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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY,

Respondent,

vs.

LORNA YOUNG and COLIN YOUNG.

Appellants

APPELLANT'S OPENING BRIEF

Case # # 50361-1-II

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I. INTRODUCTION

Appellants seek review of a trial court's denial of their motion to dismiss for want of prosecution, issuance of injunction, and summary judgment for Kitsap County.

Respondent/plaintiff Kitsap County sued appellants/defendants Colin Young and Lorna Young in May of 2012, by serving the county's Complaint for Injunction, Declaratory Judgment and Abatement of Nuisance simultaneously with the county's motion for preliminary injunction. CP 1 CP 16 On May 17, 2012 the county filed Declaration of code official Stephen Mount, CP 134, and on May 22, 2012 Declaration of health department official Daydra Denson. CP 211

The County noted their preliminary injunction hearing for May 22, 2012, two days before the 20 days allowed by rule to answer complaint. In lieu of answering formally, Young's counsel filed and served responsive pleadings and Declaration of Colin Young for the hearing on the county's temporary injunction CP 229 and CP 236, and in doing so appellants joined various issues of fact and law.

At the conclusion of the May 25, 2012 injunction hearing, the trial court entered its order of preliminary injunction, CP 268, which included pretrial findings of fact and conclusions of law as required for preliminary injunctions. Appellants timely moved for reconsideration of the ordered injunction - and in so doing, filed and served further pleadings and an additional declaration of Colin Young on June 11, 2012. CP 276 and CP286 Although the trial court denied appellant's motion for

reconsideration by order issued June 18, 2012. CP 330. Young's June 11 filings joined additional issues of fact and law.

Neither party took any further action for the next 14 months. Then on notice of Clerk's CR41(b) Motion to Dismiss for Want of Prosecution October 12, 2013 (CP 333), the county waited until November 4, 2013, the last day to avoid dismissal, then filed its first motion for summary judgment. County's filing on November 4, 2013, CP 839, was an action of record which tolled the Clerks dismissal of the action.

Young's first response to county's motion for summary judgment was the December 9, 2013 filing and service of Defendant's CR41(b)(1) Motion to Dismiss for want of prosecution. CP 334 Youngs CR41(b)(1) motion was noted to be heard December 20, 2013, thus complying with CR41(b)(1)'s ten day notice requirement. Young's Motion to Dismiss was then followed by a formal response to the county's motion for summary judgment. CP 341

At the December 20, 2013 motions hearing, and before hearing the county's summary judgment motion, the trial court heard and orally ruled on the appellant's CR41(b)(1) motion. The county presented no rebuttal to Youngs demonstration that issues had been joined by defendant declarations and other pleadings in response to the county's complaint and its motion for injunction, nor did the county contest Young's assertions that they had simply failed to prosecute their case CP 396-409. Instead, and in defense of Young's CR 41(b)(1) dismissal motion, the county presented two arguments – neither supported by applicable authority.

First, the county argued summary judgment was akin to a trial, and that the filing summary judgment served to terminate the operation of CR 41(b)(1). Second, the county argued the CR 41(b)(1) motion should be denied in the interest of judicial economy - specifically the cost and loss of effort the county had put into the case.

The trial court denied Young's motion to dismiss on grounds independent of the county's defense, and continued summary judgment to the close of the county's parallel criminal matter against Colin Young.

Young's January 14, 2014 Amended Motion for Reconsider the trial court order denying dismissal, CP 410, was denied by order dated January 29, 2014. CP 438

II. ASSIGNMENTS OF ERROR

1. The Trial Court Erred in Not Dismissing Kitsap County's Case for Want of Prosecution on Appellant's CR 41(b)(1) Motion
2. The Trial Court erred when it denied reconsideration of its order denying Appellants Motion to Dismiss
3. The Trial Court Erred in Ordering Preliminary Injunction without proper demonstration of harm or emergent issue.
3. The Trial Court Erred when it denied reconsideration of its order granting Kitsap County Preliminary Injunction.
- 4 After appellants CR56(f) motion allowing time for discovery was granted CP 678 the Trial Court Erred in declining to hear Youngs show cause issue offered at the bar prior to Summary Judgment - when Show Cause pleadings and declaration were prepared and filed specifically for the January 30,2017 continued Summary Judgment hearing after county attorney two days earlier at a discovery conference refused to produce critical discovery identifying witnesses including Search Warrant sign-in and sign-out sheets critical to Young's defense against Summary Judgment.
5. The Trial Court erred when it entered its order granting Kitsap County summary judgment on January 30, 2017.

