The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAUL LEHTO, Individually, JOHN WELLS, Individually;

Plaintiffs,

vs.

SEQUOIA VOTING SYSTEMS, Inc. and SNOHOMISH COUNTY;

Defendants.

NO. C05-0877 RSM

DEFENDANT SNOHOMISH COUNTY'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

Noted on Motion Calendar: Friday, June 10, 2005

I. MOTION

This motion to dismiss is brought by Defendant Snohomish County pursuant to Fed. R. Civ. P. 12(b). Snohomish County seeks to dismiss in its entirety the lawsuit brought by Plaintiffs Paul Lehto and John Wells on the grounds that the claims alleged in their Complaint are not legally cognizable due to a lack of standing, limitations defenses, or for failure to join an indispensable party. This motion is based on the following memorandum of law, the authorities cited herein and the pleadings already on file with the Court.

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II. INTRODUCTION

This lawsuit is brought by two Snohomish County residents who claim that Snohomish County's 2002 contract (the "Contract") with Sequoia Voting Systems, Inc. ("Sequoia") for the production and support of electronic voting machines is somehow voidable as against public policy or state and federal law. For a number of reasons made apparent on the face of the Complaint, Plaintiffs fail to present a cognizable legal claim.

First, Plaintiffs' own Complaint shows that the Contract at-issue is now nearly three years old, and that Plaintiffs themselves have previously used and acquiesced as to the suitability of the voting machines they now attempt to question. Their claims are accordingly barred by applicable statutes of limitations and the equitable doctrines of laches and estoppel. ***Second,*** Plaintiffs clearly lack standing to challenge the Contract, either for lack of privity, or for the failure to show they meet the common law requirements to bring a suit as taxpayers challenging a government contract. ***Finally,*** although Plaintiffs admit it is Washington's Secretary of State that bears the responsibility for determining the suitability of any given voting system, they have failed to join the Secretary of State as an indispensable party to this suit.

For all of these reasons, Plaintiffs' claims against Snohomish County are without legal merit and Plaintiffs' Complaint should be dismissed in its entirety.

III. STATEMENT OF FACTS

A. Procedural History Of The Case

Plaintiffs filed this action in King County Superior Court on April 7, 2005. Compl (Docket No. 2). They served the Summons and Complaint on Defendant Snohomish

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County on April 14, 2005. Pl.'s Decl. of Service (Docket No. 5). On information and belief, Sequoia was served on approximately the same date. Id. On May 11, 2005, Sequoia removed the action to this Court. Def.'s Not. Of Removal (Docket No. 1).

B. The Substance of Plaintiffs' Claims

Paragraph 1.1 of Plaintiffs' Complaint broadly sets forth the substance of Plaintiffs' claims. In it, Plaintiffs state:

> This case arises out [of] a dispute concerning a contract between defendants Snohomish County and Sequoia Voting Systems, Inc. for the purchase of Sequoia touch-screen voting computers employed in the 2004 elections (hereinafter "the Contract"). . . . . Plaintiffs make claims under the Uniform Declaratory Judgments Act [RCW 7.24.010, *et seq.*] for specific declarations respecting the Contract and its provisions and for such further relief as may be necessary and proper.

More specifically, Mr. Lehto and Mr. Wells state:

> Plaintiffs Wells and Lehto, as citizens and voters, object to provisions of the contract between Snohomish County and Sequoia Voting Systems, Inc. attempting to shield from public view and verification the means by which votes are recorded, counted, tabulated, and reported on the grounds that they contain "trade secret," "confidential," or "proprietary" materials. Plaintiffs contend, among other things, that provisions of the contract ought properly to be set aside based upon contractual, statutory, Constitutional and public policy grounds.

Compl. at ¶ 1.2.

In support of these general contentions, Plaintiffs offer 34 additional pages of averments, the bulk of which are little more than legal conclusions or political commentary. However, the following allegations establish that Plaintiffs' Complaint fails to state a cognizable legal claim, and are accordingly relevant to this motion:

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1. Snohomish County Entered Into The Contract Over Two Years Ago.

