COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON
NO. 287262

FILED
2010
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DIVISION III
STATE OF WASHINGTON
By

ROD ULLERY, et ux.

Respondents

v.

BILLY L. FULLETON, et ux., et al.

Appellants.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Respondent Rod Ullery (Ullery) falsely asserts that "except for the addition of Patrick Fulleton as an additional plaintiff in the later lawsuit, the parties and issues were the same in both [lawsuits]." (Response Brief p. 1).

The true facts are, in the first lawsuit the trial court found there had been no effective assignment of "Reclamation Agreement" rights and therefore, Billy Fulleton (Billy) had no standing to sue defendants Ullery. (CP 811, lns. 16-21).

After the first lawsuit trial ended, to correct this deficiency, a new and specific "Assignment" of "Reclamation Agreement" contract rights was executed by and between Patrick R. Fulleton (Pat) and Billy. (CP 807-808). This new document was not before the trial court in the original lawsuit, and despite a motion to reopen the case to provide the court with this new evidence, the court did not grant the motion (CP 233) and a judgment issued without the court considering this new contract and the new issues which it presented. (CP 233, 809-816).

It follows that in the second suit, different facts and different legal issues were presented for substantive determination and all claims to the contrary by Ullery are simply false.

Ullery also falsely says that purportedly "Patrick Fulleton, although not named as a party to the 2005 lawsuit, had previously turned over his interest in the claims under the Reclamation Agreement to his brother Billy . . ." (Response Brief p. 15).

Not so. Again, the judgment in the first lawsuit conclusively holds that whatever documents the parties had previously signed, those documents were not legally sufficient to actually turn over Pat's interest in the Reclamation Agreement to his brother Billy. (CP 816-819).

As another false assertion, Ullery states on Response Brief page 11, "Would it also not be unjust for Rod and Dianne Ullery to be forced to perform a bilateral contract where the other party to the contract did not perform? Contract law principles excuse parties to a bilateral contract from performing where the other party has 'materially breached' the contract." (Response Brief p. 18).

This mischaracterization of case facts is directly refuted by the court's November 16, 2007 "Order Denying Judgment on the Pleadings." (CP 229-235). Addressing this issue, the trial court confirmed it had concluded only that Billy did not have the standing to compel Ullery to fulfill his obligations under the Reclamation Agreement, and that Billy had not procedurally established the conditions precedent, which would trigger Ullery's obligation

to perform. (CP 235). The court did not find that Billy, Pat, or FPC had not fulfilled their contract obligations or that Pat or FPC could not subsequently establish performance under the contract. (CP 235).

Because no substantive rulings on these issues were made, after the second lawsuit was filed, the court in its 2007 order specifically said new evidence placed of record by Billy, was sufficient to prove all contract work by Pat and Billy had been properly performed.

. . .

> For the purposes of this motion, the court is confident from the evidence considered that the reclamation work has been fully and satisfactorily completed as contemplated by the reclamation contract, and that the Ullerys have not as of yet performed as required by said contract. The court therefore determines that the issues subject to determination in this case are not identical to those issues decided in the previous matter, and thus collateral estoppel should not preclude the defendants and third-party plaintiffs from asserting the theories underlying their respective cases. [Emphasis added.]

(CP 235.)

It follows that Ullery's contract breach assertions are provably false.

In complete contradiction to the trial court's Memorandum Decision statements, Ullery also falsely says that purportedly the court found in the 2005 lawsuit, that Billy had failed to obtain the necessary state agency approvals required to establish contract performance.

> The trial court in the 2005 action found that plaintiff Fulleton had failed to obtain the approvals of two state agencies for the work in question, which was a crucial component of the contract performance. The work itself involved stream and land remediation to satisfy government agencies from prior mining operations. Without the government agency approval, the contract had no meaning to the property owners, Rod and Dianne Ullery. If the approval of the two state agencies was considered to be a "condition precedent" to the obligation of Mr. and Mrs. Ullery to perform the contract, the failure to secure performance of that condition precedent excuses the performance of the Ullerys under the contract. [Emphasis added.]

