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STATE OF WASHINGTON

No. 37738-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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.

BRIEF OF RESPONDENTS

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II. INTRODUCTION

RCW 84.64.080 clearly states that the record owner who held title when the certificate of delinquency was issued is the person entitled to the refund of the excess funds from the tax foreclosure sale. Linda Pleger and Daniel Pleger were the record owners who held title when the certificate of delinquency was issued. The trial courts correctly determined that as the record owners, Linda Pleger and Daniel Pleger were entitled to the excess funds, and correctly granted them summary judgment.

Kaiser's due process violation claim fails because he had no property interest in the excess funds. Furthermore, his claim also fails because he was afforded an opportunity to be heard, and the trial court correctly decided that the excess funds belonged to Linda Pleger and Daniel Pleger. Kaiser's takings' claim also fails because no property he owned was taken from him. Additionally, his claim also fails because he failed to join necessary parties and failed to assert appropriate claims to challenge the constitutionality of the statute.

Daniel Pleger should be awarded attorney's fees because Kaiser's appeal against him is frivolous as he never opposed nor responded to Daniel Pleger's summary judgment motion. Therefore, the trial courts' orders should be affirmed, and sanctions should be awarded in favor of Daniel Pleger.

III. ASSIGNMENTS OF ERROR

A. **Assignment of Error No. 1**: Appellant contends that the trial court erred in entering the order of September 7, 2007, granting defendant Linda Pleger's motion for summary judgment. The applicable standard of review is *de novo*. All questions of law are reviewed *de novo*. The trial court's order granting summary judgment should be affirmed because there are no genuine issues of any material fact and the trial court's interpretation of the statute was correct.

B. **Assignment of Error No. 2**: Appellant contends that the trial court erred in entering the order of October 26, 2007, denying Joseph Kaiser's motion for reconsideration. The applicable standard of review for CR 59(a) motion for reconsideration is abuse of discretion. Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. The trial court's order denying Kaiser's motion for reconsideration should be affirmed because it was not manifestly unreasonable, or exercised on untenable grounds, or for untenable reason.

C. **Assignment of Error No. 3**: Appellant contends that the trial court erred in entering the order of April 18, 208, granting defendant Daniel Pleger's motion for summary judgment. The applicable standard of review is *de novo*. All questions of law are reviewed *de novo*. The trial

court's order granting summary judgment should be affirmed because there are no genuine issues of any material fact and the trial court's interpretation of the statute was correct. More importantly, Kaiser never opposed or responded to the summary judgment motion, thereby making this appeal pertaining to that order frivolous.

D. Counter Statement of Issues

Issue No. 1: Whether the trial court correctly concluded that Defendant Linda Pleger was entitled to the excess proceeds under RCW 84.64.080 as the record owner on the date the certificate of delinquency was issued.

Issue No. 2: Whether Appellant Kaiser had a property interest in the excess funds when RCW 84.64.080 makes it clear that the funds belong to the record owner.

Issue No. 3: Whether Appellant Kaiser can raise a takings' violation challenge when his property was not taken from him.

Issue No. 4: Whether Appellant Kaiser's appeal of the order granting summary judgment to Defendant Daniel Pleger was frivolous in light of the fact that Kaiser never opposed, nor responded to, Defendant Daniel Pleger's summary judgment motion.

IV. COUNTER STATEMENT OF THE CASE

On July 8, 2005, Kitsap County Treasurer issued and filed a Certificate of Delinquency concerning real property Parcel No. 222401-2-090-2008 (hereinafter "Property") (CP 211). Linda Pleger and her ex-husband, Daniel Pleger, were the record owners of the Property (CP 193).

On or about February 10, 2006, the County commenced a tax foreclosure sale of the Property pursuant to RCW Chapter 84.64. The foreclosure sale generated excess funds in the amount of $37,522.02 (CP 194). Linda Pleger ("Ms. Pleger"), as a fifty percent record owner of the Property, was entitled to half of the excess funds or $18,776.01. Id. A few days before the foreclosure sale, a representative of Cumulative LLC contacted Ms. Pleger and informed her that Cumulative was intending to purchase the Property at the foreclosure sale, but wanted to see if Ms. Pleger would sell her interest in the Property before the foreclosure sale, knowing that it was not intending to purchase the Property at the sale. Id. The representative offered to pay Ms. Pleger $2,500 for her Property. Id. The representative never advised Ms. Pleger that it was aware that there would be excess funds from the foreclosure sale of the Property, which would far exceed the $2,500 he was offering her. Id.