Plaintiffs' Complaint states that "[o]n or about Spring 2002, Snohomish County entered into negotiations with defendant Sequoia for the purchase of DRE (Direct Recording Electronic) voting machines for Election Day voting purposes." Id. at ¶ 5.3. "On July 24, 2002, Snohomish County executed the purchase contract for 1000 DRE's from Sequoia . . . ." Id. at ¶¶ 5.4, 3.9, Ex. 1. Plaintiffs make no allegation they sought to assert this claim prior to filing the current suit. Id.

2. The Complaint Addresses Past Election Activity.

Plaintiffs' Complaint also makes numerous references to the conduct of past elections, as opposed to future actions. For instance, it states that "Lehto was an election day attorney observer . . . in the November 2004 election . . . and observed both voting and whatever vote counting was allowed to be observed at Penny Creek Elementary School in Snohomish County." Id. at ¶ 4.8. Plaintiffs claim that while Mr. Lehto was so stationed, he "was not able to observe the counting of electronic ballots, even though the Sequoia touch screens printed out election totals." Id. at ¶ 4.17. In other sections of the Complaint, Plaintiffs likewise claim:

> . . . ballots cast by Washington citizens for the Democratic gubernatorial candidate, Christine Gregoire, were illegally, unconstitutionally, and faithlessly attributed to the Republican gubernatorial candidate, Dino Rossi, due to systematic errors of the AVC EDGE Electronic Voting System technology and/or DRE (Direct Recording Electronic) voting machines sold by Sequoia to Snohomish County.

Id. at ¶ 4.15.

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In still other sections, Plaintiffs claim that "at least 81 different touch screens had to be recalibrated on election day [2004], some more than once, meaning that nearly 10% of the touch screens exhibited vote hopping or switching behavior sufficient to require intervention by elections officers or troubleshooting teams." Id. at ¶ 5.26. Plaintiffs make no allegations that they sought to institute a timely election challenge after they became aware of these alleged improprieties in 2004. Id.

3. The Causes of Action All Relate To The Contract Between Snohomish County And Sequoia.

Although Plaintiffs allege twelve separate causes of action, all twelve seek the rescission of a contract between Snohomish County and Sequoia because it is violative of some law or public policy. See generally, Id. at ¶¶ 1.1-1.2. Accordingly, Plaintiffs' Complaint is really just a taxpayer suit presenting one claim: namely, that the government's contract is illegal (based on twelve different sources of law) and should be avoided. This commonality is apparent by examining each of Plaintiff's claims:

- The First Claim: requests that the Court: ". . . declare the Contract void . . . [because] . . . it violates the above-described liberty interests in free and equal elections, burdens and dilutes the fair, equal and effective right to vote, and gives rise to an electoral scheme which is not rationally related to the purposes of establishing a representative government . . . ." Id. at ¶ 7.1.5;

- The Second Claim: requests that the Court ". . . declare the Contract void . . . to the extent it violates the transparency of elections mandated by the Constitution, Washington law and statute, and Washington tradition." Id. at ¶ 7.2.4;

- The Third Claim: requests that the Court ". . . declare the Contract void . . . to the extent that it establishes an impermissible delegation of core governmental functions to a private party while purporting to relieve from that private party from the performance of the Constitutional, legal, and traditional obligations associated therewith." Id. at ¶ 7.3.6;

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- The Fourth Claim: requests that the Court "declare the Contract void . . . to the extent it sets forth trade secrecy and confidentiality in violation to the principles set forth under the Washington Constitution, Washington law and statute, and Washington tradition." Id. at ¶ 7.4.5;

- The Fifth Claim: requests that the Court "declare that Sequoia breached its express and implied [contractual] warranties justifying rescission, restitution, and damages." Id. at ¶ 7.5.5.

