

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GRAYSMARSH, LLC, a limited liability
company,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY;
WASHINGTON STATE
CONSERVATION COMMISSION;
CLALLAM CONSERVATION
DISTRICT; and SEQUIM-PRAIRIE
TRI-IRRIGATION ASSOCIATION,

Respondents,

and

SEQUIM VALLEY RANCH, LLC,

Appellant.

No. 41507-1-II

RULING GRANTING MOTION
ON THE MERITS TO AFFIRM

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

Sequim Valley Ranch, LLC (SVR) appeals from an order granting Graysmarsh's motion for voluntary dismissal and from a stipulated order and judgment entered thereafter. Graysmarsh filed a motion on the merits under RAP 18.14. Concluding that SVR's appeal is clearly without merit, this court grants Graysmarsh's motion on the merits and affirms the trial court's orders.

On November 25, 2003, the Department of Ecology (Ecology) issued a final environmental impact statement (FEIS) evaluating a water conservation plan

for a segment of the Dungeness River. The purpose of the conservation plan was to increase stream flow in the Dungeness River to protect threatened species of fish. Graysmarsh owns 405 acres of wetlands that it alleged were threatened by Ecology's water conservation plan. In 2004, Graysmarsh sought an injunction and declaratory relief challenging the FEIS, claiming that Ecology violated the State Environmental Protection Act (SEPA). Graysmarsh sought to enjoin implementation of the water conservation plan until a supplemental FEIS that complied with SEPA was completed. Graysmarsh argued that the EIS failed to properly assess certain environmental impacts to the wetlands should the water conservation plan be implemented.

On June 16, 2004, SVR filed a motion to intervene. SVR operates a lavender farm that receives irrigation water from Sequim Prairie Tri-Irrigation Association, a non-profit which sought funding for the water conservation plan. SVR claimed interest in the matter because it supported the water conservation project proposed by Ecology. SVR posited that its interests in the litigation were different than the existing defendants, who were not reliant on implementation of water conservation measures. SVR claimed that the water conservation project was important to ensure late-season irrigation water for its lavender crop. On September 30, 2004, the original parties to the litigation stipulated that SVR could intervene as a defendant in the matter.

On October 21, 2010, Graysmarsh moved for voluntary dismissal of SVR because SVR refused to agree to a settlement between Ecology and Graysmarsh. SVR opposed the motion. The trial court granted the motion on

October 29, 2010. The same day, it entered the following Stipulated Order and Judgment:

1. Ecology, Sequim-Prairie, and the Conservation District shall not take any action to implement or fund structural improvements identified in the Conservation Plan in the area designated as the potential zone of contribution unless Graysmarsh consents to such an action. Action will be defined as in the law for triggering SEPA, and will include any funding of projects or direct implementation of projects in the zone of contribution, which is described in the map attached hereto as Exhibit 1 and incorporated herein by reference. The FEIS therefore shall not be applicable for any action regarding the implementation of the Conservation Plan in the areas designated as the zone of contribution.

2. Ecology, if it desires to take any action in the zone of contribution, will first perform additional environmental review under SEPA that could result in the preparation of an addendum to the current FEIS, a supplemental EIS, or a new EIS. The basis for the EIS addendum, supplemental EIS, new EIS, or other SEPA work, would be the new information provided in the last several years including the work completed by Aspect Consulting for Graysmarsh, and additional work completed for Ecology's development of the new instream flow rule for WRIA 18 (Dungeness-Elwha).

3. The parties Graysmarsh and Sequim Valley each maintain and in no manner waive their rights to involvement in the process relating to the additional environmental review under SEPA, and to challenge and appeal any final decision, in accordance with SEPA, the Administrative Procedure Act, and any other applicable law.

Clerk's Papers (CP) at 278-279. This appeal follows.

An appeal is "clearly without merit" under RAP 18.14(e)(1) if the issues "(a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court." First, SVR argues that the trial court erred in entering the order of dismissal because the order resulted in significant prejudice to it. CR 41(a)(1)(B) requires the court to dismiss an action upon a

motion by the plaintiff if the motion is made before the conclusion of plaintiff's opening case. See *Greenlaw v. Renn*, 64 Wn. App. 499, 501-02, 824 P.2d 1263 (1992). However, if a "counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection." CR 41(a)(3). CR 41 is designed to allow dismissal only where no prejudice will result to any party. See *In re Marriage of Parker*, 78 Wn. App. 405, 409, 897, P.2d 402 (1995), review denied, 128 Wn.2d 1016 (1996). But the "mere prospect of a second lawsuit does not constitute the type of prejudice with which the rule is concerned." *Farmers Ins. Exch. v. Dietz*, 121 Wn. App. 97, 106, 87 P.3d 769 (2004). Rather, the prejudice inquiry focuses on whether "legal or equitable hurdles" bar a defendant from bringing another lawsuit. *Farmer's Ins. Exch.*, 121 Wn. App. at 106.

