

FILED

No. 331148

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

APR 29 2016
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

RICK A. HOLMAN, individually and on behalf of WOLF CREEK
HOLDINGS OF SPOKANE, LLC, a Washington Limited Liability
Company,

Respondents,

v.

BRIAN W. BRADY and MOUNTAIN, LLC, a Washington Limited
Liability Company,

Appellants.

SUPPLEMENTAL BRIEF OF APPELLANTS

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I. INTRODUCTION

On March 28, 2016, the Court identified questions relating to Holman's derivative claim on which it invited the parties to provide supplemental briefing of no more than 10 pages. What follows are Appellants' responses to the Court's inquiries.

II. PROCEDURAL BACKGROUND

Holman sought and obtained certification under CR 54(b) and entry of final judgment on his claim against Mountain Broadcasting, LLC ("Mountain").¹ Holman, individually and derivatively on behalf of Wolf Creek Holdings of Spokane, LLC ("Wolf Creek"), claimed prevailing party status against Mountain and requested that a final judgment be entered because the claims against Mountain had been fully adjudicated. The trial court certified a final monetary judgment against Mountain in favor of Holman individually and on behalf of Wolf Creek under CR 54(b) and thereafter entered judgment against Mountain.²

Holman's only basis to assert a claim against Mountain is derivatively on behalf of Wolf Creek, as he has no direct claims (the lease at issue is between Wolf Creek and Mountain). Appellants dispute Holman's right to assert a derivative claim, and challenge the propriety of

¹ CP 379.

² CP 379-384, 385-387.

Holman joining personal claims against Brady with his derivative claim against Mountain. Holman's failure to assert a valid derivative claim mandates dismissal of Mountain from the lawsuit.

III. QUESTIONS PRESENTED

1. **Does the trial court's Order Denying Defendants' Motion to Dismiss entered on July 8, 2013, prejudicially affect the partial summary judgment within the meaning of RAP 2.4(b)?**

Answer: Yes.

Discussion: Appellants' Notice of Appeal reflects that this appeal covers the final judgment against Mountain entered on April 20, 2015, "and all Orders that inhere in that Judgment."³ Holman objects to this Court now considering the derivative issue, apparently desiring instead to have the issue resolved at a later date in connection with a subsequent appeal. That course of action is neither warranted nor prudent.

A notice of appeal must designate the decision or part of the decision that the party wants reviewed. *Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wash. 2d 136, 144-45, 298 P.3d 704, 708 (2013); *see also* RAP 5.3(a)(3); *Sargent v. Selvar*, 46 Wash.2d 271, 272-73, 280 P.2d 683 (1955). This designation also subjects to potential review any related order that "prejudicially affected the

³ CP 388-392.

designated decision and was entered before review was accepted.” *In re Dependency of Brown*, 149 Wash.2d 836, 840 n. 2, 72 P.3d 757 (2003) (citing RAP 2.4(b)).

RAP 2.4(b) provides, in part:

Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

...

One of the beneficial effects of RAP 2.4(b) “is the avoidance of undesirable piecemeal appeals.” *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 135, 750 P.2d 1257, 756 P.2d 142 (1988).

After a decision or part of a decision has been identified in the notice of appeal, the assignments of error and substantive argument further determine precisely which claims and issues the parties have brought before the court for appellate review. *Clark Cty.*, 177 Wash. 2d at 144-45.

In *Brown*, the Washington Supreme Court addressed whether a dependency order and a dispositional order, which were the subject of appeal, had to be specifically identified by Brown in his notice of appeal to confer appellate jurisdiction. In holding that they did not, the Court held that even “if [Brown] had designated only the dispositional order, he could have challenged the dependency order, since an appellate court may

review an order not designated in the notice if it prejudicially affected the designated decision and was entered before review was accepted. RAP 2.4(b). The dependency order ‘prejudicially affected’ the dispositional order, *since the dispositional order could not have been entered without a finding of dependency.*” *Brown*, 149 Wash. 2d 836, 840, 72 P.3d 757, 759 (2003) (emphasis added).