- The Sixth Claim: requests that the Court "declare the scheme established by the Contract to be violative of the requirements of Washington Constitution, law and state, and tradition." Id. at ¶ 7.6.3;

- The Seventh Claim: alleges "that the contract to purchase Sequoia AVC Edge voting machines is illegal, and void *ab initio* (from the day it was signed) because it purports to waive the right to vote a legal ballot of Snohomish County electors," and because it purportedly does not comply with statutory requirements for a "ballot." Id. at ¶ 7.7.1;

- The Eight Claim: requests that the Court "declare the Contract is void as the product of impermissible conflict of interest on the part of Snohomish County agents, employees and officials involved in the Contract negotiations and decisions to purchase . . . the Sequoia equipment." Id. at ¶ 7.8;

- The Ninth Claim: requests that the Court award remedies because the Contract provisions call for illegal "tying" under the "Magnuson-Moss Warranty Act; Id. at ¶ 7.9.4;

- The Tenth Claim: requests that the Court "declare that the Contract is invalid and illegal in that its implementation is contrary to the statutory scheme for elections . . ." Id. at ¶ 7.10;

- The Eleventh Claim: seeks "other equitable, compensatory, or restitutionary relief" as provided under the Declaratory Judgment Act, but does not allege any new facts or causes of action separate from those already relying on the Contract. Id. at ¶ 7.11;

- The Twelfth Claim: requests that "the Contract be rescinded, be deemed void *ab initio*, and that defendant Sequoia be required to disgorge the full extent of any remuneration received under this illegal contract . . . ." Id. at ¶ 7.12.

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4. No Allegations That Plaintiffs Are Taxpayers.

The Complaint alleges that Plaintiffs Mr. Lehto and Mr. Wells are both citizens of the United States, residents of Snohomish County, and registered voters therein. Id. at ¶¶ 2.1-2.2, 4.1-4.4. It further alleges both Mr. Lehto and Mr. Wells have voted "during the last two years" using Sequoia machines owned by Snohomish County. Id. at ¶¶ 4.3-4.4. There is no allegation that Mr. Lehto or Mr. Wells are Snohomish County taxpayers with standing to challenge contracts entered by Snohomish County's elected officials. Id.

5. Plaintiffs Do Not Allege They Presented Their Claims To The Attorney General Prior to Filing Suit.

Finally, Plaintiffs allege that "[b]ecause constitutional claims are raised, Rob McKenna, the Washington State Attorney General, shall be and (as of the time the defendants' answer this complaint) has been provided with a copy of this Complaint pursuant to the provisions and procedures of RCW 7.24.110." Id. at ¶ 2.8. They do not, however, allege they provided the Attorney General with any pre-lawsuit notice of the subject matter of their claims, as is required to assert taxpayer standing to challenge government decision to contract. Id.

6. The Secretary of State Is Not Named As a Party.

The Complaint makes reference to the Secretary of State's role in certifying election machines for use by County Auditor's offices, but does not name him as a party to this suit. The Complaint states that the "Secretary of State improvidently certified the Sequoia machines in violation of 29A.12.150(2), which requires the Secretary of State not to certify unless separate ballots available for audit purposes after the election are created." Id. at ¶ 7.7.6. It also states that "Sequoia touch screens do not comply with the

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requirements of Help America Vote Act of 2002 (HAVA) . . . they can only be used in elections under the questionable waiver of the Washington State Secretary of State of compliance with these requirements." Id. at ¶ 7.10.2. However, Plaintiffs do not name the Secretary of State as a party defendant in this lawsuit. Id.

IV. ARGUMENT[1]

Plaintiffs' rambling 35-page Complaint is replete with hyperbole and politicized commentary, but utterly devoid of alleged facts that would form the basis of a cognizable claim against Defendant Snohomish County. Nevertheless, upon sifting through Plaintiffs' narrative pleading, a few things become clear: (1) Plaintiffs' action seeks to challenge Snohomish County's contract with Sequoia, even though that contract was entered nearly three years and two elections ago; (2) Plaintiffs were not parties to the Contract, nor were they in privity to the parties therein; (3) Plaintiffs make no allegations that they are Snohomish County taxpayers, or that they complied with the prerequisites to bring suit as taxpayers; and (4) Plaintiffs have not named the Secretary of State as a party to this action, even though his certification is required before any machine is used in elections in this state. Such facts, established from the face of Plaintiffs' own Complaint, show Plaintiffs cannot assert a cognizable legal claim. See Fed. R. Civ. P. 12(b)(6)-(7); see also Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995) (parties can allege themselves out of court by averring facts that defeat their legal claims).

