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Court of Appeals No. 25947-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON MOTORSPORTS, LTD., Respondent,

v.

LEMASTER & DANIELS, P.L.L.C., Defendant, LARRY D. WYATT,
Petitioner.

PETITIONER'S REPLY RE: MOTION FOR DISCRETIONARY
REVIEW

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I. ARGUMENT

A. The Trial Court Committed Obvious Error.

The Receiver's Response to Wyatt's Motion for Discretionary Review fails to address the trial court's and Court of Appeals' 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.

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 contingent argument that the two statutes conflict, which was adopted by the Court of Appeals. The Receiver's interpretation of RCW 7.60.160 ignores the actual text, 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.

The unavoidable answer is that (i) RCW 7.60.160 is not ambiguous, and (ii) there is no conflict between RCW 7.60.160 and RCW 4.12.050, and therefore, it was obvious error to deny Wyatt his right to a change of judge. The trial court and Court of Appeals decisions, when taken to the logical conclusion, effectively mean that no party could ever have a change of judge within the context of a receivership action, even in the presence of actual prejudice. That argument is legally and logically unsound.

Wyatt respectfully submits that the Receiver has failed to rebut Wyatt's assertion that the Court of Appeals committed obvious error. Wyatt is entitled to review.

1. Reliance on the Legislative Purpose of RCW 7.60.160 is In Error Because the Statute is Unambiguous.

The Receiver's argument that RCW 7.60.160 and RCW 4.12.050 conflict is based on the trial court and Court of Appeals' flawed interpretation of RCW 7.60.160. That statute 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 Receiver argues that certain "black letter rules of statutory construction" support the trial court's interpretation of this statute as prohibiting a change of judge. The method of statutory interpretation employed by the trial court, urged by the Receiver, and adopted by the Court of Appeals 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 initially assigned to the receivership court and ultimately remain associated and subordinate to the receivership action. Nothing in RCW 7.60.160 (or any other part of the receivership statute) expressly requires receivership and adjunct cases to remain with that same receivership judge after referral.

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 attempts to justify the trial court's and Court of Appeals' rulings 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 “streamlined” receivership litigation conflicts with the right to a change of judge. The Receiver argues that because receivership actions involve “literally hundreds of persons in interests, creditors, owners, etc.,” allowing each a change of judge would yield an “absurd” result. (Receiver’s Response at 13.)

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”). Further, only one plaintiff or defendant is allowed to move for a change of judge. See LeMon v. Butler, 112 Wn.2d 193, 770 P.2d 1027 (1989). Thus, the Receiver’s citation to “hundreds” of persons and creditors in interest is of no consequence because none of these hypothetical persons has the legal right to a change of judge, and in any case, only one party on each side has the right to change of judge. The Receiver’s argument is further discredited when the actual pending Receivership Action is analyzed. The Receiver has initiated only one adjunct proceeding naming two additional defendants (Wyatt and L&D). The potential for “hundreds” of persons to

exercise their recusal rights does not exist. Wyatt would be the only defendant allowed such relief.

The Receiver's assertion that LeMon supports its position on this issue is also in error. In LeMon, the Court's ruling was limited to deciding that co-plaintiffs in an action constitute one "party" for purposes of RCW 4.12.050. LeMon, 112 Wn.2d at 203. Thus, the Court held that only one plaintiff and one defendant in each action are allowed to move for a change of judge under RCW 4.12.050. Id. Significantly, the Supreme Court in LeMon in no way curtailed the non-discretionary right of a party to move for a change of judge. To the contrary, the LeMon holding reaffirms the supremacy of the right granted to each party to a change of judge. See id.

3. Wyatt Was Not Permitted Nor Required to Move for a Change of Judge in the Receivership 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. 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"). See e.g., Receiver's Response at 3-4, 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 Petition.

The Receiver ignores Wyatt's extremely limited role in the Receivership Action: (1) entering a Special Notice of Appearance in the Receivership Action on February 6, 2004, for the stated purpose of receiving all further pleadings regarding the third-party depositions of Wyatt and other L&D employees (Ex. "C" to Motion to Modify); and (2) responding to requests to produce documents as a non-party. (Ex. "B" to Motion to Modify at 2-3.) Wyatt's role was as a limited witness.

It is undisputed that Wyatt was not a party to the Receivership Action. Only a party can file a motion for a change of judge. See RCW 4.12.050; see also 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. The Receiver fails to even address the fact that only a party can file for a change of judge.

In any case, 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. The Receiver Apparently Concedes That the Trial Court's Decision Would Render Further Proceedings Useless.

The Receiver fails to argue that the trial court's decision would not render further proceedings useless if the decision was ultimately overturned on appeal. This would be a difficult argument to make. As argued in Wyatt's opening brief, the entire case would have to be retried with a new judge if the decision was overturned on appeal after trial. Not surprisingly, appellate courts routinely choose to resolve issues related to motions to recuse on discretionary review. See e.g., Harbor Enter., Inc. v. Gudjonsson, 116 Wn.2d 283, 291, 803 P.2d 798 (1991); Marine Power & Equip., 102 Wn.2d at 459; Hanno v. Neptune Orient Lines, 67 Wn. App. 681, 838 P.2d 1144 (1992); In re Estate of Black, 116 Wn. App. 492, 66

P.3d 678 (2003); In re Marriage of Tye, 121 Wn. App. 817, 90 P.3d 1145 (2004). The Receiver apparently concedes this well-established point.

II. CONCLUSION

Based on the foregoing argument, the court should grant discretionary review of the Court of Appeals' decision upholding Wyatt's Motion for Change of Trial Judge under RCW 4.12.050.

DATED this 3 day of October, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2007, I caused to be served via email a true and correct copy of the foregoing Petitioner's Reply Re: Motion for Discretionary Review addressed to the following:

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