On February 8, 2006, Ms. Pleger met with the Cumulative representative and signed an agreement assigning her interest in the Property to Cumulative for $3,000. Id.

On March 30, 2006, Defendant Cumulative LLC sent a letter to the County demanding payment of the excess funds (CP 219-20). In response to Cumulative's demand, the County initiated a declaratory judgment action seeking relief that Cumulative was not entitled to the excess funds under RCW 84.64.080 (CP 2-3)[1]. On or about September 14, 2006, the County amended its complaint and interpleaded the excess funds with the registry of the court. (CP 130-175, 188). On October 10, 2006, Ms. Pleger, for herself only, submitted an application to the County for half the excess proceeds from the foreclosure (CP 222).

On June 28, 2007, after appearing in the interpleader action, Ms. Pleger moved for summary judgment on the grounds that RCW 84.64.080 required the excess funds from the tax foreclosure sale to be disbursed to the record owner, who held title on the date the certificate of delinquency was issued, and that as the record owner as defined by statute that she was entitled to her share of the proceeds, which was fifty percent of $37,522.02 (CP 193-197).

[1] The Plaintiff's complaint for declaratory judgment was later amended to an interpleader action on or about Sept 14, 2006 (CP 130-175).

On September 7, 2007, the trial court granted Ms. Pleger's motion for summary judgment, but reduced the amount of her recovery to $15,776.01 to offset the $3,000 she received from Cumulative (CP 298-299). On October 26, 2007, the trial court denied Kaiser's motion for reconsideration (CP 340-341).

On February 28, 2008, after appearing in this action, Daniel Pleger also moved for summary judgment, arguing similar to his former wife, that RCW 84.64.080 required the excess funds to be disbursed to the record owner, and that he was a fifty percent record owner who held title on the date the certificate of delinquency was issued with respect to the Property (CP 348-351).

Unlike Ms. Pleger's summary judgment motion, Kaiser did not oppose nor respond to Daniel Pleger's summary judgment motion. Therefore, the trial court granted the unopposed motion and ordered the clerk to disburse the other half of the excess funds to Daniel Pleger (CP 356-357). The Court entered an amended order on May 14, 2008, to correctly note the final disposition of this matter (CP 358-361). This appeal followed.

V. ARGUMENT

A. Linda Pleger and Daniel Pleger were the record owners as set forth under RCW 84.64.080, and therefore, were entitled to the excess funds.

Interpretation of a statute is a question of law. McIntyre v. State, 135 Wn. App. 594, 599, 141 P.3d 75 (2006). When ascertaining the meaning of a statute, the court first looks to its language. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). If the language is not ambiguous, courts give effect to its plain meaning. Id. "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002) (citing State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)). If a statute is ambiguous, courts are required to employ tools of statutory construction to ascertain its meaning. Cerrillo, 158 Wn.2d at 201. A statute is ambiguous if it is "'susceptible to two or more reasonable interpretations,' but 'a statute is not ambiguous merely because different interpretations are conceivable.'" Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)(quoting State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)). Courts are not to subject an unambiguous statute to statutory construction and have "declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it." Kilian, 147 Wn.2d at 20. "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." Id.(footnote omitted) (citing Associated Gen. Contractors v. King County, 124 Wn.2d 855, 865,

881 P.2d 996 (1994). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "Thus, when a statute is not ambiguous, only a plain language analysis of a statute is appropriate." Cerrillo, 158 Wn.2d at 201. The paramount policy of RCW 84.64.080 is to protect the rights of delinquent taxpayers. Pierce County v. Desart, 9 Wn. App. 760, 762, 515 P.2d 550 (1973).

The pertinent language of RCW 84.64.080 states:

> If the highest amount bid for any such separate unit tract or lot is in excess of the minimum bid due upon the whole property included in the certificate of delinquency, the excess shall be refunded following payment of all recorded water-sewer district liens, on application therefor, 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.*

(Emphasis added.)