The Court reached a similar result in *Adkins v. Aluminum Co. of Am.*, 110 Wash.2d 128, 134–35, 750 P.2d 1257, 756 P.2d 142 (1988). In *Adkins*, a mistrial was granted during the initial trial, but no immediate appeal was taken. A second trial resulted in a defense verdict, and Adkins appealed. In response, defendant ALOCA claimed that the trial court's oral ruling granting the mistrial was not reviewable on appeal from the judgment entered on the second jury's defense verdict. Citing RAP 2.4(b), the Washington Supreme Court rejected this contention, holding that “the requirements of RAP 2.4(b) are satisfied here. The second trial would not have occurred absent the trial court's decision granting the motion for a mistrial; thus the decision prejudicially affected the final decision which was designated in the notice of appeal. Obviously the trial court's action granting the mistrial occurred before the Court of Appeals accepted review.” *Id.* at 134-135.

Here, the Court asks whether the trial court’s Order Denying

Defendants' Motion to Dismiss entered on July 8, 2013, prejudicially affects the partial summary judgment within the meaning of RAP 2.4(b). Washington law confirms it does. The partial summary judgment order, which is the subject of appeal, would not have been entered against Mountain absent the trial court's denial of Appellants' Motion to Dismiss. That is to say, the trial court could not have entered judgment against Mountain without first denying Appellants' Motion to Dismiss, finding that Holman's derivative claim was permitted. As such, under RAP 2.4(b), *In re Dependency of Brown*, and *Adkins*, the Order Denying Defendants' Motion to Dismiss entered on July 8, 2013, prejudicially affected the partial summary judgment entered against Mountain.

2. If so, is the trial court's denial of Holman's request for leave to amend before us on appeal?

Answer: No.

Discussion: In Response to Defendants' Motion to Dismiss, Holman argued that CR 23.1 was inapplicable and, therefore, it was irrelevant that his derivative complaint did not comply with the court rule. Alternatively, Holman sought leave to amend his complaint if the trial court determined his derivative claim was defective.⁴

In its Order Denying Defendants' Motion to Dismiss for Lack of

⁴ CP 120.

Personal Jurisdiction; For Improper Pleading of Derivative Claim and For Improper Joinder, the trial court determined that Holman's derivative claim on behalf of Wolf Creek was appropriate.⁵ The trial court did not rule on Holman's alternative request, presumably determining such a ruling was unnecessary in light of its Order. As the trial court did not rule on Holman's alternative request to amend, there is no appealable decision from the trial court on this issue subject to appellate review. Should this Court agree with Appellants' contention that Holman's derivative complaint did not satisfy CR 23.1, then it should reverse the trial court, dismiss the derivative claim, and remand so the trial court may consider and rule on Holman's motion to amend, after briefing and argument.

Imbedded in the briefing and argument advanced by Holman in his request to amend his Complaint is the over simplistic view that to comply with CR 23.1, all he needed to do was "verify" his Complaint. The suggestion advanced by Holman is that verification is a mere technicality that he can readily cure. This is not the case, as CR 23.1 requires more than just a verified complaint.

CR 23.1 imposes four requirements upon a party who wishes to bring a derivative action, all of which must be alleged in a verified

⁵ CP 154.

complaint: (1) the claimant must be a member of the LLC at the time of the complained of transaction, (2) the action must not simply be collusive in order to confer jurisdiction on the court, (3) the complaint must allege what attempts the claimant made to have the company bring the suit, and (4) the claimant bringing suit must fairly and adequately represent the interests of the other members. *Gustafson v. Gustafson*, 47 Wn. App. 272, 276-77, 734 P.2d 949 (1987). Holman's Complaint fails to comply with CR 23.1 in several key respects. In addition to not being verified, Holman's Complaint failed to allege that the purported derivative claim was not merely collusive in order to confer jurisdiction on the court⁶ and that Holman could fairly and adequately represent the interests of the other member (Brady) in bringing the derivative action.

There are only two members of Wolf Creek: Holman and Brady. Holman cannot, therefore, fairly represent the interest of the members of Wolf Creek as a class under CR 23.1, nor has Holman cited any Washington case allowing a derivative claim in a two-member LLC. Holman's proper remedy is a direct action against Brady for declaratory relief (as to the members' rights and responsibilities vis-a-vis Wolf Creek), and for damages to the extent he alleges financial harm. Wolf

⁶ Appellants assert that Brady is not subject to personal jurisdiction in Washington.

