

FILED
COURT OF APPEALS
DIVISION II

NO. 37738-1-II

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STATE OF WASHINGTON
BY

COURT OF APPEALS, DIVISION II OF THE STATE OF DEPUTY
WASHINGTON

BARBARA A. STEPHENSON, in her capacity as Kitsap
County Treasurer,

Plaintiff Interpleader,

v.

LINDA A. PLEGER and DANIEL PLEGER,

Defendants/Respondents

and

JOSEPH Kaiser, as assignee of CUMULATIVE, LLC,

Defendant/Appellant

REPLY BRIEF OF APPELLANT

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FILED 10/15/18

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I. TABLE OF AUTHORITIES

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II. INTRODUCTION

Respondents Linda and Daniel Pleger have mistakenly construed RCW 84.64.080 to create a property right in the excess funds resulting from a tax foreclosure sale. While the statute does establish a procedure to be followed by a county treasurer, it does not restrict or prohibit a record owner from entering into a contract to sell their interest in such proceeds.

Respondents wrongfully claim that Mr. Kaiser did not have a property interest in the excess funds, and therefore his due process and takings claims must fail. This again stems from an incorrect reading of the statute. Not only was Mr. Kaiser the deed holder of the property immediately prior to the sale, but he was also the assignee of any overages. RCW 84.64.080 does

nothing to affect the validity of the contract he made with the Plegers.

Mr. Kaiser's appeal with respect to Daniel Pleger is not frivolous. RAP 2.5 generally allows an appellate court to refuse to review an issue that was not raised in the trial court. Here, the issues surrounding Daniel Pleger's summary judgment are factually identical to Linda Pleger's. These issues were indeed raised at the trial court and are appropriately heard by the appellate court. Further, even if the issues were not similar, RAP 2.5(a) allows a party to raise, for the first time, errors affecting a constitutional right. Here, Mr. Kaiser has asserted constitutional claims with respect to Daniel Pleger's summary judgment.

III. ISSUES RAISED BY RESPONDENT'S BRIEF

A. Whether RCW 84.64.080 creates a property interest in excess tax foreclosure when the text of the statute is silent on that issue.

B. Whether Mr. Kaiser had a property interest in the excess proceeds pursuant to the contract entered into between Cumulative, LLC and the Plegers, and whether Mr. Kaiser has properly raised his due process and takings claims.

C. Whether Mr. Kaiser's appeal against Daniel Pleger is rightfully heard by the appellate court when it is factually identical to Linda Pleger's appeal and raises constitutional issues.

IV. ARGUMENT

A. RCW 84.64.080 is procedural in nature and does not create a property interest in tax sale overages.

In their brief, the respondents have clearly and concisely established that the statute at issue is not ambiguous and requires only a plain

language interpretation from the court (Resp. Brief p. 11-12). We agree. They correctly quoted the *Killian* court stating that courts have "declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it" (Id. Quoting *Killian v Atkinson*, 147 Wn.2d 16, 50 P.3d 638 (2002)).

However, the interpretation sought by the Plegers in this case reaches far beyond the actual text of the statute. They claim there is no ambiguity, they ask for a plain language interpretation, and then they request this court to read a property interest into the statute where none exists.

RCW 84.64.080 states in part:

"... the excess shall be refunded following payment of all water-sewer district liens, on application therefore, to the record owner of the property. The record owner of the property is the person who held title on

the date of issuance of the certificate of delinquency. Assignments of interests, deeds, or other documents executed or recorded after filing the certificate of delinquency shall not affect the payment of excess funds to the record owner."

The Plegers assert that this language somehow establishes a property right and also prohibits and makes unenforceable all listed contracts entered into following the issuance of a certificate of delinquency. This is simply not the case.

They back this assertion by pointing out that the legislature indeed holds the power to deem contracts void or voidable, illegal, or both (Resp. Brief p. 14, citing *Suburban Fuel Co. v. Lamoreaux*, 4 Wn. App. 179, 480 P.2d 216 (1971)). While the legislature may have the power to prohibit contracts like the one entered into between the Plegers and Cumulative they have not done so.

If RCW 84.64.080 was intended to create a property interest or to prohibit certain types of contracts the legislature would have clearly said so. A plain text interpretation simply allows no room for the insertion of such a meaning. "A court must not add words to a statute where the legislature has chosen not to include them." *Restaurant Development Inc. v. Cananwill*, 150 Wn.2d 674, at 582, 80 P.3d 598 (2003).

B. Mr. Kaiser has a recognized property interest for the purposes of his constitutional claims.

(i) Property Interest

In their brief, Respondents assert that Mr. Kaiser lacks a recognized property interest necessary to proceed with his constitutional due process and takings claims. This assertion is based on the Plegers' erroneous interpretation of RCW 84.64.080 discussed above.

It has long been established that a property

interest can be created by the terms of a contract or by a "mutually explicit understanding" between parties that support a claim of entitlement to a benefit. See *Conard v. Univ. of Wash.*, 119 Wash.2d 519, 530, 834 P.2d 17 (1992), cert. denied, 510 U.S. 827, 114 S.Ct. 91, 126 L.Ed.2d 59 (1993); *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Likewise, as Respondents point out "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing" (Resp. Brief p. 14, quoting *Conrad* at 529).