Response Brief, p. 18.

The record proves however, the court made no such finding. (CP 235). This intentional mischaracterization of the facts by Ullery is done purposefully. Ullery knows the trial court did not issue a judgment "on the merits" in the first trial regarding contract performance, and he knows the evidence shows appellants did fully perform all contract work, so that Ullery has breached the contract by not transferring the contract property consideration owed. Ullery does not want this court to focus on these true facts however, because they defeat the fourth test required for res judicata and collateral estoppel to apply (*i.e.* that doctrine application not be "unjust" to the party against whom it is asserted).

Rather than admit this, Ullery's claim that the trial court found appellants to have breached the contract at first lawsuit conclusion, is simply disingenuous and does not comply with the duty of candor owed to this court.

II. STANDING AND "PRIVITY" ARE MUTUALLY EXCLUSIVE

The record proves that in the first lawsuit, Ullery asserted as a legal defense that Billy "lacked standing" and was not the "real party in interest" able to enforce the Ullery contract. Ullery also asserted that Billy had "failed to join an indispensable party" (*i.e.* Pat/FPC). (CP 683).

The trial court ultimately found in Ullery's favor on these procedural defenses. (CP 809-814, 815-816).

Ullery correctly asserts that Billy did not appeal the trial court's decision. (Response Brief p. 2). Equally however, Ullery never appealed the trial court's procedural rulings either.

Because Ullery did not challenge the trial court's rulings, the binding "lack of standing" judgment which issued, conclusively establishes there is no "privity" for either collateral estoppel or res judicata purposes, which exists. (*See, Owens v. Kuro*, 56 Wn.2d 564, 354 P.2d 696 (1960)).

In the *Kuro* case, the court defined "privity" for purposes of issue-preclusion as follows:

> . . . Privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property. The binding effect of the adjudication flows from the fact that when the successor acquires an interest in the right it is then affected by the adjudication in the hands of the former owner. [Emphasis added.]

Id. 568.

See also, Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 887 P.2d 898 (1995); and *Hackler v. Hackler*, 37 Wn. App. 791, 794, 683 P.2d 241 (1984).

Here, once the court ruled Billy lacked standing, it also resolved as a matter of law, that Billy did not have current title to or any interest in Reclamation Agreement rights which he could enforce. Without an existing title in or right to enforce the Reclamation Agreement, by definition, there is no "privity," and without privity, neither res judicata nor collateral estoppel barred second lawsuit claims. A ruling from this court so stating must issue.

III. A LAWSUIT DISMISSAL FOR LACK OF STANDING IS NOT A "FINAL JUDGMENT ON THE MERITS" FOR COLLATERAL ESTOPPEL OR RES JUDICATA PURPOSES

Dismissing a lawsuit for lack of standing is a procedural decision, not a "merits" decision. Ullery cites not one case which holds otherwise.

Because Washington courts are prohibited from rendering advisory opinions, before lawsuit disputes can be considered on their merits, a party must first evidence for the court there is a "justiciable controversy" for the court to resolve.

As defined by Washington law, a justiciable controversy means:

> (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 interest,
>
> (3) <u>which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic</u>, and
>
> (4) <u>judicial determination of which will be final and conclusive</u>. [Emphasis added.]

Walker v. Munro, 124 Wn.2d 402, 411, 414, 407 P.2d 920 (1994).

A party without standing to enforce a contract cannot, by definition, present a "justiciable controversy," because their legal interests are not "direct," but are rather potential or theoretical only.