This language of RCW 84.64.080 is unambiguous. Therefore, the plain meaning of the statute applies. Based on the plain meaning of RCW 84.64.080, the excess funds are to be paid to the record owner of the property who held title on the date the certificate of delinquency was issued. Moreover, any documents executed or recorded **after** the

certificate of delinquency was filed, including assignment of interests or deeds, "shall not affect the payment of excess funds to the record owner."

In the case at bar, it is undisputed that Linda Pleger and Daniel Pleger were the record owners, who held title when the certificate of delinquency was issued and filed. It is also undisputed that the excess funds were to be paid to Linda and Daniel Pleger under the statute, regardless of any documents they executed **after** the filing of the certificate of delinquency. The trial courts correctly concluded that Linda and Daniel Pleger were entitled to payment of the excess funds under the statute, and correctly granted each of them summary judgment.

Kaiser is not claiming that the pertinent language of RCW 84.64.080 is ambiguous. Nor is he claiming that there was a genuine issue of material fact concerning whether Linda Pleger and/or Daniel Pleger were record owners of the property when the certificate of delinquency was issued. Instead, Kaiser is contending that the trial court erred with respect to the order granting Linda Pleger summary judgment because the trial court voided the parties' agreement and concluded that Cumulative did not have the right to contract with Linda Pleger because it violated public policy.

The trial court's interpretation and conclusion was correct. The statute mandates that the excess funds go to the record owner, and the

record owners were Linda Pleger and Daniel Pleger. To disburse the funds to anyone other than the record owners would contravene the clear mandate of the legislature. The legislature by statute has the authority to exercise legislative power and change state substantive law in the exercise of the state's police power. Suburban Fuel Co. v. Lamoreaux, 4 Wn. App. 179, 181, 480 P.2d 216 (1971). As part of that power, the legislature can provide by statute that certain types of contracts or transactions shall be deemed void or voidable, illegal or both. Id. "Many illustrations of the exercise of this power may be found in the fields of consumer protection, minors, incompetent persons, married persons, statutes of fraud, fraudulent conveyances, securities acts, contracts involving employee discrimination, sales below cost, various types of commercial transactions and others. Indeed the legislature may even abolish a cause of action in the proper exercise of the state's police power." Id. By concluding that half of the excess funds were to be disbursed to Linda Pleger and that Cumulative never had the right to contract with the record owner, the trial court correctly interpreted that the "[a]ssignments of interests, deeds, or other documents executed or recorded after filing the certificate of delinquency shall not affect the payment of the excess funds to the record owner" language of the statute precluded Cumulative to contract with the record

owner. Any other interpretation would make the language meaningless or superfluous. *See* J.P., 149 Wn.2d at 450.

However, even if Kaiser was correct and the trial court erred by concluding that the parties' contract was void, the error was harmless as it does not affect the ultimate outcome of the case. *See* Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 311, 898 P.2d 284 (1995) (harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case). The statute is clear and unambiguous. The record owner is entitled to the excess funds. Any assignments or contracts executed after the filing of the certificate of delinquency does not affect the payment of the funds to the record owner. Therefore, the trial court's order granting Linda Pleger summary judgment should be affirmed.

Similarly, the trial court's order granting Daniel Pleger summary judgment should also be affirmed, not only for the reasons above, but because Kaiser never opposed nor responded to Daniel Pleger's summary judgment motion. There was no reasonable basis for Kaiser appealing the summary judgment order with respect to Daniel Pleger when he filed no response to Daniel Pleger's motion. The trial court entered the order

unopposed. As further discussed below, Daniel Pleger should be entitled to attorney's fees under RAP 18.9(a) for Kaiser's frivolous appeal.

B. Kaiser did not have a property interest, thus his constitutional rights were not violated.

Kasier contends that the trial court's application of RCW 84.64.080 violated his procedural due process rights and also violated his right to be free from an unconstitutional taking of private property. Kaiser's constitutional challenges fail because the excess funds did not belong to him, and therefore, he was not entitled to any due process. Similarly, no takings violation occurred because according to RCW 84.64.080, the excess funds belonged to the record owners, Linda Pleger and Daniel Pleger, and not to Cumulative/Kaiser.