It is undisputed by either party that Cumulative LLC and the Plegers had a contract, which sold the rights to any tax overages from the sale of the Plegers' house to Cumulative. Here, the Plegers attempt to claim that this

contract does not create a property right for Mr. Kaiser because RCW 84.64.080 makes that contract void. As discussed above, the statute on its face does nothing to abrogate the rights of a party to buy or sell the rights to the disputed overages. As such, the overage assignment clearly creates a property interest under which Mr. Kaiser may assert constitutional claims.

(ii). Due Process

Respondents claim that even if Mr. Kaiser does have a property interest entitling him to due process, that due process was given as he had an opportunity to be heard by the trial court before the excess funds were distributed to the Plegers (Resp. Brief p. 17).

However, what Mr. Kaiser argues is that the lower court's ruling resulted in an unconstitutional application of RCW 84.64.080. As applied by the trial court, the statute would mandate a treasurer to disperse overages to a

record owner despite the potential entitlement to the funds of a third party without an opportunity to be heard. Respondents claim that the trial court already heard this argument and therefore Mr. Kaiser received his due process is illogical.

(iii). Takings

Respondents assert that Mr. Kaiser's takings claim should fail because of a failure to join necessary parties. (Resp. Brief p. 20). This claim is without merit. In their brief the Plegers cite to CR 13(h), 19, and 20. Of these three rules only CR 19 contains mandatory language regarding joinder of parties. CR 19(a) states generally that a third party shall be joined when complete relief cannot be had otherwise or when a third party possesses an interest in the matter that cannot be protected in their absence.

In this case, a third party does not exist that CR 19(a) would require Mr. Kaiser to join.

Mr. Kaiser seeks relief from this court from an unconstitutional application of a statute that resulted in a loss of his property. The court here is situated to provide all necessary relief and can do so without detriment to any third party interests.

C. Mr. Kaiser's appeal was not frivolous with regard to Daniel Pleger.

The Respondents' claim that the appeal against Daniel Pleger was frivolous and warrants a sanction is completely baseless.

When an appeal is based on a summary judgment and a trial court had no opportunity to address an issue an appellate court may decline to consider that issue on appeal. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wash.App. 290, at 299, 38 P.3d 1024, at 1029 (Div. 1, 2002). An appellate court's decision to decline to hear such an issue is purely discretionary and does not automatically preclude the introduction of an issue. *See Pulcino v. Federal Express Corp.*, 141

Wash.2d 629, 9 P.3d 787 (2000), *State v. Ford*,
137 Wash.2d 472, 973 P.3d 452 (1999).

Here, Mr. Kaiser's appeal regarding Daniel Pleger's summary judgment motion is factually identical to Linda Pleger's. The trial court heard argument from both sides regarding all issues and the court here has an adequate record to reach an informed decision. Not only is Mr. Kaiser's appeal not frivolous but opposing Daniel Pleger's summary judgment motion after Linda Pleger's identical motion was granted would have been a frivolous waste of time and money for all parties involved.

Lastly, even without the similarities to Linda Pleger's case, Mr. Kaiser would still have a viable appeal regarding Daniel Pleger. RAP 2.5(a) states that notwithstanding a failure to raise an issue at trial a party may raise a claim for the first time on appeal of a "manifest error affecting a constitutional right." Here, Mr.

Kaiser is clearly asserting constitutional rights with respect to his appeal of Daniel Pleger's summary judgment motion.

V CONCLUSION

The trial court's interpretation and application of RCW 84.64.080 is not supported by the plain meaning of the statute or the statute's legislative history. Mr. Kaiser has a recognizable interest in the disputed funds as the beneficiary of a valid contract for them. As such, the trial court's application has resulted in the violation of Mr. Kaiser's rights protected by both the federal and state constitutions.

Mr. Kaiser's appeal against Daniel Pleger was in no way frivolous as his claims are allowable under RAP 2.5(a).

Appellant respectfully requests that the court reverse the trial court's summary judgment

orders and remand the case so that all parties
have the proper opportunity to litigate their
interests in the disputed funds.

October 15, 2008

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "A. Stephen Anderson", written over a horizontal line.

A. Stephen Anderson, WSBA#8369
Attorney for
Defendant/Appellant

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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BARBARA A. STEPHENSON, in her
capacity as Kitsap County Treasurer,

Plaintiff,

v.

CUMULATIVE LLC; LINDA A.
PLEGER; DANIEL E. PLEGER;
TONEY M. MONTGOMERY; BEVERLY
J. MONTGOMERY; and GLEN P.
PSZCZOLA, in his capacity as trustee
of the Aladdin Trust,

Defendants.

No. 37738-1-II

DECLARATION OF SERVICE

I certify that I filed and served copies or originals of (1) REPLY BRIEF OF APPELLANT (16 pgs) and (2) DECLARATION OF SERVICE (2 pgs) on the parties or their counsel of record on the date and manner below as follows:

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5 I certify under penalty of perjury under the laws of the state of Washington that the
6 foregoing is true and correct.

7 DATED this 15th day of October, 2008, at Seattle, WA.

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