Graysmarsh responds that it brought no claims against SVR, nor did SVR file any counterclaims against Graysmarsh. SVR relies on *In re Marriage of Parker* in arguing that claims that are not specifically labeled "counterclaims" can be deemed as such for purposes of this rule. SVR claims that its motion to intervene serves as the "functional equivalent" counterclaims for the purpose of the rule. *In re Parker*, 78 Wn. App. at 409.

SVR filed its motion to intervene stating that it sought "to argue in support of the validity of the Conservation Plan and the adequacy of the EIS." CP at 113. This is unlike *Parker*, where the appellant specifically requested "spousal maintenance, child support, a parenting plan, and an alternative division of property." *Parker*, 78 Wn. App. at 409. Moreover, the *Parker* court noted that

the pleading scheme in dissolution cases required that requests for relief found within a response to a dissolution petition be treated as counterclaims. See *Parker*, 78 Wn. App. at 409. Because SVR filed no counterclaims, Graysmarsh was free, as a matter of right, to dismiss unless dismissal would prejudice SVR. See *Farmers Ins. Exch.*, 121 Wn. App. at 101. SVR has not demonstrated prejudice as a result of the dismissal because it has not shown that legal or equitable hurdles bar it from bringing a second lawsuit. See *Farmers Ins. Exch.*, 121 Wn. App. at 106.

SVR next claims that the stipulated judgment is void because Ecology acted ultra vires in entering into it. SVR also argues that the trial court exceeded its authority under SEPA when it entered the order. Graysmarsh responds that because SVR was not a party to the settlement, it has no standing to contest its validity here. *Hines v. Cheshire*, 36 Wn.2d 467, 472, 219 P.2d 100 (1950).

A party must be “aggrieved” in order to seek appellate review. RAP 3.1. “[A]ggrieved” means the party must be subject to the “denial of some personal or property right, legal or equitable, or [subject to] the imposition . . . of a burden or obligation.” *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 691 (1949). The party’s “proprietary, pecuniary, or personal rights” must be “substantially affected.” *Polygon Nw. Co. v. American Nat’l Fire Ins. Co.*, 143 Wn. App. 753, 767, 189 P.3d 777, review denied, 165 Wn.2d 1033 (2008) (quoting *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987)). Having been a party to the proceedings below does not confer

automatic standing to appeal. See, e.g., *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003); *Terill v. City of Tacoma*, 195 Wn. 275, 80 P.2d 858 (1938).

Here, the goal of the water conservation plan was to provide for greater stream flow in the Dungeness River for the purpose of protecting threatened species of fish. SVR would benefit only incidentally from the possible increased water supply for late-season irrigation of its lavender crop. The order does not affect SVR's "proprietary, pecuniary, or personal rights" in the manner necessary for it to be aggrieved. This case stands in contrast to the facts of *Mestrovac v. Department of Labor and Indus.*, on which SVR relies. 142 Wn. App. 693, 704, 176 P.3d 536 (2008), *aff'd sub nom. Kusturar v. Department of Labor and Indus.*, 169 Wn.2d 81 (2010). In that case, the Board of Industrial Insurance Appeals sought to appeal an order of the trial court entered in a proceeding to which it was not a party. The Board was aggrieved because it was liable for interpreter costs attorney fees. *Mestrovac*, 142 Wn. App. at 704. Similarly, in *State v. G.A.H.*, 133 Wn. App. 567, 575, 137 P.3d 66 (2006), non-party DSHS was allowed to appeal a trial court's order in a juvenile offender matter because it was ordered to place the offender child in foster care. This required DSHS to "assume custodial and financial responsibility" for the child's welfare. *G.A.H.*, 133 Wn. App. at 575. The order here does not impose an obligation on SVR and leaves SVR in no worse position than before the commencement of the litigation. While SVR may be "disappointed" over the result, and wishes that Ecology would continue to litigate the existing FEIS, that is not enough to make SVR an

aggrieved party for the purposes of appellate review. *State v. Taylor*, 150 Wn.2d at 603.

SVR's appeal is clearly without merit. Accordingly, it is hereby

ORDERED that Graysmarsh's motion on the merits is granted and the trial court's order dismissing SVR and the Stipulated Order and Judgment are affirmed.

DATED this 7th day of November, 2011.



Eric B. Schmidt
Court Commissioner

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