[1] Snohomish County hereby joins in the Motion to Dismiss concurrently submitted by co-Defendant Sequoia Voting Systems, Inc. To the extent the arguments in the briefing submitted by Sequoia are applicable to both parties, Snohomish County requests that they be adopted herein by reference and justify dismissal of Plaintiffs' claims against Snohomish County.

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A. Plaintiffs' Claims Are Barred By Applicable Statutes of Limitations or The Doctrine of Laches.

Plaintiffs seek to invalidate an agreement between Snohomish County and Sequoia that was entered into in July 24, 2002. Compl., ¶ 5.4. This action was commenced in April 2004. Plaintiffs have accordingly waited nearly three years and at least two general elections to challenge Snohomish County's authority to contract. Under applicable statutes of limitations, statutory bars to untimely election challenges, and even pursuant to the doctrine of laches, Plaintiffs untimely claims must be dismissed.

1. Plaintiffs' Challenge to Official Acts of Snohomish County Is Time-Barred By The Applicable Statute of Limitations.

All of Plaintiffs' claims relating to the Snohomish County's entry into a contract with Sequoia are barred by the applicable two-year statute of limitations, RCW 4.16.130. This statute provides that:

> An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued.

As noted in Constable v. Duke, 144 Wash. 263, 266, 257 Pac. 637 (1927), this statute applies where "the wrong alleged … is the dereliction of a public officer in the performance of his official duty." It applies where, as in the instant case,

> The cause of action ... pleaded is indirectly based upon the failure of public officials to perform duties imposed by law.

Northern Grain & Warehouse Co. v. Holst, 95 Wash. 312, 315, 163 Pac. 775 (1917).

Here, Plaintiffs attempt to bring a just such a taxpayers' suit to challenge Snohomish County's decision to contract with Sequoia and utilize its AVC Edge voting system. Plaintiffs claim the Contract should be rescinded because it requires the use of

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unlawful voting machines in elections run by the County. The Complaint itself pleads that the Contract between Snohomish County and Sequoia was entered into in July 2002, substantially more than two years before Plaintiffs filed this action. All of Plaintiffs' claims that arise from the County's decision to utilize the AVC Edge voting system, to contract with Sequoia to obtain that system and their claims that relate to the way that system operates as described in the contract, accrued in July 2002. This was the date the County executed the Contract and, thereby, made the official commitment of Snohomish County to henceforth utilize the AVC Edge voting system. Because Plaintiffs' claims accrued more than two years before Plaintiffs brought this action, they are barred by RCW 4.16.130.

2. Plaintiffs' Claims Should Be Dismissed as an Improper and Untimely Election Contest.

In their Complaint, Plaintiffs list many problems they allege occurred in the conduct of the November 2004 general election. See Compl., at ¶¶ 4.15, 4.17, 4.18, 5.23, 5.24, 5.25, 5.26, 7.2.3, 7.6.1, 7.6.2, 7.6.3, 7.7.2, 7.7.4 and 7.7.5. Washington law provides a means for courts to address errors or other problems in the conduct of elections. Election contests may be brought pursuant to chapter 29A.68 RCW by any elector, upon affidavit filed with the appropriate court. RCW 29A.68.011 provides as follows:

> **RCW 29A.68.011 Prevention and correction of election frauds and errors.** Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, *whenever it is made to appear to such justice or judge by affidavit of an elector that*:

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> (1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or
>
> (2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or
>
> (3) The name of any person has been or is about to be wrongfully placed upon the ballots; or
>
> (4) A wrongful act other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or
>
> (5) Any neglect of duty on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur; or
>
> (6) An error or omission has occurred or is about to occur in the issuance of a certificate of election.
>
> An affidavit of an elector under subsections (1) and (3) above when relating to a primary election must be filed with the appropriate court no later than the second Friday following the closing of the filing period for nominations for such office and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsections (1) and (3) of this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns and shall be heard and finally disposed of by the court not later than five days after the filing thereof. *An affidavit of an elector under subsection (6) of this section shall be filed with the appropriate court no later than ten days following the issuance of a certificate of election.*

RCW 29A.68.011 (emphasis added).

