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SUPREME COURT
STATE OF WASHINGTON

No. 80554-7

2008 JUN 12 A 10:01

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SUPREME COURT OF THE STATE OF WASHINGTON
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WASHINGTON MOTORSPORTS, LTD., by and through Barry W.
Davidson, in his capacity as Receiver and as Acting General Partner,

Respondent,

v.

LeMASTER & DANIELS, P.L.L.C., a Washington limited liability
company,

Defendant,

and

LARRY D. WYATT and JANE DOE WYATT, husband and wife,

Appellant.

PETITIONER'S
~~APPELLANT'S REPLY BRIEF~~

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I. INTRODUCTION

The Receiver's Response to Wyatt's Appeal Brief fails to address the trial court's abrogation of the well-established, non-discretionary right to a change of judge afforded a party by RCW 4.12.050. Case law is clear that a timely motion for change of judge presents no question of discretion or policy and must be granted as a matter of right. See State v. Mauerman, 44 Wn.2d 828, 830, 271 P.2d 435 (1954); Marine Power & Equip. Co. v. State, 102 Wn.2d 457, 461, 687 P.2d 202 (1984). The trial court impermissibly exercised a great deal of discretion in denying Wyatt's Motion for Change of Judge.

Instead, the Receiver would like the Court to focus exclusively on a strained interpretation of RCW 7.60.160, Washington's receivership statute. The erroneous interpretation of RCW 7.60.160 is necessary to support the Receiver's argument that the statute is both ambiguous and conflicts with RCW 4.12.050. The Receiver's interpretation of RCW 7.60.160 ignores the statute's plain language, which solely and unambiguously provides that "litigation by or against a receiver is adjunct to the receivership case," and that "[a]ll adjunct litigation shall be referred to the judge, if any, assigned to the receivership case," without mention of change of judge. The Receiver's argument wrongly relies on legislative purpose to justify the trial court's re-writing of an unambiguous statute.

In addition, the Receiver's argument regarding Wyatt's failure to move for a change of judge in the Receivership Action is a legally misplaced red herring. Wyatt, a non-party, was barred from moving for a change of judge in the Receivership Action. The Receiver's argument also deflects from the point that the relevant inquiry is not whether Wyatt should have (or even could have) moved for a change of judge in the Receivership Action, but whether the trial court could have reconciled Wyatt's statutory right to a change of judge under RCW 4.12.050 with RCW 7.60.160's requirement that all actions by the Receiver are "referred" to the receivership judge.

Finally, the Receiver expends a great deal of effort strenuously objecting to Wyatt's so-called "*in terroram*" one-line suggestion that continuing jurisdiction in the Receivership Action is "questionable." However, there is no clear guidance either way. If this Court finds in favor of Wyatt, it will necessarily have to decide whether the judge in the Receivership Action had continuing jurisdiction to act in that action, given that it should have been transferred to another judge. Thus, jurisdiction is indeed, "questionable."

II. ARGUMENT

A. Wyatt Was Entitled to a Change of Judge in the Adjunct Case.

The Receiver's argument that Wyatt was not entitled to a change of judge ignores the plain language of RCW 4.12.050 and, instead, focuses on the erroneous argument that "this is not the ordinary superior court case." *Respondent's Brief at p. 16*. In this regard, the Receiver's argument mirrors the trial court's flawed interpretation of RCW 7.60.160.

1. **The Plain Language of the Receivership Statute Unambiguously Allows for a Change of Judge.**

RCW 7.60.160 provides that "[l]itigation by or against a receiver is adjunct to the receivership case," and that "[a]ll adjunct litigation shall be referred to the judge, if any, assigned to the receivership case."

RCW 7.60.160(2). Notably, RCW 7.60.160 is silent as to a party's right to seek a change of judge in a receivership action. See RCW 7.60.160.

The method of statutory interpretation employed by the trial court and urged by the Receiver ignores the foremost rule of statutory interpretation: a court should not subject an unambiguous statute to statutory construction. The Receiver fails to argue that the statutory text is in any way ambiguous.