Generally, the doctrine of standing precludes a party from asserting the legal right of another person. *Timberlane Homeowners Ass'n, Inc. v. Brame,* 79 Wn. App. 303, 307-08, 901 P.2d 1074 (1995). Under Washington law, a party has standing to litigate an issue only if he or she can demonstrate "a real interest in the subject matter of the lawsuit, that is, <u>a present,</u>

substantial interest, as distinguished from mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue to it by the relief granted. *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

For these sound reasons, a party who lacks standing to enforce contract or statutory rights, can't ask the court for a declaratory judgment under RCW 7.24.020, because they have no legally recognizable interest in the contract which would support this statutory request. (*See, e.g. To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 997 P.2d 960 (2000)).

Washington courts have also upheld that if a plaintiff lacks standing to bring a suit, the court lacks jurisdiction to consider it. *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986).

> fn. 6. Although the Port does not claim that Branson lacks standing, Suppl. Br. of Resp't at 4, we may raise the issue *sua sponte*. [Citation]; *see also, High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) ("If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it."). [Emphasis added.]

Branson v. Port of Seattle, 152 Wn.2d 862, 875, 101 P.3d 67 (2004); *Skagit Surveyors & Eng'rs., LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556-57, 958 P.2d 962 (1998).

Here, once the trial court ruled that Billy lacked standing to enforce Reclamation Agreement terms, the court had no further jurisdiction to make

a decision "on the merits." Therefore, the second test required for the doctrines of res judicata or collateral estoppel to apply is just not satisfied.

It follows that appellants' proper focus on the court's lack of standing ruling is not a "fatal flaw" as Ullery wrongly claims. It is rather dispositive in establishing that (1) there was no "final judgment on the merits" in the first lawsuit; (2) therefore, all four tests required to establish res judicata and/or collateral estoppel have not been proven, either factually or legally; and (3) the trial court accordingly erred in dismissing appellants' claims requiring judgment reversal and remand.

In an effort to avoid appellate reversal, Ullery wrongly asserts that the court's "burden of proof" ruling in the first lawsuit was also supposedly a "decision on the merits."

> The same Kittitas County Superior Court judge in two proceeding has determined that appellants have no claim against Ullery under the 2002 "Reclamation Agreement," both because of lack of standing and on the merits based upon lack of proof . . .

(Response Brief, p. 5).

That assertion however, is contrary to Washington law. As addressed by appellants' initial brief, Washington courts have continually held that a case decided on procedural grounds is not a case decided "on the merits."

> Since we are dismissing on procedural grounds petitioner's claim to withdraw his guilty pleas to 2nd° and 3rd° Rape, <u>we</u>

> did not consider it on the merits. *Stoudmire*, 141 Wn.2d 350-51, 5 P.3d 1240. Thus, this PRP is not barred as a successive petition. [Emphasis added.]

In Re Stoudmire, 145 Wn.2d 258, 36 P.3d 1005 (2001).

Also particularly relevant is the dispositive holding of the appellate court in *Gold Star Resorts v. Futurewise*, 140 Wn. App. 378, 386, 166 P.3d 748 (2007) that the failure by a party to sustain a "burden of persuasion" (*i.e.*, "burden of proof") is a procedural ruling, and not a "decision on the merits" for subsequent collateral estoppel or res judicata purposes. It follows that neither specified ground for first lawsuit dismissal satisfies the necessary "on the merits" legal test and an appellate reversal must issue.

IV. SINCE THERE WAS NO "FINAL JUDGMENT ON THE MERITS" IN THE FIRST LAWSUIT NO "SECOND BITE OF THE APPLE" IS BEING SOUGHT

The fact some identical issues may have been raised in both lawsuits does not control whether res judicata or collateral estoppel apply. Rather, the specific issues referenced must have been actually tried and determined in the prior proceeding.

The trial court confirmed this to be Washington law when it initially refused to apply res judicata and collateral estoppel to bar appellants' claims in the second lawsuit, because substantive contract disputes had not been tried or determined. (CP 234-235).