6. The Trial Court erred when on February 23, 2017 it entered its order denying reconsideration of its order granting Summary Judgment
7. The Trial Court Erred in Making Finding of Fact 5 CP 270 ;;;;;;;;;;
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III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS,

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 1. Dissipating "any" one joined issue of fact or law by does not serve to toll the running of CR 41(b)(1)'s one year clock while other then joined issues of fact or law remain undissipated.8
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- B. Did the trial court fail to properly assess the facts of the case when determining the statutory requirements for a preliminary injunction were met, and in doing so overlooked appellants rights and liberties? (errors 3,7-18)
- C. Did the trial court err when it determined that the county had met its burden for summary judgment?16

1. The county failed to substantively demonstrate each one of the prerequisite requirements for application of collateral estoppel were met.17
2. Collateral estoppel from the 2011 Hearing Examiner decision comes to bear on only one issue, the “junk vehicle” issue.22

III. ARGUMENT

A. Do the provisions of CR 41(b)(1) apply making dismissal of the county’s case mandatory?

Standard of Review:

Whether a court rule applies to the facts in a case is a question of law that we review de novo. Whiley v. Rehak, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

Where the provisions of CR41(b)(1) apply, dismissal for want of prosecution “is mandatory; there is no room for the exercise of the trial courts discretion”

Snohomish County v. Thorp Meats, 110 Wn.2d 163, 157, 759 P.2d 1251 (1988).

In ruling on a motion to dismiss under CR41(b)(1), “the trial court may not generally consider the merits of the case nor the hardship which application of the rule may bring” Id. CR41(b) provides:

For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

(1) *Want of Prosecution on Motion of Party.* Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

“The circumstances mandating dismissal are: (a) the matter has not been noted for trial or hearing within 1 year after any issue of law or fact has been joined and (b) the failure to note the matter was not caused by the party moving for dismissal.” Poleilov. Knapp 68 Wn.App 809, 815, 847 P.2d 20 (1993)

In applying the rule, the court cannot consider the merits of the case nor the hardship which its application may bring, even though the cause of action may, if dismissed without prejudice, be barred by the statute of limitations. State ex rel. Lyle v. Superior Court, supra. The obligation of going forward to escape the operation of the rule always belongs to the plaintiff (or cross-complainant) and not to the defendant. State ex rel. Lyle v. Superior Court, supra; State ex rel. Philips v. Hall, 6 Wash.2d 531, 108 P. (2d) 339.

After the close of oral arguments on CR41(b)(1), the court continued on to the summary judgment issues. The trial court took the motions under consideration without ruling.

1. Dissipating “any” one joined issue of fact or law by does not serve to toll the running of the CR 41(b)(1) one year clock while other then joined issues of fact or law remain undissipated.

It is undisputed that responsive defendant pleadings and declarations filed May 23, 2012 and June 11, 2012 joined county issues of fact and law and triggered the running of the one year clock under CR 41(b)(1). CP 357-373 CP 410-417

On December 23, 2013 the court issued its written order on the Motion to Dismiss and Summary Judgment. CP 370-373 That order provided a formal explanation for

the trial court's denial of defendants CR41(b)(1) motion, and effectively continued the county's summary judgment until the close of the county's parallel criminal proceedings against defendant Colin Young. In that explanation, neither of the county's above defensive arguments were accepted or mentioned, but the trial court did present its own defense to Young's motion to dismiss.