1. Due Process

The scope of the Fourteenth Amendment's procedural protection of property interest is not coextensive with contract rights. Perry v. Sindermann, 408 U.S. 593, 599-601 (1972); Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972). Although the terms of a contract may be the source of a property interest, the protected property interests include all benefits to which there is a "legitimate claim of entitlement." Roth, 408 U.S. at 566 fn.1 & 577. Such a claim is "more than an abstract need or desire for" and "more than a unilateral expectation of" the benefit." Id. at 577. Property interests are created by "state law-rules or understandings

that secure certain benefits and that support claims of entitlement to those benefits." Id.; See also Conrad v. University of Washington, 119 Wn.2d 519, 529, 834 P.2d 17 (1992). "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**." Conrad, 119 W.2d at 529 (citing Perry, 408 U.S. at 601) (emphasis added).

Kaiser's procedural due process claim fails because he had no property interest in the excess funds. RCW 84.64.080 makes clear that the excess proceeds shall be paid to the record owner regardless of any agreement after the filing of the certificate of delinquency. Kaiser's due process claim also fails because any property interest he may have had was not created by state law or rules or any other mutually explicit understanding with a governmental entity. He, therefore, was not entitled to due process. But even if, assuming arguendo, that he was entitled to procedural due process, Kaiser was afforded an opportunity to be heard by the trial court before the excess funds were ordered to be released to Linda Pleger. Therefore, Kaiser's due process rights were not violated.

Kaiser asserts nevertheless that "it would be unconstitutional for Kitsap County to disburse tax overages to a prior record holder of interest when at the time of disbursement the County has notice that Cumulative

LLC/Kaiser is the legal assignee of the overage, and on the basis of the statute the County is allowed to disperse (sic) such funds to Pleger without allowing Cumulative LLC/Kaiser an opportunity for a hearing." *See Appellant's Brief, p. 16.* However, Kaiser's assertion misstates the facts. That is not what occurred in this case. The county never disbursed the excess funds to the prior record owners without affording Cumulative/Kaiser an opportunity to be heard. Rather, the county deposited the excess funds with the registry of the court and interpled the issue for the trial court to determine who the rightful owner was to the funds. Kaiser was afforded an opportunity to be heard, but the trial court concluded that Linda Pleger was one of the record owners, and therefore, entitled to her share of the excess proceeds.

2. Takings Clause

Kaiser also asserts that the trial court's application of RCW 84.64.080 constitutes an unconstitutional taking of personal property for private use in violation of Article I, Section 16 of the Washington State Constitution. *See Appellant's Brief, p. 21-22.* Kaiser's takings' claim fails because Kaiser's property was never taken. Moreover, Kaiser's taking's challenge also fails because he has neither joined necessary parties nor asserted any causes of action raising the constitutional claims against the necessary parties.

a. Kaiser's property was not taken.

Before engaging in a takings analysis, "it must be first determined if 'property' has actually been taken." Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 363-64, 13 P.3d 183 (2000).

In the case at bar, Kaiser's takings' claim fails because Kaiser's property was never taken from him. Kaiser was not the record owner when the certificate of delinquency was issued or filed, and therefore, was not entitled to the excess funds. RCW 84.64.080 clearly states that the excess funds shall be refunded to the record owner regardless of any assignments or documents executed or recorded after the filing of the certificate of delinquency. The record owners were Linda Pleger and Daniel Pleger, and the excess funds were their property, not Kaiser's.

Kaiser's assertion that the excess funds were his property is based upon the flawed argument that he obtained an executed document from the Plegers **after** the filing of the certificate of delinquency. However, the legislature made clear through the language of RCW 84.64.080 that such documents do not determine which person is entitled to the refund of the excess proceeds, and that the only way to make that determination is to see who held title when the certificate of delinquency was issued.