If electors such as Plaintiffs wished to seek judicial intervention regarding improper actions by Snohomish County election officials in conducting the 2004 general election, they could have proceeded under this statute. However, Plaintiffs did not bring a proper election contest. The Plaintiffs did not file affidavits of electors setting forth facts related to the alleged errors as required by RCW 29A.68.011. Although Plaintiffs have been aware of the facts related to the alleged improper functioning of the touch screen voting devices since November 2, 2004, they have failed to file an election contest under chapter 29A.68

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RCW within the 10 day statute of limitations. See RCW 29A.68.030, Reid v. Dalton, 124 Wn. App. 113, 122, 100 P3d 349 (2004). Even putting aside Plaintiffs' failure to meet the statute of limitations, they have delayed unreasonably in raising their allegations and are barred by laches.

Plaintiffs' claims regarding the function of the touch screen voting devices during the November 2004 general election should also be barred for Plaintiffs' failure to exhaust an available remedy. RCW 29A.60 210 provides that,

> **RCW 29A.60.210 Recanvass – Generally.** Whenever the canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any precincts of the county. The canvassing board shall conduct any necessary recanvass activity on or before the last day to certify the primary or election and correct any error and document the correction of any error that it finds.

Plaintiffs did not bring their concerns to the attention of the County canvassing board in a timely manner to permit the canvassing board to address them prior to the certification of the election. See, Washington State Republican Party v. King County Div. of Records, 153 Wn.2d 220, 103 P.3d 725 (2004).

3. Plaintiffs' Contract Claims Are Barred by Laches.

Even if the two-year statute of limitations is somehow found inapplicable to Plaintiffs' claims arising from Snohomish County's award of the contract to Sequoia, their action is nevertheless barred by the doctrines of latches and estoppel. Laches is an implicit waiver that arises when one has knowledge of existing conditions but, through inaction, acquiesces in them. Neighbors & Friends v. Miller, 87 Wn. App. 361, 373, 940 P.2d 286 (1997). Laches prevents a plaintiff from obtaining relief on an unreasonably tardy claim. A

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claim is unreasonably tardy if (1) the plaintiff knew or had a reasonable opportunity to know the facts constituting the cause of action, (2) the plaintiff's commencement of the action was unreasonably delayed, and (3) the defendant is damaged by the delay. Id.

In this action, Plaintiffs seek to challenge the action of a governmental body to procure the materials needed to fulfill one of its duties to the electorate—namely, to provide for the holding of elections. Plaintiffs claim the voting systems at-issue are inherently unreliable and fail to meet statutory and Constitutional requirements for the conduct of elections. Plaintiffs therefore allege Snohomish County's contract with Sequoia to provide such machines is illegal and subject to rescission in a taxpayer suit.

However, Plaintiffs also themselves allege that Snohomish County acquired the AVC Edge voting system in 2002 and began using it to conduct elections beginning in the fall of that year. Plaintiffs indicate in their own Complaint that they have actually voted using the system for the last two years. Compl., at ¶¶ 4.3-4.4. There is no allegation that the way the voting system works has changed since the County began using it. Thus, Plaintiffs have known or have had a reasonable opportunity to know of the facts that underlie their claims for the last two years.

Plaintiffs' over two-year delay in bringing this action is unreasonable under the circumstances. Snohomish County has used the AVC Edge voting system in numerous elections in the past two years. Plaintiffs never challenged the use of the system before an election, at a time when the County could have taken action to address the matters of which they complain. Rather, Plaintiffs have waited to bring their claims only after an election was conducted in which their preferred candidate lost. This is unreasonable and unfair.