The December 23, 2013 order concluded that "Defendant joined '*any issue*' " in his responsive pleadings filed May 17, 2012, when he disputed the status of his vehicles as '*junk vehicles*' " (emphasis added). CP 371 The trial court then explained that it relied its pretrial finding of "junk vehicles," from the preliminary injunction proceeding, CP 271, to foreclose the operation of CR41(b)(1) and stop the running of the one year clock because the issue of '*junk vehicle*' status had been "dissipated when the Court issued the preliminary injunction" CP 372 The trial court further determined that CR41(b)(1) clock was not reset to running again after the issuance of the preliminary injunction on May 30, 2012, because no additional issues were joined thereafter CP 372.

In point of fact, the court erred when it relied on the dissipation of just one specific factual issue, '*junk vehicles*,' while ignoring other issues of fact and law raised by the county's complaint, pleadings, and declarations, which had been joined by way of Young's responsive pleadings and declarations.

Here appellants joined issues of fact and law with Young's responsive filings on May 24 and June 11, 2012. CP 229, 236, 276, 286. and CP 410-417

"An issue of law or an issue of fact arises whenever in the progress of a legal action or proceeding it becomes necessary and proper to decide a question of law or a question of fact. . . . In adopting the rule, trial court did not use the phrase 'any issue of law or fact' in the narrow and technical sense in which those words had been used in Rem. Rev. Stat., §§ 309, 310, and 311, but in the broader and more accurate sense of having reference to every issue of law or fact, however raised." (pp. 150, 152.) State ex. rel. Goodnow v. O'Phelan, supra. (emphasis added)

In this case the trial court erred as it failed to apply the above broader and more accurate application of the rule which serves to prevent piecemeal determination of outstanding issues.

Like CR 41(b)(1), its predecessor, Rules of Pleading, Practice and Procedure (RPPP) 41.04W, provided in part: "Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counter-claimant, cross-claimant, or third-party plaintiff neglects to note the action for trial or hearing within one year after any issue of law or fact has been joined, . . ." Yellam v. Woerner, 77 Wash.2d 604, 606, 464 P.2d 947 (1970); Friese v. Adams, 44 Wash.2d 305, 305-06, 267 P.2d 107 (1954) (quoting similar language from RPPP 41.04W's predecessor, RPPP 3); see also RPPP III, 193 Wash. 40-a (1938); RPPP 3, 18 Wash.2d 32-a (1944); RPPP 3, 34A Wash.2d 69 (1951); RPPP 41.04W, 54 Wash.2d 1vii (1960). Interpreting this former rule, we held, "[t]he rule permitted no discretion. If the conditions of the rule were met, dismissal

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was mandatory.” Yellam, 77 Wash.2d at 606, 464 P.2d 947. Thus, any case was subject to a nondiscretionary motion for dismissal if the plaintiff had not noted it for trial within one year after the issues had been joined.

It is undisputed that the county failed to note the case for trial prior to Young’s CR41(b)(1) hearing December 20, 2013, as required under the rule to escape mandatory dismissal. CP 357-373 CP 410-417

“[T]he failure of the defendant to take any steps to bring the cause to trial or hearing is not a ground for denial of the defendant’s motion to dismiss the cause for want of prosecution since the obligation in that respect rests upon plaintiff rather than the defendant.” State ex rel. Lyle v. Superior Court, 3 Wn.2d 702, 707, 102 P.2d 246 (1940) (predecessor version of the rule). The burden of going forward to escape operation of the rule providing for dismissal for want of prosecution always belongs to the plaintiff and not to the defendant. McDowell v. Burke, 57 Wn.2d 794, 796, 359 P.2d (1961) (predecessor rule); State ex rel. Wash. Water Power Co. v. Superior Court, 41 Wn.2d 484, 489, 250 P.2d 536 (1952) (same). Dissent

It is undisputed that in this matter the county simply failure to prosecute within the year allowed under the rule and thier failure to prosecute was not caused by the appellants. CP 357-373