In order to ascertain the meaning of a statute, a court must first look to the plain language. “If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.” Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (citing Killian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)). A court must “decline[] to add language to an unambiguous statute, **even if it believes the Legislature intended something but did not adequately express it.**” Id. (emphasis added). “Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” Id. Thus, when a statute is not ambiguous, “only a plain language analysis of a statute is appropriate.” Cerrillo, 158 Wn.2d at 20.

RCW 7.60.160(2) unambiguously states that litigation by or against a receiver shall be “referred” to the judge that is assigned to the receivership case and that such litigation should be “adjunct” to the receivership case. This is not subject to two interpretations as would render it ambiguous. See Cerrillo, 158 Wn.2d at 20. The plain language simply requires that all adjunct cases to be “assigned” to the receivership court and ultimately remain “dependent and subordinate” to the receivership action. See The American Heritage Dictionary (2d College ed.), pp. 79, 1038 (definitions of “referred” and “adjunct”). Nothing in RCW 7.60.160 (or any other part of the receivership statute) requires or

implies that receivership and adjunct cases permanently remain with that same receivership judge after referral, particularly in light of a valid motion for change of judge.

Thus, the Receiver's resort to the stated legislative purpose of chapter 7.60 RCW, which is "to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein," cannot be used to disregard the plain statutory directive of RCW 7.60.160. Moreover, the cited statutory purpose, even if considered, is irrelevant because it does not directly or indirectly address the change of judge issue.

2. There is No Conflict Between RCW 7.60.160 and RCW 4.12.050.

The Receiver also attempts to justify the trial court's ruling by re-writing RCW 7.60.160 to create a conflict with RCW 4.12.050's clear directive of entitling a party the right to a change of judge. Doing so not only violates the controlling canon of statutory construction (as discussed above), but also fails to create a conflict. RCW 7.60.160 and RCW 4.12.050 operate in complete harmony. A party can exercise his right to a change of judge in an adjunct action at the same time that all adjunct matters are referred to the receivership judge. Nothing in either

RCW 7.60.160 or RCW 4.12.050 prohibits a new receivership judge from being assigned to handle all adjunct matters following a party's exercise of his recusal rights under RCW 4.12.050.

Instead of highlighting any conflict within the statutes themselves, the Receiver once again turns to the purported legislative purpose of RCW 7.60.160 and asserts that the statute's goal of "streamlined" receivership litigation conflicts with the right to a change of judge. First, the cited statutory purpose, even if considered, is irrelevant because it does not directly or indirectly address the change of judge issue.

Also in this regard, the Receiver argues that allowing a party to an adjunct action to have a change of judge would present a conflict because it would allow for numerous changes of judge "...*ad infinitum...ad absurdum.*" *Respondent's Brief at p. 24.*

First, because only "parties" can move for a change of judge, the potentially numerous creditors and other "persons of interest" in a receivership would not be allowed to move for a change of judge. Second, although allowing each side to an adjunct proceeding to obtain their statutory right to a change of judge has the potential to create some amount of judicial strain, depending on the number of adjunct proceedings, it is nonetheless required by statute. If the Legislature had intended to preclude parties to adjunct actions from exercising their right

to a change of judge, it could have expressed that through the plain language of the statute. It did not. In any case, the Court has established that efficiency, increased costs and loss of judicial economy are insufficient bases to deny a motion for change of judge. See Marine Power & Equip., 102 Wn.2d 457. The Receiver's dismissal of this Court's precedent in this regard as "current judicial gloss," is insufficient to rebut valid, binding precedent from this Court.

3. Wyatt Was Not Permitted Nor Required to Move for a Change of Judge in the Receivership Action.

The Receiver apparently argues that, as a "party in interest," Wyatt had the ability and duty to move for a change of judge in the Receivership Action. *Respondent's Brief at p. 18.*

This argument completely ignores the fact that a non-party cannot move for a change of judge. See RCW 4.12.050 (allowing "any party" to move for a change of judge); see also Riverpark Square, LLC v. Miggins, 143 Wn.2d 68, 899 P.2d 800 (1995) (holding that in order to move for a change of judge, the movant "must be a party to the action").

The Receiver also attempts to persuade this Court to accept the trial court's finding that Wyatt's limited, non-party participation in the receivership action somehow precludes him from moving for a change of judge in the adjunct case. As discussed above, this erroneously assumes

that Wyatt was allowed to move for a change of judge in the Receivership Action.