> For the purposes of this motion, the court is confident from the evidence considered that the reclamation work has been fully and satisfactorily completed as contemplated by the reclamation contract, and that the Ullerys have not as of yet performed as required by said contract. The court therefore determines that the issues subject to determination in this case are not identical to those issues decided in the previous matter, and thus collateral estoppel should not preclude the defendants and third-party plaintiffs from asserting the theories underlying their respective cases. (CP 234-235). [Emphasis added].

It is pertinent to note that Ullery does not dispute or distinguish the on-point case law cited by appellants, requiring that a decision on the merits actually issue, in order to support a collateral estoppel or res judicata defense. (*See, Mead v. Park Place Properties*, 37 Wn. App. 403, 681 P.2d 256 (1984); *Bradley v. State*, 73 Wn.2d 914, 442 P.2d 1009 (1968); *Davis v. Nielson*, 9 Wn. App. 864, 515 P.2d 995 (1973); *Roper v. Mabry*, 15 Wn. App. 819, 551 P.2d 1381 (1976); *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 751 P.2d 329 (1988); *Alishio v. Dept. of Social & Health Svcs.*, 122 Wn. App. 1, 91 P.3d 893 (2004); or *Estate of Sly v. Linville*, 75 Wn. App. 431, 435, 878 P.2d 1241 (1994)).

Here, because Judge Sparks' ruling in the first trial was not "on the merits," a fact which the trial court specifically confirmed, (CP 234-235) it necessarily follows, that all of the substantive contract disputes presented by

the first lawsuit and which were not tried or decided, were lawfully brought in the second lawsuit.

Simply put, there was no "bite of the apple" taken in the first lawsuit. The parties' substantive contract disputes were never decided. It is accordingly appropriate for this court to now reverse and remand the trial court's dismissal order so that a substantive contract breach decision can be finally made by the court.

V. IT WOULD BE "UNJUST" FOR THE MERITS OF CONTRACT PERFORMANCE TO NOT BE LITIGATED

Ullery says it would be "unjust" for the court to make Ullery "re-litigate" the merits of whether the contract has been performed. (Response Brief, p. 18).

> Even if the standing issue had been decided differently by the trial court in the first lawsuit, the trial court in its Memorandum Decision and in its Conclusions of Law determined that Billy had failed to prove that he was entitled to performance from Rod and Dianne Ullery under the 2002 "Reclamation Agreement" by reason of his own material failure to perform. [Emphasis added.]

Response Brief, p. 20.

Ullery's arguments however, are premised solely upon the Ullery's assertions that 1) there was a substantive litigation of the parties' contract disputes in the first lawsuit; and 2) purportedly the facts show that appellants did not perform the contract.

Those assertions are false. The first lawsuit was decided solely on procedure. The trial court specifically confirmed this in its November 16, 2007 Order Denying Judgment on the Pleading:

> For the purposes of this motion, the court is confident from the evidence considered that the reclamation work had been fully and satisfactorily completed as contemplated by the reclamation contract and that the Ullerys have not as of yet performed as required by said contract. The court therefore determines that the issues subject to determination in this case are not identical to those issues decided in the previous matter, and thus collateral estoppel should not preclude the defendants and third-party plaintiffs from asserting the theories underlying their respective cases. [Emphasis added.]

(CP 235).

Similarly, as noted by the court early in the second lawsuit, based upon the additional evidence which appellants were able to provide, the trial court had concluded that full and satisfactory contract performance by appellants had occurred, and that Ullery had materially breached the contract by not yet tendering all contract consideration owed. (CP 235). Accordingly, it would be "unjust" for the merits of contract performance to not be litigated at least once, otherwise Ullery will inequitably receive a "windfall" of the approximate $250,000 worth of work (not to mention the increased value of the property on which this work was performed which he still retains). For this reason as well, the court's dismissal order should be reversed and remanded.

VI. ULLERY AND THE SUPERIOR COURT HAVE BOTH ERRED BY FOCUSING EXCLUSIVELY ON THE ISSUE OF "PRIVITY"

Ullery correctly notes that Judge Sparks eventually decided collateral estoppel and/or res judicata applied, solely because he believed Pat's knowledge of the first lawsuit had somehow created "privity" between Pat and Billy, sufficient to meet this one of the four required tests (all of which must be met) necessary to validate lawsuit claims dismissal.