Even though issues of fact or law, other than “junk vehicles,” were “joined” by the appellants May 24 and June 11, 2012 responsive filings, those joined issues were clearly not “dissipated” by the trial court’s pretrial finding of fact of “junk vehicles” and thus undissipated issues remained outstanding and subject to the operation of the rule for dismissal. CP 268, CP 412-417

The following is just one example of a list of issues joined, CP 313-317, but remained undissipated for more than a year after the preliminary injunction was ordered:

Undissipated Issue

Plaintiff's Complaint, CP 5, Paragraph 16(b) assertion: parts not "properly" screened or fenced according to RCW 46.80.130 (Chapter 46.80 RCW - Vehicle Wreckers) regulations for licensed wreckers Joined by Declaration of Colin Young RE: Reconsideration 6/11/12 paragraph 12

"Contrary to the declaration of Stephen Mount, the county's only previous abatement action at the subject Big Valley property was not sustained by the Mason County Superior Court as to the allegations of the storage of "junk" motor vehicles or the vehicle "parts" (by product of my 2005 LUPA appeal and decision of Judge Sawyer) Nor is it the case that I have ever been found to be operating a "wrecking yard" at the subject property" (emphasis added)
CP 288

Here Young contests and brings to issue the county assertion of the subject property is a vehicle wrecker business subject to statutory screening and fencing requirements.

CR 41(b)(1) clearly applies to 14 months of the county's languishing on joined but undissipated issues of fact or law, where just 12 months is required to apply the operation of the rule and dismiss the matter.

2. Preliminary injunction is a pretrial procedure and pretrial procedures generally have no effect on the operation of CR 41(b)(1).

Trial court erred when it improperly relied a pretrial proceeding to foreclose operation of CR41(b)(1)

Pretrial proceedings such as preliminary injunctoin findings do not effect on the operation of the rule. "Pretrial procedures, however, have no effect on this rule of dismissal." Day v. State, 68 Wash 2d 364, 413).2d 1 (1966)

Here the court ruled that the preliminary injunction procedure's dissipation of just one of many joined issues of fact or law foreclosed the operation of the rule.

Its purpose was not simply to dispose of those cases wherein an unreasonable length of time had been allowed to elapse after a demurrer, answer, or reply had been filed, but to cover all cases wherein for any reason the vice of procrastination existed. Permitting a case to slumber indefinitely upon some preliminary motion, is just as . . . frequent an occurrence, as is that of permitting delay after the filing of the main, or essential pleadings." State ex rel. Goodnow v. O'Phelan, 6 Wn. (2d)146, 151, 106 P. (2d) 1073.

The effect of the pretrial findings of fact in this matter should properly have been limited to the preliminary injunction. This is because pretrial findings are not an ultimate determination of the facts or issues, and here, the trial courts reliance on them to toll running of the one year clock is misplaced. Pretrial proceedings should not be given the effect circumventing the application of CR41(b)(1)

This supplemental application of the court's pretrial findings or conclusions is clearly misplaced, because they have not be put to trial, they do not represent a final adjudication of issues of fact or law.

Accordingly, the courts have previously held, with a few exceptions none of which are applicable here, that pretrial proceedings have no effect on the operation of CR41 (b)(1) dismissal of actions for want of prosecution.

The trial court reliance on a pretrial procedure to deny Young's motion to dismiss and Young motion to reconsider this issue, is clearly is at odds with the above shown reasoning and case law

B. Did the trial court fail to properly assess the facts of the case when determining the statutory requirements for a preliminary injunction were met, and in doing so overlooked appellants rights and liberties?

On May 24, 2012 Kitsap county was granted a temporary injunction CP 268-275, in the nature of a prior restraint on Young's liberties. The record shows that the injunction was issued without the required demonstration of serious harm, or that the county's need for injunction was "emergent." CP 300-312

Because of these deficiencies as well as the prior restraint nature of the order, Young motion for reconsideration or clarification of the temporary injunction. And that motion was filed June 11, 2012 CP 276-285. The resulting Order on Reconsideration and Clarification was filed on June 18, 2012 CP 330-332

Under RCW 7.40.020 the threshold that must be met to grant a preliminary injunction is that there must be shown "the commission or continuance of which during the litigation would produce great injury to the plaintiff."