In an attempt to bolster the argument that Wyatt actively participated in the Receivership Action, the Receiver repeatedly references non-party actions taken by LeMaster & Daniels, P.S. (hereafter, "L&D"), and actions taking on behalf of L&D that "could have" also been taken on behalf of Wyatt, but, as it must concede, were not actually taken on his behalf. *Respondent's Brief at p. 7.* Any alleged participation by L&D is completely irrelevant because L&D did not move for a change of judge, and L&D is not a party to this Appeal.

The Receiver ignores Wyatt's extremely limited role in the Receivership Action: (i) entering a Special Notice of Appearance in the Receivership Action on February 6, 2004, to receive all further pleadings regarding the third-party depositions of Wyatt and other L&D employees; and (ii) responding to requests to produce documents as a non-party. Wyatt's role was as a limited witness.

The Receiver apparently argues that because non-parties in a receivership action "have a right to be heard . . . whether or not they have been joined as a party to the action," Wyatt somehow had the right and

responsibility to move for a change of judge in the Receivership Action.¹ *Respondent's Brief at pp. 18-19, 29.* First, it is difficult to see how the *ability* to actively participate in the Receivership somehow charges Wyatt with *actual* participation. In any case, it is undisputed that non-party "participation" (whether the mere ability to participate or active participation) is irrelevant, because only *parties* may move for a change of judge. See Riverpark Square, LLC v. Miggins, 143 Wn.2d 68, 80, 17 P.3d 1178 (2001) (holding that in order to file a successful motion for change of judge, the applicant "must be a party to the action and establish prejudice by motion, supported by affidavit) (citing RCW 4.12.050) (emphasis added). Wyatt, as a non-party, was not allowed to file a motion for change of judge in the Main Receivership Action. Thus, the Receiver's argument that Wyatt was not procedurally entitled to relief because he failed to move for a corresponding recusal in the receivership is not well-founded. To the contrary, Wyatt did not have the right of recusal until he became a party in the Adjunct Action.

¹ Ironically, the argument advanced by the Receiver here – that non-parties to a receivership (such as Wyatt) somehow have the right, if not the obligation, to file a motion for change of judge – would create far more chaos and undue strain on the judicial system than the argument herein – that *parties to adjunct actions* are entitled to a change of judge. The Receiver's argument certainly calls into question the validity of its proposition that concerns for strain on the judicial system somehow control this Court's determination.

The appeal issue is not whether Wyatt properly moved for a change of judge in the Receivership Action, but rather, whether the trial court's interpretation is in error because it fails to give effect to both RCW 4.12.050 and 7.60.160 and recognize that a change of judge in the Adjunct Action would require a change of judge in the Receivership Action.

B. Appropriate Relief on Remand.

The Receiver argues that if the Court finds that the trial court erred in denying Wyatt's motion, only the Adjunct Action should be transferred to a new judge. This flies in the face of the rest of the Receiver's argument: that adjunct actions should remain with the receivership judge in order to effectuate the streamlining and efficiency goals of the Receivership Statute, particularly because the judge in the Receivership Action will necessarily have to resolve issues that are "intertwined with" the Adjunct Action. By the Receiver's own argument, the actions should stay together – albeit with a different judge.

The Receiver points out that Wyatt does not cite any authority for the proposition that the rulings made in the Receivership Action after denial of Wyatt's motion are "questionable." Notably, the Receiver fails to cite any authority to support his contrary position. In fact, there is no authority on point. However, it follows that if the trial court erred in

denying Wyatt's motion because it could have and should have transferred both the Receivership Action and the Adjunct Action to a new judge, all of the actions taken in the Receivership Action would not have been taken, and this Court must decide to what effect.

III. CONCLUSION

Based on the foregoing argument, Wyatt respectfully submits that the trial court erred in denying Wyatt's Motion for Change of Judge. This Court should reverse and remand for assignment of the L&D and Receivership Actions to a new judge and vacate any rulings in the L&D and Receivership Actions entered after the wrongful denial of Wyatt's Motion for Change of Judge.

RESPECTFULLY SUBMITTED this 11th day of June, 2008.

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CERTIFICATE OF SERVICE

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I hereby certify that on the 11th day of June, 2008, I caused to be served via email a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF addressed to the following:

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