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If, as appears to be the case from the Complaint, Plaintiffs maintain Snohomish County should never have utilized the AVC Edge voting system, they should have taken action to enjoin the award of the contract to Sequoia in 2002, before the voting machines were bought, paid for, delivered and placed in use. This is the remedy recognized by Washington courts to challenge the allegedly improper award of public contracts, but such actions to enjoin the award of public contracts must be brought before the contract is signed. Quinn Constr. v. Fire Prot. Dist., 111 Wn. App. 19, 29, 44 P.3rd 865 (2002) (citing Dick Enterprises., Inc. v. King County, 83 Wn. App. 566, 569, 922 P.2d 184 (1996)); BBG Group, LLC v. City of Monroe, 96 Wn. App. 517, 982 P.2d 1176 (1999). Permitting Plaintiffs to bring their challenge at this late date would cause significant damage to Snohomish County in that it has already expended millions of dollars under the contract with Sequoia. The Court should hold that Plaintiffs are barred by laches from challenging the contract between Snohomish County and Sequoia.

B. Plaintiffs Have No Standing to Challenge the Provisions of the Contract Between Snohomish County and Sequoia.

Plaintiffs' Complaint seeks to void the Contract between Snohomish County and Sequoia, but fails to allege any recognized legal basis for such action. The Complaint fails to show Plaintiffs are parties, in privity to parties, or intended third-party beneficiaries to the Contract. Moreover, the Complaint also fails to sufficiently allege the elements of taxpayer standing in order to challenge the legality of the government's action via a taxpayer suit. For these additional reasons, Plaintiffs' Complaint fails to state a claim and should be dismissed.

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1. Plaintiffs Fail to Show They Have Standing To Challenge The Contract As Parties, Persons in Privity to Parties, Or As Third Party Beneficiaries.

It is well-settled law in Washington that "a stranger to a contract" has no standing to enforce that contract. Lobak Partitions, Inc. v. Atlas Constr. Co., Inc., 50 Wn. App. 493, 497, 749 P.2d 716 (1988) ("a stranger to a contract may not sue"). Likewise, it is similarly true that "one cannot cancel an agreement to which he is not a party and with which he has no privity." Henry v. Lind, 76 Wn.2d 199, 204, 455 P.2d 927 (1969). However, Washington law does recognize that a third-party may nevertheless enforce a contract to which he is not in privity if it is made to appear that the contracting parties intended to "secure to him personally the benefits of the provisions of the contract." Layrite Concrete Products of Kennewick, Inc. v. H. Halvorson, Inc., 68 Wn.2d 70, 72, 411 P.2d 405 (1966); see also Rowan Northwest Decorators, Inc. v. Washington State Convention & Trade Center, 78 Wn. App. 322, 332-333, 898 P.2d 310 (1995) (non-party to contract could not complain the contract's conflict of interest provisions would be violated if performance was allowed to proceed between parties). "In order to create [such] a third-party beneficiary contract, the parties must intend to create one." Donald B. Murphy Contractors, Inc. v. King Co., 112 Wn. App. 192, 196, 49 P.3d 912 (2002) (citing Postlewait Construction, Inc. v. Great American Ins. Co., 106 Wn.2d 96, 99, 720 P.2d 805 (1986)). "The test of intent is an objective one: whether performance under the contract would necessarily and directly benefit the third party." Id. "Merely incidental, indirect or inconsequential benefits to a third party are insufficient to demonstrate an intent to create a third-party beneficiary

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contract." Id. (citing Del Guzzi Construction Co., Inc. v. Global Northwest Ltd., Inc., 105 Wn.2d 878, 885, 719 P.2d 120 (1986)).

Here, there is no question the only parties to the Contract were Defendants Snohomish County and Sequoia. Compl. at ¶ 3.9, 5.4, Ex. 1. Likewise, Plaintiffs allege no facts from which it could be inferred they are in privity to either party. See generally, Id. at ¶¶ .2.1-2.2, 4.1-4.4. Finally, there are no allegations in the Complaint that the contract to procure voting machines in order to conduct elections in Snohomish County was made with the intent to specifically benefit Mr. Wells and Mr. Lehto. Id. at ¶¶ 3.9, 5.4, Ex. 1. Plaintiffs thus fail to show any basis to infer their status as third-party beneficiaries to the Contract. Accordingly, Plaintiffs' Complaint fails to assert any standing to assert defenses to the validity of the Contract at-issue and Plaintiffs' claims should be dismissed.