"An injunction is a extraordinary remedy designed to prevent serious harm; its purpose is not to protect a plaintiff from mere inconveniences or speculative and

insubstantial injury.” Tyler Pipe Induc., Inc. v. Dept. of Revenue 96 Wash.2d 785 792-96 (1982).

The record shows that the county failed to meet the legal requirements for a temporary injunction, by not demonstrating in its declarations submitted, that there was an immediate fear of an irreparable harm.

When specifically asked by the Court, the County admitted it was not the case of “imminent risk of bodily harm or of injury to some person or to property.” Nor could the County provide the Court with the “emergent nature” of their request. CP 311, 312 (Transcript of hearing p.10, 11)

“If the claimed harm is only speculative, or the anticipated action is not imminent, the court should deny injunctive relief.” 15 Wash Practice, Civil Procedure sec. 44:37 citing Turner v. City of Spokane, 39 Wash 2d 332, 235 P.2d 200 (1951)

In this case, the trial court failed ensure a showing of specific harm or imminent injury as required to justify issuance of the injunction in this matter, and thus trial court erred in not granting the motion for reconsideration to ensure that the injunction was issued on a proper basis.

C. Did the trial court err when it determined that the county had met its burden for summary judgment?

Standard of review: De Novo

In this case the county’s summary judgment rest on the shoulder of the declaration of Steven Mount. Young early pleading bring to issue the fact that

Mount is not qualified to present opinion evidence concerning “junk vehicles” and that his declarations are conclusory and absent of specifics required to meet the initial burden of summary judgment.

Appellants are unfairly prejudiced because the January 30, 2017 hearing was a twice previously continued summary judgment hearing and not all responsive filings were considered in summary judgment, when all previous responsive filings for continued county summary judgment hearings were referenced before the court.

Young’s Show Cause filings CP 685-680, CP 690-719 brought to the attention of the trial court at the final summary judgment hearing, are in fact summary judgment responsive pleading which extensively identify unresolved issues of fact and law in this matter, but which the trial court failed to consider.

1. The county failed to substantively demonstrate that each one of the prerequisite requirements for application of collateral estoppel had been met.

A party asserting collateral estoppel as a bar must prove four elements: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Reninger v. Department of Corrections*, 134 Wash.2d 437, 449, 951 P.2d 782 (1998) (citing *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wash.2d 413, 418, 780 P.2d 1282 (1989)). [*City of Bremerton v. Sesko* 100 Wash.App. 158 (2000)]

Here the county failed to establish in its pleadings the four elements that are required to sustain their claim of collateral estoppel from the July 2011 hearing examiner decision. The trial court's reliance on collateral estoppel of the July 2011 hearing examiner decision for any purpose is misplaced, unfounded, and err.

Furthermore, because Colin Young was not a named party to the July 2011 Kitsap Hearing Examiner's hearing, he was unable to appeal any part of examiners' decision due to legislative requirements under KCC9.56.050 (8), as shown below.

Consequently, appellants were unfairly prejudiced by trial court's collateral estoppel of their defense to summary judgment based on July 2011 examiner's decision, because Young did not qualify under KCC 9.56.050 (8) to appeal that decision, and July 2011 findings and conclusions are now relied on by the court after having applied collateral estoppel.

Because constitutional issues are not heard under the hearing examiner process, appeal is required to raise constitutional issues.¹ Appeal is also the only means challenge examiner determinations as to Colin Young's vehicles on the subject property and that there is no primary use of the property. Therefore the forth element for collateral estoppel acts as a bar: *"(4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied."*

Clearly this requirement cannot be met, because Colin Young could not appeal the July 11, 2011 ruling and he now suffers unfair prejudice by estoppel from a matter to which was not a party and was without recourse. This unfair prejudice is

¹ Constitutional issues including, but not limited to, issues of unlawful search, due process, invasion of private affairs, each material to the July 2011 proceeding.

an injustice that now exists because the court improperly relies on a decision to which Colin Young was not a party defendant and unable to appeal constitutional or other issues.