> Judge Sparks placed high importance in the summary judgment dismissing the Fulleton claims and defenses in the 2007 consolidated actions, based on the 2002 "reclamation agreement," on the recently taken deposition of Patrick R. Fulleton. The Patrick Fulleton deposition testimony is compelling in support of the conclusion that Patrick Fulleton knew before the 2005 lawsuit was filed that it would be filed by Billy. [Emphasis added.]

Response Brief p. 10-11.

Ullery however, does not challenge or distinguish the dispositive case law cited by appellants, which establishes that mere awareness of legal proceedings is not sufficient to place a person in "privity." *Loveridge v. Fred Meyer, Inc.,* 125 Wn.2d 759, 887 P.2d 898 (1995); *State ex rel. Lidral v. Superior Court for King County*, 198 Wash. 610, 618, 89 P.2d 501 (1939); *Stevens County v. Futurewise*, 146 Wn. App. 493, 504, 192 P.3d 1 (2008).

Rather, as noted in *Loveridge*:

> Privity is established only in cases where a person is in actual control of the litigation or substantially participates in it even though not in actual control. Mere awareness of proceedings is not sufficient to make a person in privity with a party to a prior proceeding. [Emphasis added.]

Loveridge at 764.

Here, the facts about Pat's involvement (or more accurately stated lack of involvement) with the first lawsuit are not disputed. Pat did not control the Billy/Ullery litigation. Pat did not participate in the Billy/Ullery litigation. (Pat Fulleton dep. p. 31). Pat was not a witness, and in fact, when he was asked to be a witness in the first lawsuit, he declined. (Pat Fulleton dep. p. 33). Ullery never acted to make Pat a party or witness, nor was Pat involved in any lawsuit discovery.

Essentially the only connection Pat had with the first lawsuit was his personal knowledge that Billy had filed and was pursuing the litigation.

As a matter of law, Pat's mere knowledge a lawsuit was filed and was being prosecuted by Billy is not sufficient to establish legal "privity." (*See, Loveridge, supra).* Accordingly, the trial court erred in thinking this fact alone establishes that collateral estoppel or res judicata bar the appellants' second lawsuit claims.

VII. ULLERY IS JUDICIALLY ESTOPPED FROM INCONSISTENTLY CLAIMING THAT BILLY LACKED STANDING BUT HAD "PRIVITY"

Conspicuously omitted from Ullery's Response Brief is any response regarding judicial estoppel.

Here, the facts show Ullery took the position in the first lawsuit that Billy had no legal interest in the Reclamation Agreement which he could enforce. The trial court agreed, and on that procedural basis, dismissed the first lawsuit. (CP 811).

Subsequently, in response to the second lawsuit, Ullery inconsistently claimed that Billy actually did have an enforceable legal interest in the Reclamation Agreement at the time of the first lawsuit, so he should be held to be in "privity" for res judicata and collateral estoppel purposes.

As noted in appellants' initial brief, Washington's doctrine of "judicial estoppel" precludes a party from taking inconsistent positions in successive legal proceedings. *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001).

Here, Ullery has not cited this court to one case which holds that a party without standing can be subsequently found to have had "privity" with a non-lawsuit party. Ullery does not even argue that these two legal positions are not mutually exclusive. He can't because they are. It follows that since

parties in Washington can't claim one set of facts to be true in one lawsuit, and then inconsistently claim the exact opposite facts are true in a second lawsuit, Ullery is judicially estopped from claiming res judicata and collateral estoppel legally apply to bar the second lawsuit, and the trial court's dismissal order must be reversed and remanded for this reason as well.

VIII. CONCLUSION

Ullery falsely asserts that the issues in the first lawsuit were identical to the issues raised in the second lawsuit. The trial court's written order dated November 16, 2007 (CP 229-235) conclusively disproves that assertion.