2. Plaintiffs Fail To Allege Facts Establishing Taxpayer Standing.

Lacking standing to directly challenge the Contract as a party, persons in privity to parties, or as third-party beneficiaries to the contract, the only other recognized legal basis for Plaintiffs to challenge the award of a contract by Snohomish County is a "taxpayer suit." However, Plaintiffs have failed to allege facts sufficient to state such cause of action.

Washington courts have recognized that taxpayer suits are available to challenge the award of a public contract that "will illegally cast upon taxpayers a substantially larger burden of expense than is necessary". Times Publishing Co. v. Everett, 9 Wash. 518, 522, 37 Pac. 695 (1894). In a proper case, the courts will enjoin the award of such a contract. Bellingham American Pub. Co. v. Bellingham Pub. Co., 145 Wash. 25, 258 Pac. 836 (1927); Mottner v. Town of Mercer Island, 75 Wn. 2d 575, 579, 454 P.2d 750 (1969).

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Courts have entertained taxpayer lawsuits, for instance, where a government contract is found to be unlawful because it is in conflict with a specific statute or ordinance. See Mincks v. City of Everett, 4 Wn. App. 68, 480 P.2d 230 (1971).

However, courts have created a common law prerequisite to bringing such a suit so that they may balance the public's need to police the acts of its elected officials with the government's need to act without constant citizen interference in the performance of its day to day operations. See Reiter v. Wallgren, 28 Wn.2d 872, 874, 184 P.2d 571 (1947) (noting courts should avoid "having the regularity and legality of every contract and every act of state officers and committees subject to challenge by any litigious spirit whose personal views are at variance with the action taken," as well as allowing citizens to act against "the failure of public officers to protect the public interest"). The two conditions precedent to bringing a taxpayer suit to enjoin a public contract are: (1) that Plaintiffs allege they are taxpayers who are burdened by the expense of the contract (in other words, that they pay the type of taxes that fund the project in question); and (2) that, before bringing suit, Plaintiffs demand that the state Attorney General take action to prevent the improper expenditure of tax funds. Tabor v. Moore, 81 Wn.2d 613, 617, 503 P.2d 736 (1972). For instance, in Dick Enterprises, Inc. v. King County, 83 Wn. App. 566, 572, 922 P.2d 184 (1996), the court found a disappointed bidder to a government contract could not challenge the validity of the contract that was awarded because it failed to plead these prerequisites:

> The Regional Justice Center is funded from county property taxes, but neither [the Plaintiff] nor either of its partners owns property in the county. Finally, [Plaintiff] did not show that it requested action by the Attorney General's office.

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In the instant case, just as in Dick Enterprises, Plaintiffs have not properly pled a taxpayer suit. Plaintiffs' Complaint is clearly couched as a taxpayer lawsuit, as it seeks to have a contractual agreement undertaken by a public body voided because it is allegedly unlawful or unconstitutional. See Section III.B.3, *infra.* However, Plaintiffs' Complaint wholly fails to plead the prerequisites necessary to show taxpayer standing. Although Plaintiffs claim they are Snohomish County "voters," they do not allege they are Snohomish County taxpayers. See Section III.B.4, *infra*. Likewise, they mention the fact that they will provide the Attorney General with a copy of the Complaint "as of the time of defendants' answer," but do not otherwise allege they have presented their issues to the Attorney General for action prior to initiating this suit. See Section III.B.5, *infra.* Plaintiffs thus fail to show they met their necessary duty to present their claims "to the public officials who are charged with responsibility" for preventing unlawful public expenditures. Reiter, 28 Wn.2d at 877. Absent such presentation and a showing that the officials failed to act, Plaintiffs cannot bring suit. Dick Enterprises, 83 Wn. App. 573. Such a mechanism is not merely technical, it is fundamental in balancing the competing interests of citizens in overseeing the acts of their government and the government in operating efficiently and without undue impediments. See Reiter, 28 Wn.2d at 877. Since Plaintiffs wholly fail to allege these conditions precedent to maintaining a taxpayer action, their Complaint must be dismissed.

