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Court of Appeals No. 72961-6-1
King County Superior Court No. 13-2-35033-5 SEA

72961-6

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CIVIL DIVISION
ADMIN DEPT OF FL

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION ONE

RICHARD AZPITARTE, *appellant*

v.

KING COUNTY et al, *respondents*

ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON

AMENDED OPENING BRIEF

2016 OCT 27 PM 8:14
CIVIL DIVISION
ADMIN DEPT OF FL

Richard Azpitarte
pro se

ORIGINAL

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**ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR
REVIEW**

A. ASSIGNMENTS OF ERROR

1. The court erred in failing to allow for discovery.
2. The court erred in dismissing the case on the grounds of res judicata.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err in taking motions out of order
2. Did the court abuse its discretion by not allowing discovery?
3. Did the court err in claiming res judicata in issues that were never litigated in the federal court?

STATEMENT OF THE CASE

A. PROCEDURAL FACTS

1. Azpitarte initiates federal action in July 2010 in case USDC Case No. CV 10-1186-TSZ. (CR 20)
2. July 23, 2011 (Dkt 31) order in that case dismissed all claims with prejudice occurring before March 3, 2009 with prejudice.(CR 20-21).
3. The trial court never addressed the state tort claim in that order. (CR 21-22)

3. Reconsideration was denied on 8-2-2011. This action was served 30 days later. CR 22. It was then filed on November 30, 2011. CR 22.

4. When the plaintiff appealed the federal court he did not appeal the state issues nor mention them in his briefing. (CR 24)

5. As a consequence the Ninth Circuit never addressed the state issues in its final order (CR 24)

6. The defendants only addressed the federal issues in their motion for summary judgment. (CR 24). It was not until the reply brief that they brought up the state issues. The Federal court contended that the federal court retained jurisdiction once the appeal got remanded. (CR 17). The trial court agreed with the federal court on 12-5-2014. Timely notice of appeal was filed on 1-5-2015.

B. SUBSTATIVE FACTS.

7. Before August of 2004, Azpitarte was a collector of older cars. He collected his first one when he was sixteen and had been continually collecting them for over 40 years. His specialty was the so-called "muscle cars" that were made by United States manufacturers between 1964 and 1972. Cars in good condition in this era typically sold for between

\$25,000 up to \$200,000 in 2004. He had approximately 30 cars of this caliber and maybe another 30 cars of the same vintage but not quite as good condition. He also had a number of cars that he referred to as "runners". Runners were cars that ran, that he picked up at auctions, but were not collector cars. He bought them because they were bargains, and legal running cars. He also had other vehicles such as tow trucks ramp trucks, trailers and tow dollies that were that were used to service the collection. The value of these vehicles ranged from \$25,000 on up.

8. The campaign of harassment he received from the County started after he obtained a judgment against King County on December 8, 1989 This judgment was obtained after he filed a discrimination suit against the County pursuant to RCW 49.60 (discrimination on the basis of physical handicap.)

9. After he won the suit, county officials and police officers would continually come up to his house, several times a year, claiming that he was maintaining a a nuisance and that he had too many vehicles. He would retain an attorney to handle the hearings, which for the most part, never resulted in cars being towed. However, he would have to expend fees and put up with police officers trespassing on his property at odd

hours in the day and middle of the night. In addition, the county would buzz his house with helicopters in the middle of the night approximately once a week. They should hover over his house, shining spotlights in windows. The police would continually come onto his property ostensibly to complain about the cars, when the enforcement was not a police matter, but civil complaints handled through DDES. (Department of Developmental and Environmental Services). This harassment continued as long as he lived there.

10. After an April 23rd 2004 hearing on the cars, Denobi Olegba came onto his property with Steve Cox, Scott Laviere, and a large number of police officers. Azpitarte stopped them at the door and asked for a warrant. They refused. Denobi said he was tired of the litigation and that if the plaintiff did not agree to do what they wanted, he said he would have my house condemned and the County would “bury me.” He said that he wanted to work out an agreement where he would agree to keep some cars and not others and that once we arrived at a set number, he would not move another car onto the property without taking another one off. Denobi came back on April 27th and agreed to work it out with the plaintiff. Denobi said that he was in close contact with Sims and that as

long they were proceeding with at a fair pace there would no towing of cars. The plaintiff began removing cars and refuse at an agreed pace. Since Mr. Olegba seemed most concerned about refuse and spare tires, the plaintiff concentrated on moving that material first. He then started moving the worst cars, since Mr. Olegba said those were the ones that generated the most complaints.

