPHEN M. WARNING

BRIEF OF RESPONDENTS

MICHAEL W. FREY
Attorney for Respondents
Frey & Busby PLLC
600 Royal Street Suite B
Kelso, WA 98626
360-577-8700

2013 SEP 23 AM 9:10
COURT OF APPEALS
DIVISION II
BY
DEP. CLERK

Table of Contents

INTRODUCTION.....1

ARGUMENT.....1

 1. Standard of Review.....2

 2. Keystone Has No Interest In This Nuisance Case.....2

 3. Keystone’s Motion Was Not Timely.....5

 4. Motion for Attorney’s Fees.....7

CONCLUSION.....8

APPENDIX.....10

Table of Authorities

Cases

Aguirre v. AT & T Wireless Services, 109 Wn.App. 80, 33 P.3d 1110 (Div. 1 2001); Rev. denied, 146 Wn.2d 1017, 51 P.3d 86 (2002).....4, 5, 8

American Discount Corp. v. Saratoga West, Inc., 81 Wn. 2d 34, 499 P.2d 869 (1972).....2, 3

Columbia Gorge Audubon Society v. Klickitat County, 98 Wn.App. 618, 626, 989 P.2d 1260 (Div. 3 1999).....5

In re Dependency of J.H. 117 Wn.2d 460, 815 P.2d 1380(1991)....3

Kreidler v. Eikenberry, 111 Wn.2d 828, 766 P.2d 438 (1989).....5

Martin v. Pickering, 85 Wn.2d 241, 533 P.2d 380 (1975).....2, 5

Olver v. Fowler, 131 Wn. App. 135, 126 P.3d 69 (Div. 1 2006), aff'd, 161 Wn.2d 655, 168 P.3d 348 (2007).....2

Rich v. Starczewski, 29 Wn.App. 244, 250, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981).....8

Spokane County v. State, 136 Wn.2d 644, 966 P.2d 305 (1998)...2

Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980).....7

Westerman v. Cary, 125 Wn.2d 277, 892 P.2d 1067 (1994).....2, 5

Rules

CR 11.....7

CR 24.....1, 2, 4, 5, 8; See Appendix

RAP 3.1.....8

RAP 18.9.....7

INTRODUCTION

Keystone Contracting, Inc. (Keystone) appeals an order denying its motion to intervene as a matter of right pursuant to CR 24(a)(2). Jeff and Trish Wilson (Wilson) as plaintiffs/respondents argue that Keystone has no interest in the present matter and is merely using the court rules to harass, cause unnecessary delay and increase the litigation costs to the Wilsons. The Wilsons have been litigating their private nuisance claim against Mt. Solo Landfill, Inc. (Mt. Solo Landfill) since early 2011. In late 2012, the Wilsons made a fraudulent transfer claim against Keystone and Mt. Solo Landfill.

For the purposes of respondent's brief, no statement of issues or statement of the case will be presented.

ARGUMENT

Keystone claims an interest relating to the property in this matter for the purposes of its motion to intervene; however, in its defense to the Wilsons' fraudulent transfer claim, Keystone vigorously contends it has no liability and therefore no interest in the present lawsuit. Keystone has failed the "interest test" under CR 24(a)(2) in that it: (1) has no interest in this lawsuit; (2) there is no risk that Keystone's absence in the case will impair its ability to protect its valid interests; (3) the Wilsons and Mt. Solo Landfill will adequately protect their own interests; and (4) Keystone's

application is untimely. This four prong test was articulated in *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994); and *Spokane County v. State*, 136 Wn.2d 644, 966 P.2d 305 (1998).

1. Standard of Review

According to *Westerman*, the trial court's denial of Keystone's motion to intervene will be reversed only if an error of law has occurred. An error of law is an error in applying the law to the facts as pleaded and established. *Westerman v. Cary*, 125 Wn.2d at 302. The identification of Keystone's interest in intervening in the present matter is left to the trial judge to decide on a case by case basis. *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn. 2d 34, 499 P.2d 869 (1972).

The determination of what constitutes a timely application for a motion to intervene rests within the trial court's discretion. *Olver v. Fowler*, 131 Wn. App. 135, 126 P.3d 69 (Div. 1 2006), *aff'd*, 161 Wn.2d 655, 168 P.3d 348 (2007). Timeliness will be determined with reference to the facts and circumstances in a particular case. *Martin v. Pickering*, 85 Wn.2d 241, 533 P.2d 380 (1975).

