

72961-6

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**COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION ONE**

RICHARD AZPITARTE, *appellant*

v.

KING COUNTY etal, *respondents*

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON**

REPLY BRIEF

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Richard Azpitarte
pro se

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REPLY

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

On page 6 of their brief the respondents claim that the record in this case does not show that Azpitarte successfully appealed the federal district court's orders of October 8, 2014. However the appellant requests that this court take judicial notice that he attempted to appeal the order on, and he was thwarted when the appeals court withdrew the order of indigency that allowed him to prosecute the case without paying the fees he could not afford.

ARGUMENT

1. AZPITARTE'S CLAIMS ARE NOT BARRED BY COLLATERAL ESTOPPEL

The respondents cite to the four elements in *Hanson v. City of Snohomish* 121 Wn.2d 552, 561, 852 to argue that collateral estoppel had occurred with respect to the state claims of helicopter harassment. The respondents claim that the second element was met because there was a final judgment on the merits of helicopter harassment for the state causes of action.

Azpitarte argues that this condition has not been met because the so-called judgment on the state claims was void.

Washington has adopted Restatement (Second) of Judgments §§ 1, 11 (1982) as a test for voiding judgment. *Marley v. Department of Labor and Industries*, 125 Wash. 2d 533, 886 P.2d 189 (Wa. 12/22/1994

Section 1 of the Restatement (Second) of Judgments sets forth the requisites of a valid judgment:

A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action, as stated in § 11, and (1) The party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or

(2) Adequate notice has been afforded the party, as stated in § 2, and the court has territorial jurisdiction of the action, as stated in §§ 4 to 9.

By implication, a void judgment exists whenever the issuing court lacks personal jurisdiction over the party or subject matter jurisdiction over the claim.

Thus, the principle of collateral estoppel cannot apply because it was a void judgment, which by definition is not a final judgment on the merits.

Also, Azpitarte, contrary to the allegation of the respondents, on page 9 of their brief, was not given ample opportunity to put forward

evidence, because he was only given notice that the federal claims were being litigated, not the state claims. Thus, the 4th prong of collateral estoppel is likewise not met because it would work an injustice.

2. AZPITARTE'S CLAIMS ARE NOT BARRED BY RES JUDICATA

The respondent's argument applying res judicata fails for exactly the same reason as it does for claim preclusion. As stated earlier, the use of a final judgment as used in the second restatements does not work if the judgment was void.

3. AZPITARTE CAN COLLATERALLY ATTACK THE FEDERAL COURT'S DETERMINATION IN AZPITARTE II THAT IT HAD JURISDICTION.

The reasoning in *Royal Insurance Company of America v. Quinn-I-Capital Corporation*, 960 F.2d 1286, 1293 (5th Cir.) 1992 does not hold because he filed a timely notice of appeal in the federal court. He was denied an opportunity to appeal because the court withdrew his right to appeal under a prior indigency finding.

Thus, Azpitarte was denied an opportunity to present his case. He was not allowed to present his case at the trial level in federal court because he was given notice by the court of appeals that the only issue

before the court was his 1983 claim. He could not prove his 1983 because he could not prove custom and policy against the county and he could not prove the identity of the officers in the helicopter. However proving liability under the state claims does not require those elements. He was not given an opportunity to present that evidence.

When he realized, for the first time the court was going to assert jurisdiction over state causes of action, then he tried to raise the issue again on reconsideration.. The court then ruled on jurisdiction. However, when he attempted an appeal, he was denied an opportunity to appeal when the federal court rescinded the indigency order that allowed the appeal. This court should see from that order that the appellant was denied a fair opportunity to appeal and remand this case back to Superior Court for litigation on the merits.

Dated this ninth day of March, 2009.



Richard Azpitarte

FILED

UNITED STATES COURT OF APPEALS

FEB 26 2015

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

<p>RICHARD AZPITARTE,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>KING COUNTY; et al.,</p> <p>Defendants - Appellees.</p>
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No. 14-36043

D.C. No. 2:10-cv-01186-TSZ
Western District of Washington,
Seattle

ORDER

Before: LEAVY and MURGUIA, Circuit Judges.

The district court has certified that this appeal presents “no non-frivolous issue” and has revoked appellant’s in forma pauperis status. Our review of the record confirms that appellant is not entitled to in forma pauperis status for this appeal because we find the appeal is frivolous. *See* 28 U.S.C. § 1915(a).

If appellant wishes to pursue this appeal despite the court’s finding that it is frivolous then, within 21 days after the date of this order, appellant shall pay \$505.00 to the district court as the docketing and filing fees for this appeal and file proof of payment with this court. Otherwise, the appeal will be dismissed by the Clerk for failure to prosecute, regardless of further filings. *See* 9th Cir. R. 42-1.

No motions for reconsideration, clarification, or modification of the denial of appellant's in forma pauperis status shall be entertained.

Because the court has found that this appeal is frivolous, the district court judgment may be summarily affirmed even if appellant pays the fees. If appellant pays the fees and files proof of such payment in this court, appellant therefore shall simultaneously show cause why the judgment challenged in this appeal should not be summarily affirmed. *See* 9th Cir. R. 3-6. If appellant elects to show cause, a response may be filed within 10 days after service of appellant's filing. If appellant pays the fees but fails to file a response to this order, the Clerk shall dismiss this appeal for failure to prosecute. *See* 9th Cir. R. 42-1.

If the appeal is dismissed for failure to comply with this order, the court will not entertain any motion to reinstate the appeal that is not accompanied by proof of payment of the docketing and filing fees and a response to the order to show cause.

Briefing is suspended pending further order of this court.

I hereby certify that on March 11, 2016, I caused to be served a copy of
this document by the delivering to the office of the following:

Mark Stockdale
500 4th Ave. Ste. 900
Seattle, WA., 98104-

A handwritten signature in black ink, consisting of the letters 'R' and 'A' in a stylized, cursive font.

Richard Azpitarte