Creek is neither a necessary nor appropriate party to such an action. Wolf Creek is a named party merely to assist in obtaining jurisdiction over Brady in an inconvenient forum. The entire purpose of this lawsuit is for Holman to gain advantage over Brady, the only other member of the LLC, not to advocate for both members' interests on a common footing. The case should have been brought as a suit for declaratory judgment as to control of Wolf Creek, or for asserted breach of the LLC agreement to the extent Holman believes the new Lease with Mountain is somehow unfair. It wasn't brought that way, however, because Holman needed to join Wolf Creek to support jurisdiction in a forum that is inconvenient to Brady. There is no basis for a derivative action, except as a forbidden aid to personal jurisdiction that otherwise does not exist. From the allegations in Holman's Complaint, this action is in the best interest of Holman, not in the best interests of Wolf Creek and all members of Wolf Creek.

The Washington Supreme Court cautioned that "derivative suits are disfavored and may be brought only in *exceptional circumstances*." *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 147, 744 P.2d 1032, 1063 (1987) (emphasis added). CR 23.1, which the trial court ignored, serves as an important gatekeeper for derivative claims to ensure they proceed only in the appropriate "exceptional circumstances." Holman's lawsuit is not in the best interest of Wolf Creek, as his

derivative claim is a thinly disguised personal claim against Brady. The trial court's disregard of the important pleading requirements set forth in CR 23.1 constituted reversible error.

3. How will Holman be prejudiced if this court entertains Mountain's challenge to the trial court's Order Denying Defendants' Motion to Dismiss entered on July 8, 2013 now, rather than following entry of a final judgment resolving the issues that remain pending in the trial court?

Answer: No prejudice.

Discussion: Holman will not incur prejudice if the derivative issues on appeal are resolved now, nor did he claim the existence of prejudice in his appeal brief. What is more, not reviewing the Order Denying Defendants' Motion to Dismiss now will result in piecemeal appeals, which runs contrary to the purpose of RAP 2.4(b). One of the beneficial effects of RAP 2.4(b) "is the avoidance of undesirable piecemeal appeals." *Adkins*, 110 Wash.2d at 135.

4. If Holman is prejudiced if this court entertains Mountain's challenge to the trial court's July 9, 2013 Order now, then did the trial court abuse its discretion by entering a final partial judgment in light of that order and the claims that remain pending before the trial court?

Answer: No.

Discussion: Holman will incur no prejudice if the derivative issues on appeal are resolved now, nor did he claim the existence of prejudice in

his appeal brief.

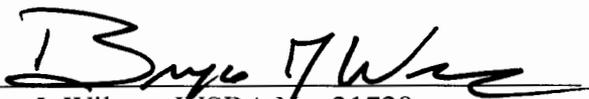
To the extent Holman claims prejudice in his supplemental brief, the claimed prejudice would need to be evaluated to determine whether the trial court's decision (made at Holman's request) to enter a final partial judgment constituted reversible error given the significant deference afforded the trial court under the abuse of discretion standard of review. If Holman now claims the existence of prejudice, Appellants request the opportunity to further brief the issue in response to this question.

IV. CONCLUSION

For the reasons set forth above and in Appellants' opening and reply briefs, Holman's derivative claim fails, and the trial court committed reversible error in denying Appellants' Motion to Dismiss the same.

DATED this 22nd day of April, 2016.

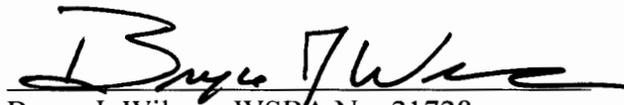
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of April, 2016, I caused to be served a true and correct copy of the foregoing document as follows:

| | |
|---|---|
| Kammi Mencke-Smith Kevin J. Curtis Winston & Cashatt, Lawyers, PS 601 W. Riverside Ave., Ste 1900 Spokane, WA 99201 | <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Fax Transmission |
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