11. By late August he had moved virtually all of the tires and refuse and approximately 20 cars, when unexpectedly, the police showed up to seize all his remaining cars on August 26th and 27th.. When he questioned Mr. Olegba these tows, on August 31, 2004 as to why the cars were towed when we had a deal, he simply stated he was overruled. Olegba also claimed to the plaintiff that none of the vehicles ran, which was untrue. Easily 50-75% of the vehicles were in running order. In fact, the plaintiff gave the police the keys to the cars that were running so they would not break the locks in order to get them off the property.

12. Olegba then stated that the county would not allow the plaintiff to stay in his houses if he continued to give them problems in court. He stated the county would condemn his houses. Then Steve Cox stated that the plaintiff could not win in court, because it was "in the

design” that he would lose.

13. Later, the plaintiff would begin to return licensed running cars to his lot. Mr. Denobi would show up and demand that he start the vehicles for him and said if he could not, he would have them towed. He also threatened to take other people’s cars, even though the plaintiff did not own the cars or have a way to start them. None of these vehicles were cars that were part of the original court order. The plaintiff pointed out that this was not being done to other cars in the county and Olegba said that he didn’t care, that his orders came from Ron Sims personally. This went on for months, where he would come onto the property without permission and threaten to tow cars unless the plaintiff stopped whatever he was doing and start cars. There was a fence around the property with a locked gates and no trespassing signs, but that would not stop Mr. Olegba. He would climb the fence without a warrant and threaten to tow cars unless the plaintiff would start cars and show they were running.

14. Also, after the cars were towed on August 26th and August 27th, the number of buzzing by helicopters dramatically increased so it was being done on a daily basis.

15. Finally, on September 30th, 2005, with a helicopter buzzing overhead, Mr. Olegba climbed the fence for the last time, came on to the property and posted do not occupy signs on the plaintiff's two houses. He said "I told you not to push this thing in the courts so now we are going to push you out." This was during a time the plaintiff was appealing the judge's orders in the court of appeals. When the plaintiff told him that he would file suit Olegba said he didn't care because he had complete immunity from that. He said he would arrest the plaintiff if he did not move out.

16. The plaintiff then decided to move out because of the legal threats and the constant harassment of buzzing helicopters. During the next two years he began moving his belongings to various locations in South King county. He still had belongings at the 153 address, and he would stay in the garage from time to time, which had not been condemned, but it had electricity but not running water. During this time there would be helicopter harassment both at the 153, S. 120th St. address and at other locations in South King County. He filed an appeal of the housing code violations, none of which seriously impacted the safety of the building. He hired an attorney, and should have been able to have the

housing code violation notices removed. He never did receive a timely response to his appeal. Many years later the plaintiff learned that the county had stopped the appeal because it considered the matter moot because the plaintiff moved out. However, the condemnation notices have never been retracted by the county. The plaintiff still fears arrest if he moved back in because even though the agency that posted the notices no longer has enforcement authority, they cannot speak for the Burien Police Dept. or the King County Deputy Sheriff officers, who still patrol the area when they work for Burien.

17. By 2007, the plaintiff had moved out most of his belongings out of the 153, S. 120th address but would return periodically because there were burglaries occurring there. During this period of time, most of the helicopter harassment was occurring at 153, S. 120th and at other locations in South King County but had tapered off.. However in 2009, it started up again and he was constantly being harassed with helicopter flights. Overall, he estimated there were well more than 50 helicopter flights altogether, possibly 100-200. These have continued right up until the present time.

18. For example, at a location in Auburn where he was staying, on March 12, 2014 at 3:35 pm a helicopter came in slow and low over the house. Two days later on March 14, 2014 at 2:40 pm a helicopter flew over again heading north and as it passed over the house it turned northwest.

19. On September 15, 2014 a helicopter came in heading south, turning SE as it passed over the house at 2:49 pm. On September 16th 2014 the guardian one helicopter hovered over the house at 2:42 pm.

20. The plaintiff still have outstanding discovery in this case has not been addressed. While the defendants have produced a limited amount of records since 2009, the records are suspect because the records show a huge increase in the number of flights in the past year as compared to previous years by a factor of three or four. When the plaintiff asked Mr. Stockdale, the defendant's how this could possibly be, he refused to give many any assurances that the plaintiff had been supplied a complete set of helicopter records. (CR 55-59)

ARGUMENT

1. INTRODUCTION

This case was still early in litigation with several months of discovery left. The plaintiff has proposed discovery to the defendant and the defendant has refused to supply complete records of helicopter flights or housing records. The the defendant, after stonewalling for several years on the discovery, rather than supplying the discovery sought to dismiss the causes of action on the grounds of claim preclusion, for which there is no basis. The plaintiff had brought a motion to compel on the defendants' refusal to provide discovery and sought a CR 56(f) continuance, until he can identify the perpetrators of the harassment and have an opportunity to conduct discovery on the defendants to show exactly how the harassment proceeded.