The legislature by statute has the authority to exercise legislative power and change state substantive law in the exercise of the state's police power. Lamoreaux, 4 Wn. App. at 181. As part of that power, the legislature can provide by statute that certain types of contracts or transactions shall be deemed void or voidable, illegal or both. Id. "Indeed the legislature may even abolish a cause of action in the proper exercise of the state's police power." Id. Because it is undisputed that Linda Pleger and Daniel Pleger held title and were the record owner, the trial courts correctly concluded that they were entitled to the excess funds. Kaiser's takings' claim fails because his property was never taken from him by the trial courts.

b. Kaiser's failed to join necessary parties

Under some certain circumstances, the original issues of an interpleader action may be expanded to include additional matters in controversy between the parties. State Bank of Wilbur v. Wilbur Mission Church, 44 Wn.2d 80, 94 (1954). Similarly, our civil rules allow a party to assert cross-claims, counterclaims, and/or third party claims against the opposing parties as well as joining additional necessary parties to seek complete relief. *See* CR 13(h), 19, and 20. Unfortunately, Kaiser never joined additional necessary parties nor did he assert any causes of action alleging constitutional violations against said parties. Therefore, because

those necessary parties who may have an interest in defending the constitutionality of the statute are not a party in this case, Kaiser is not entitled to such relief. *See* State Bank of Wilbur, 44 Wn.2d at 94 (evidence inconclusive because uncertain whether all necessary parties are before the court).

Because there was no due process violation and no takings violation, Kaiser's constitutional challenges should fail, and the trial courts' orders affirmed.

C. Kaiser's appeal against Daniel Pleger was frivolous.

RAP 18.9 authorizes the appellate court to sanction a party or the attorney when the appeal is frivolous. "'An appeal is frivolous [when] there are no debatable issues upon which reasonable minds might differ and it is totally devoid of merit that there is no reasonable possibility of reversal.'" Childs v. Allen, 125 Wn. App. 50, 58, 105 P.3d 411 (2004) (citing State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (quoting Presidential Estates Apartment Assoc. v. Barrett, 129 Wn.2d 320, 330, 917 P.2d 100 (1996))).

With respect to Kaiser's appeal of the order granting Daniel Pleger summary judgment, the appeal is frivolous because Kaiser has no debatable issues and has no possibility of reversal when he never opposed nor responded in any way to Daniel Pleger's summary judgment motion.

As the general rule goes, Kaiser cannot appeal an issue that was never raised in the trial court. *See* RAP 2.5.

Because Kaiser's appeal related to Daniel Pleger was frivolous, Kaiser and/or his attorney should be sanctioned in the amount of $1,500, which represents half the time spent preparing Respondent's brief.

VI. CONCLUSION

The trial courts' orders granting Linda Pleger and Daniel Pleger summary judgment should be affirmed. The trial court correctly concluded that Linda Pleger and Daniel Pleger were the record owners entitled to the excess funds per RCW 84.64.080.

Kaiser's due process was not violated as he had no interest in the property, and therefore, was not entitled to due process. Moreover, Kaiser was afforded an opportunity to be heard, and the trial court correctly concluded that Kaiser was not the record owner. Kaiser's property was not taken from him, thus there was no takings violation.

Kaiser and/or his attorneys should be sanction for bringing a frivolous claim against Daniel Pleger.

DATED this 12th day of September 2008.

PREMIER LAW GROUP PLLC

Patrick J. Kang, WSBA#30726
Of Attorneys for Defendants-Respondents

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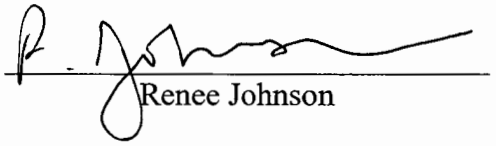
I am a citizen of the United States and a resident of the County of King, Seattle, Washington. I am over the age of 18 years and not a party to this action. My business address is 3131 Elliott Avenue, Suite 710, Seattle, Washington, 98121.

On September 15, 2008, I caused to be served the attached **BRIEF OF RESPONDENTS** on all parties in this action, by placing a true copy to be delivered via legal messenger (special delivery), and addressed as follows:

A. Stephen Anderson
A. Stephen Anderson P.S.
999 N. Northlake Way, STE 300
Seattle, WA 98103

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, on September 15, 2008.



Renee Johnson