The trial court further stated in its oral ruling:

"...this case is very similar to that of the City of Bremerton v. Sesko case that was referenced in the briefing where there was an administrative hearing examiner determination and the higher court examined whether or not that had the same effect as collateral estoppel, and it did hold that the determination by the hearing examiner did collaterally estop further argument based upon the motion." RP 1/30/2017 p4

Here the court is mistakenly states the occurrence of, and relies on "*an administrative hearing examiner determination*" in *Sesko* - when in fact the *Sesko* hearing referenced was before the city planning commission. On review of the *Sesko* case, it is clear that the court is referring to the following Div.2 recital of the underlying facts in *Sesko*:

During administrative proceedings in front of the *City Planning Commission*, the Commission viewed photographic and documentary evidence and heard testimony before determining that the properties were nuisances; then the *Commission's decisions to uphold the orders became final rulings*. Thereafter, the Arsenal Way trial court applied the doctrine of collateral estoppel in determining that the property was a nuisance per se under the meaning of the statute, and the Pennsylvania Avenue trial court applied the doctrine to preclude relitigation of the issue of whether that property was a junkyard.

The matter at hand can easily be distinguished from the *Sesko* case. Unlike the July 2011 ruling from Kitsap's hearing examiner, the *Sesko*'s administrative decision came from an administrative tribunal - the *City Planning Commission*, unlike the Young matter, which was held before an actual hearing examiner, and

governed by formal quasi judicial hearing examiner processes established in the Kitsap County Code (KCC), and the *Sesko* hearing was not. And there was no effort to establish equavalancy of process between the two, resulting in unfair prejudice to the Appellants.

Further distinguishing this case from *Sesko*, it in this matter is the fact that July 11, 2011 hearing examiner decision on the issue of “junk” vehicles on the Big Valley property, is the is itself subject to res jutacata, and collateral estoppel from the 2005 Mason County LUPA decision by Judge Sawyer. There, following Colin Young pleading his activities as a car collector and automotive hobbyist on the subject property where protected under Washington’s collector statutes RCW 46.04.125 Collector, RCW 46.04.3815 Parts Car, and Finding 1996 c 225, Judge Sawyer ruled no evidence of “junk” vehicles on the Young’s Big Valley property.

This Mason Superior Court ruling overturned the 2004 Kitsap hearing examiner finding of “junk” vehicles on the subject Big Valley property, and Kitsap’s habitual characterization of Young’s Car Collector activities on the subject property as “junk” vehicles constituting a nuisance were dispelled from future considerations.

The general term res judicata encompasses claim preclusion (often itself called res judicata) and issue preclusion, also known as collateral estoppel. Under the former a plaintiff is not allowed to recast his claim under a different theory and sue again. Where a plaintiff’s second claim clearly is a new, distinct claim, it is still possible that an individual issue will be precluded in the second action under the doctrine of collateral estoppel or issue preclusion. In an instance of claim preclusion, all issues which might have been raised and determined are precluded. In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded. *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 228, 588 P.2d 725 (1978).

Here the county did not present identical claims between the 2011 proceedings and the 2012 proceeding and they appeared in oral argument to waive all evidence subject to invalid search warrant preclusion and proceed only on the basis of the 2011 hearing examiner decision, all that remains for consideration at summary judgment in that which was found by the Hearing examiner in 2011, just “junk vehicles.”

In its oral ruling the court also stated:

“Mr Young appears to be looking largely at whether or not there was an illegal warrant. I am satisfied based on the evidence, that there is ample evidence independent of the warrant that supports summary judgment, regardless of the issue, therefore, I am not finding the that the issuance of the warrant is enough to make it an issue of fact that would defeat summary judgment.”