2. RESPONSE TO CLAIM PRECLUSION ARGUMENTS

While the defendants and the federal court are correct that these issues were raised in USDC Case No. CV 10-1186-TSZ, it is not true that they were litigated on the merits there. In that case, the District Court declined jurisdiction of the state related issues using its powers under 28 USC1367(c):

The courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if

...

(3) the district court has dismissed all claims over which it has original jurisdiction or

(4) ...

Under the plain language of 28 USC 1367(d), the original statute

of limitations had been stayed, when this suit was started, so this suit relates back to the filing date of *Azpitarte v. King County*, USDC 10-cv-01186-TSZ (filed 7-1-2010).

With this fact clearly established, all of the defendants and the court's remaining arguments regarding claim preclusion fail.

The defendants and the federal court now contend that the court reassumed federal jurisdiction once the court remanded it back but the order from the court of appeals does not say that. Neither the courts nor the defendants have cited to any authority that states that a district court automatically gets back supplemental jurisdiction on remand after another suit has been filed. Only the federal issues were litigated on appeal and the appellant did not appeal the declining of the state issues. Since the court of appeals never reversed the order of the district court declining supplemental jurisdiction, then the federal court lacked subject matter jurisdiction to hear the state issues. An order that is issued by a court that

lacks subject matter jurisdiction is void. *Sasson v. Sokloff* 424 F.3d 864-876 (9th Cir 2005). Even if the court could somehow reassert subject matter jurisdiction, for the court to do so without notifying the pro se plaintiff, denies that plaintiff due process of law, because he has not been put on notice that the court has done so, and therefore prepare his arguments accordingly. A judgment is void if the issuing court lacked subject matter jurisdiction over the action or if the judgment was entered in violation of due process. *United States v. Burle* 170 F.3d 882, 883, Cubic Def. Sys. 385 F.3d at 1226. The state issues still remain properly filed in the state action.

3. THE PLAINTIFF SHOULD HAVE BEEN ALLOWED FURTHER DISCOVERY.

As to the merits of the suit, the plaintiff outlines his case in his declaration as to what occurred. This is enough to defeat summary judgment. The defendants can deny they did it, and can deny there is any mention of it in existing records, but the defendants have not produced full discovery and there are missing records which gives rise to an inference of spoliation. In a summary judgment motion all reasonable inferences should go to the nonmoving party. The plaintiff will seek discovery

including depositions of the participants of the harassment, both before and after the statute of limitations, which will demonstrate that none of the witnesses are credible with respect to their denials of participation in the harassment which occurred over a period of several years.

Furthermore, the plaintiff has brought a motion to compel to force disclosure of helicopter records for the last ten years. The defendants claim that the federal courts have already determined that the plaintiff is only entitled to three years worth of records, but the federal case only dealt with the narrow issue as to whether the harassment by helicopter was a violation of his civil rights. In his state suit, he alleges retaliation over a twenty year period for winning a discrimination suit, which included not only the harassment by helicopter, but the theft of over \$5 million dollars worth of collector cars as well a state tort claims. The plaintiff is entitled to a larger history on these actions .

One of the actions requested by this suit is to clear title of his property from notices that have been posted that make it illegal for the defendant to reside there at 147 and 153 S. 120 St. in Burien Wash. The defendants have raised various defenses but refuse to produce any of the file in their possession which would show exactly what the status of that

property is. Since the notices have been posted, the City of Burien has annexed the property in question on April 1, 2010. The defendant contends that once he receives the complete file, it would show that the notices are not valid because the property defects were not serious enough to warrant condemnation of the property, and that they should not have future effect, once he is allowed to move back to his house.

The defendants claim that the County lacks any enforcement authority once the annexation has taken place, but has cited to no authority for that proposition. The City of Burien still hires King County deputy sheriffs as contract employees, and the deputies could still arrest the plaintiff if he moves back into the building. One of the defendants, Olegba, has already been seen on the property over the plaintiff's objections

CONCLUSION

For all the reasons stated above, the appellant requests that the ruling of the trial court be reversed and the case reinstated with the plaintiff being allowed to continue with discovery.

Dated this 26th day of October, 2015


Richard Azpitarte

I hereby certify that on October 27, 2012, 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-


Richard Azpitarte