2. Keystone Has No Interest In This Nuisance Case

As case law suggests, the CR 24(a)(2) requirement to "claim an interest" to intervene may unfortunately allow analysis to be led astray by the myopic fixation upon the word "interest." Trial courts

are to be guided on a case by case basis by the policies behind the interest requirement. Case law instructs the court to balance the relative concerns of Keystone in having their “asserted interest protected” against the interests of the Wilsons and Mt. Solo in controlling their own lawsuit, and against the public policy interest in judicial economy. *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d at 42. Simply claiming interest in a case is not enough. The interest Keystone seeks to protect must be one recognized by law. *In re Dependency of J. H.* 117 Wn.2d 460, 815, P.2d 1380 (1991).

Careful consideration of Keystone’s claimed interest is required in the context of this private nuisance claim made by the Wilsons against an illegal landfill located next to their home. The trial court has already concluded that the Mt. Solo Landfill violated Minimum Functional Standards for Solid Waste Handling per State and County law. CP 21. Mt. Solo Landfill’s unlawful acts and failure to perform legal duties have already been found to constitute a nuisance per se, so that it is strictly liable to the Wilsons for damages as a result. CP 21.

Rather than protecting its money or its rights, Keystone articulates its interest as more of a desire to fight with the Wilsons. Keystone offers no substantive evidence relative to the nuisance claim. It offers no additional arguments or suggests new aspects

for the case. Instead Keystone asserts its interest to simply minimize the Wilsons' claim for damages against Mt. Solo Landfill. For unexplained reasons, Keystone suggests that it can more effectively articulate the case than Mt. Solo Landfill. Although discovery has been ongoing since early 2011, and preliminary issues have been debated at length, Keystone predicts that Mt. Solo Landfill will not protect itself.

Keystone does not argue that it has legal standing to appear as a party in this case. Keystone leads this court through a number of contingencies: (1) If it loses the fraudulent transfer action; and, (2) If Mt. Solo Landfill loses the nuisance claim; (3) Keystone's property might be levied upon. There exists no present interest. Any future interest claimed is speculative at best. A case regarding speculative interests under CR 24 is *Aguirre v. AT & T Wireless Services*, 109 Wn.App. 80, 33 P.3d 1110 (Div. 1 2001); Rev. denied, 146 Wn.2d 1017, 51 P.3d 86 (2002). Kathleen Sanders¹ opted out of a the class action case of *Aguirre v. AT&T* and subsequently attempted to intervene into the settlement, speculating that the result would adversely affect her own class action case. Noting that Ms. Sanders' had no standing, Division I concluded that she failed to establish the "interest" prong under CR

¹ The Appellant in *Aguirre*, Kathleen Sanders was represented by Ben Shafton, Morse & Bratt, Vancouver. Ben Shafton is Appellant Keystone's attorney of record in the present matter.

24(a)(2). There was no need to reach the remaining prongs. *Aguirre v. AT & T Wireless Services*, 109 Wn.App. at 87; citing *Westerman v. Cary*, 125 Wn.2d at 303. For similar reasons this Court should affirm the trial court's decision to deny Keystone's motion to intervene.

3. Keystone's Motion Was Not Timely

Keystone asserts that any motion to intervene is timely if it is filed prior to judgment, citing *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn. 2d 34, 499 P.2d 869 (1972). Case law holds that the timing of a motion to intervene is not by itself dispositive, requiring courts to examine the surrounding circumstances such as opportunity to identify the threatened interest, reason for delay and any adverse impact of delayed intervention. *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn.App. 618, 626, 989 P.2d 1260 (Div. 3 1999), citing *Kreidler v. Eikenberry*, 111 Wn.2d 828, 766 P.2d 438 (1989). Timeliness factors include prior notice of the lawsuit, the circumstances contributing to the delay in moving to intervene, and the prejudice that would result if intervention were refused. *Martin v. Pickering*, 85 Wn.2d 241, 533 P.2d 380 (1975).

Keystone had prior notice of the lawsuit, waited over two year to intervene, and cannot now claim prejudice by being left out. This lawsuit commenced in February, 2011, and has been delayed

due to motions for default, motions to compel, objections to trial settings, appearances of new counsel for the defendant just prior to a trial date, and proceedings in Mr. Radakovich's personal bankruptcy. CP 20-22. On October 28, 2011, partial summary judgment in favor of the Wilsons was entered, making the matter a strict liability case. CP 38-40. On November 28, 2011, the Wilsons provided Mt. Solo Landfill with a statement of damages. On December 12, 2011 Mt. Solo Landfill conveyed property to Keystone. CP 8. Keystone did not bring its motion to intervene until May, 2013. Trial is currently set for the week of November 26, 2013.

Under Keystone's analysis, the Wilsons' may never get to trial so long as any past, future or contingent creditor and/or business partner of Mt. Solo Landfill may intervene at any time in this matter at any time because they predict that their interest could hypothetically be effected by a judgment in favor of the Wilsons. Keystones give no consideration to the continuous nature of the damage inflicted upon the Wilsons by the offensive landfill; nor do the coercive costs of litigation factor into considerations of prejudice. Keystone has not hidden its strategy to protract the nuisance litigation without adding any evidence or arguments of value. It is reasonable to suggest that Keystone's proposed involvement will automatically result in significant delays, increased

discovery, motions practice, appellate practice and a significant increase in attorney's fees and costs to the Wilsons. The precedent sought will only provide yet another shield for corporations being sued by private citizens.