C. Plaintiffs' Claims Should Be Dismissed Because They Have Failed to Join an Indispensable Party

As Plaintiffs admit in their Complaint, the AVC Edge voting system produced by Defendant Sequoia was approved and certified by the Washington Secretary of State for

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use by counties in conducting elections. Compl. at ¶¶ 7.7.6. RCW Chapter 29A.12 details the procedures and requirements for certification of a voting system for use in conducting elections in Washington. Defendant Snohomish County acquired and utilized the AVC Edge voting system because it was authorized to do so by RCW 29A.12.010 (formerly RCW 29.33.020). The approval process referred to is set forth in RCW 29A.12.020 as follows:

> **RCW 29A.12.020 Inspection and test by secretary of state -- Report.** The secretary of state shall inspect, evaluate, and publicly test all voting systems or components of voting systems that are submitted for review under RCW 29A.12.030. The secretary of state shall determine whether the voting systems conform with all of the requirements of this title, the applicable rules adopted in accordance with this title, and with generally accepted safety requirements. The secretary of state shall transmit a copy of the report of any examination under this section, within thirty days after completing the examination, to the county auditor of each county.

Several of the causes of action alleged by Plaintiffs directly relate to the approval of the AVC Edge voting system by the Secretary of State as they are concerned with the way the system functions as approved by the Secretary of State. These include:

- First Cause of Action - "Impermissible infringement on Liberty Interests in Free and Equal Elections." Compl. at ¶ 7.1;
- Second Cause of Action – "Violation of Open Election Requirements." Id. at ¶ 7.2;
- Third Cause of Action – "Impermissible Delegation of Core Governmental Function." Id. at ¶ 7.3;
- Sixth Cause of Action – "Failure to Provide Required Chain of Custody of Ballots." Id. at ¶ 7.6;
- Seventh Cause of Action – "Failure to Provide Separate Secret Ballot." Id. at ¶ 7.7;
- Tenth Cause of Action – "Failure to Meet Federal and State Standards for Voting Systems." Id. at ¶ 7.10;

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Plaintiffs directly challenge the approval of the AVC Edge voting system for use in Washington elections and seek declaratory and injunctive relief overturning the approval and certification of the AVC Edge voting system and enjoining its future use.

Notwithstanding the nature of Plaintiffs' claims and the relief they seek, Plaintiffs have failed to join the Washington Secretary of State as a party to this action. Under Fed. R. Civ. P. 19(a), the Court should determine that the Secretary of State is a necessary party and indispensable to this action. The joinder of the Secretary of State is required because in his absence, complete relief could not be accorded among the existing parties in that the continued certification and use of the AVC Edge voting system in this state could not be enjoined. Fed. R. Civ. P. 19(a)(1). Moreover, the Secretary of State has an interest, as chief elections officer of the state (RCW 29A.040.230), in making sure that voting systems are used uniformly throughout all the counties in the state. His ability to protect that interest would be impaired if this action were disposed of in his absence. Fed. R. Civ. P. 19(a)(2)(ii).

Because Plaintiffs have failed to join the Secretary of State, this action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(7).

V. CONCLUSION

Plaintiffs' Complaint not only fails to state a cognizable legal claim, it establishes clear legal defenses that would defeat any claims that might otherwise be raised. Plaintiffs' attempt to challenge the decisions of Snohomish County's elected officials is substantively untimely. The allegations in the Complaint fail to state a sustainable cause of action under

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well-established Washington law. Accordingly, Plaintiffs' claims should be dismissed in their entirety.

Respectfully submitted this 18th day of May, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

1. Randolph I. Gordon @ rgordon@gee-law.com; and

2. Malcolm S. Harris @ mharris@hmwlaw.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A.

s/ Douglas J. Morrill
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