> The court therefore determines that the issues subject to determination in this case are not identical to those issues decided in the previous matter, and thus collateral estoppel should not preclude the defendants and third party plaintiffs from asserting the theories underlying their respective cases. [Emphasis added.]

(CP 235).

During the two-year interval between the date the court ruled that res judicata and collateral estoppel did not apply, because this necessary test was not met, and the November 2009 date at which the court later granted a summary judgment of dismissal, lawsuit issues never changed. Rather, the

only new information placed before the court was the testimony of Pat, which simply confirmed that he personally knew Billy had sued Ullery.

Ignoring that lawsuit knowledge alone is insufficient to establish privity, and incorrectly focusing on just this one doctrinal test, the trial court erred by forgetting that there are four tests, not just one, all of which must be satisfied, in order for the doctrines to apply.

Here the record proves different issues were raised by the second lawsuit because of the post-trial written "Assignment" which Pat and Billy later signed, and which the court refused to substantively address as part of the first lawsuit.

The record equally shows that no "on the merits" decision about the parties' substantive contract breach disputes ever issued. Indeed, Judge Sparks further confirmed this at the conclusion of the very short trial held on January 12, 2010, in the ejectment lawsuit:

> The Court: Until Mr. Ullery - - basically, the value of his property if he tries to sell it, it's all going to go into attorney fees. This is going up to the Court of Appeals. Odds are it's not equitable Mr. Fulleton did the work. Billy did the work. Here we are because of legal technicalities given [sic] the property to Mr. Ullery he is going to join Billy some day when he passes away and they're going to have a conversation and you know what? I hope you know he is going to need to figure this one out. And he has got - - this is just a silly way to end a lawsuit. I am sorry to say. I do a lot of things that are silly as a judge when we think equity should

> apply but we don't get to. That's not the way it works. It's frustrating but that's what it is and I hope I get turned around, to tell you the truth. You can tell Mr. Ullery I said that. [Emphasis added.]

(RP p. 24, lns. 17-25; p. 25, lns. 1-7).

What the trial court wrongly ignored when making these comments is that the fourth test which must be met for the doctrines to apply is by definition an equitable test (*i.e.*, "Application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied"). *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001). It follows that since the court was provably convinced that factually a dismissal was not equitably fair, the court erred in finding the doctrines applicable.

Also, under Washington law, once a lack of standing is established, the court has no jurisdiction to adjudicate the merits of any substantive claims. *Branson v. Port of Seattle*, 152 Wn.2d 862, 101 P.3d 67 (2004). Here, the record proves the trial court ruled Billy lacked standing. Having so found, as a matter of law, there could be no final judgment on the merits as to any of the first lawsuit's substantive claims, which was why none issued. Why the court did not rule that res judicata and collateral estoppel doctrines were inapplicable on this basis alone is a mystery.

The court finally ignored that a party without standing cannot be in "privity" with a non-party for doctrine application purposes, because "privity" requires that the acting party have some "mutual or successive

relationship" (enforceable legal interest) in the right, property or subject matter in dispute. A party without standing, by definition, lacks that necessary relationship.

In summary, this is not a case in which appellants are seeking a "second bite of the apple." What the facts instead show is that there was never a "first bite of the apple," because the case was ended on procedural grounds only.

Since a dismissal on procedural grounds is not "on the merits," the binding precedent of *Gold Star Resorts v. Futurewise*, 140 Wn. App. 378, 166 P.3d 748 (2007), specifically applies. The trial court's entry of the dismissal order was therefore error. To now rectify the inequitable error, the trial court's erroneous orders must be reversed and remanded (this as Judge Spark' noted, will make the trial court happy) appellants can then finally have their contract breach lawsuit claims decided on the merits, so that all contract consideration owed can be recovered.

RESPECTFULLY SUBMITTED this 7 day of October, 2010.

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