4. Motion for Attorney's Fees

The Wilsons hereby move this court for sanctions against Keystone in the form of reimbursement of the Wilsons' attorney's fees and costs related to Keystone's motion to intervene and the present appeal on the basis that: (1) the appeal is frivolous; (2) Keystone has abused the court rules and procedures. RAP 18.9; CR 11.

In *Streater v. White*, 26 Wn.App. 430, 435, 613 P.2d 187, rev. denied, 94 Wn.2d 1014 (1980), the Court of Appeals held that a court should consider that: (1) a civil appellant has a right to appeal under RAP 2.2; (2) all doubts should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; however, (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no possibility of reversal.

As referenced in the *Aguirre v. AT&T* case, RAP 3.1 provides that: "Only an aggrieved party may seek review by the appellate court." An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Aguirre v. AT&T Wireless Servs.*, 109 Wn.App. at 85. Keystone has failed to articulate any proprietary interest or personal rights in the present litigation and calls for speculation as to any pecuniary interest. Considering the record as a whole, even in a light most favorable to Keystone, it is clear that Keystone was not a party to the present case, has no standing so that the present appeal is not authorized under RAP 3.1.

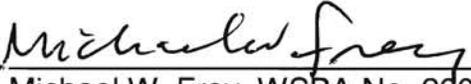
This court is allowed to impose sanctions against Keystone based upon the conclusion that it has used CR 24, and the rules of appellate procedure for the purpose of delay and harassment. RAP 18.9(a). The appellate rules are not designed to place unjustified burdens, financial and otherwise, upon opposing parties nor are they designed to provide recreational activity for litigants. *Rich v. Starczewski*, 29 Wn. App. 244, 250, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981).

CONCLUSION

Both Mt. Solo Landfill and Keystone are already afforded their day in court with respect to the underlying cases in which they

are named defendants and have vested interested to protect. Keystone offers no justification for the fact that it acquired property from Mt. Solo Landfill subsequent to the Wilsons' favorable summary judgment ruling resulting in strict liability. Its present argument is contradictory, retaliatory and advanced without merit. Absent any sanctions, Keystone will have already succeeded in harassing the Wilsons, increasing their costs, and presenting additional distractions to obtaining the relief sought. Based upon the conclusion that Keystone has no interest or standing in the present litigation, this court should find that the trial court did not error in denying Keystone's motion to intervene and should award the Wilsons their attorney's fees and costs incurred herein.

DATED this 19th day of September, 2013.



Michael W. Frey, WSBA No. 26087
Of Attorneys for Respondents

APPENDIX

CR 24 INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action:

(1) When a statute confers a conditional right to intervene; or

(2) When an applicants claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirements, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all the parties as provided in rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

NO. 44938-2-II
IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION II

STEPHEN J. WILSON and TRISH WILSON, husband and wife,
Plaintiffs/Respondents,

vs.

ROBERT RADAKOVICH, SR., and MT. SOLO LANDFILL, INC.,
Defendants,

and

KEYSTONE CONTRACTING, INC.,
Intervening/Appellant.

APPEAL FROM THE SUPERIOR COURT

HONORABLE STEPHEN M. WARNING

AFFIDAVIT OF MAILING

MICHAEL W. FREY
Attorney for Respondents
600 Royal Street, Suite B
Kelso, Washington 98626
Telephone: 360-577-8700

STATE OF WASHINGTON)
) ss.
County of Cowlitz)

THE UNDERSIGNED, being first duly sworn, does hereby
depose and state:

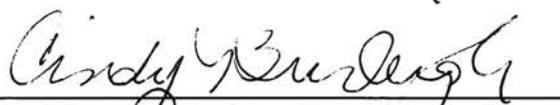
1. My name is CINDY BURLEIGH. I am a citizen of the
United State, over the age of eighteen (18) years, a resident of the
State of Washington, and am not a party to this action.

2. On September 19, 2013, I deposited in the mails of
the United States of America, first class mail with postage prepaid,
a copy of the Brief of Respondents to the following person(s):

Ben Shafton
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660

I SWEAR UNDER PENALTY OF PERJURY THAT THE
FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY
KNOWLEDGE, INFORMATION AND BELIEF.

Dated this 19th day of September, 2013.


CINDY BURLEIGH

SIGNED AND SWORN to before me this 19th day of
September, 2013.


NOTARY PUBLIC FOR WASHINGTON
My appointment expires: 6/15/2016