Here the court is referring to the unresolved issue of fact raised by Young of administrative officials searching without first attaining a proper warrant. However the court improperly narrows the issue to “*and illegal warrant*” (implying the May 2, 2012 search) when in fact the unresolved issue material fact raised by Young is the necessity of an administrative warrant **each time** Mount, Deyson, or any other regulatory official entered, “visited” or “inspected” the subject property, or entered an adjoining property without consent.

One unresolved issue of material fact that Colin Young raised in his responsive pleading and declarations concerned the fact that **any time** (not just May 2, 2012 search) any regulatory or administrative official (including Mount and Deyson) were on the subject property, or any adjoining private property without having properly informed consent to entry, an administrative search warrant was required.

Here no administrative official, who's "inspection" or "visit" testimony and/or photographs were relied on by trial court and the hearing examiners for findings of facts and decisions, was ever in possession the administrative search warrant. This is because no applicable statute or court rule provides the required authority to issue an administrative search warrant.

Consequently, Mount and Deyson were violating constitutional rights and conducting an unlawful administrative search each time in sworn declaration they stated, indicated, or photographs showed they entered the subject property when they "visited" or "inspected" - which includes those times referred to in the 2011 Hearing Examiner Decision as well as all other times relied on for findings and conclusions outside the May 2, 2012 search. This is a yet unresolved issue of material fact that precludes summary judgment

2. Collateral estoppel from the 2011 Hearing Examiner decision comes to bear on only one issue, the "junk vehicle" issue.

Shown above, the 2005 by the Sawyer ruling is the controlling law of the case as to the issue of "junk" vehicles on the subject property, Accordingly, res judicata applies to the each and all of Kitsap's claims thereafter against the subject property founded on presence of "junk" vehicles. Moreover, on this same basis, collateral estoppel applies to the county re-raising the issue of "junk" vehicles on the subject property in any proceeding. The prosecutor's office and DCD officials (Wachter, Mount and his DCD superiors) were fully aware of these material facts based on

Judge Sawyer's 2005 ruling, and this was as patently demonstrated by Kitsap's five year hiatus in their harassment of Young that continued into 2010.

However, in 2010, Kitsap's efforts against Young by the same officials began anew, with Mount re-raising the issue of "junk" vehicles on the subject property, ignoring Sawyer ruling, and claiming the same code violations. Kitsap's efforts, all based on "junk" vehicles, were at the time, and are yet still, subject to res judicata or claim preclusion, as well as issue preclusion or collateral estoppel based on Judge Sawyer's 2005 ruling.

In its oral ruling in favor of summary judgment for the county, the court indicated collateral estoppel applied, without stating specifically what was subject to estoppel:

"It is unrefuted by Mr. Young that the evidence presented by the county warrants summary judgment. This is on the basis of collateral estoppel from a determination made by the Kitsap County hearing examiner decision in July of 2011, as well as...declarations and appropriate evidence in summary judgment" RP 1/30/2017 p3

It is not clear how the court from the courts statement how the court arrived at *"It is unrefuted by Mr. Young that the evidence presented by the county warrants summary judgment... on the basis of collateral estoppel..."* when Colin Young submitted robust pleadings and personal declarations refuting evidence and moving to strike improper evidence submitted by the county for summary judgment.

It appears by the court stating that Mr. Young failed to refute the county's evidence presented for summary judgment. If so, the court has misspoken with a broad and sweeping statement that clearly conflicts with the record as well as the

comprehensive responsive summary judgment pleadings and declarations
previously filed by Colin Young before the October 2016 hearing²

By implying the issue of the search warrant issue was rendered mute by the earlier findings and conclusions of the July 2011 hearing examiner decision, the trial court is demonstrating that it is relying in large part on the evidence presented by Mount that was collected prior to that 2011 hearing:

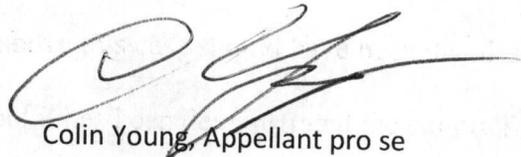
However, the burden of proof is on the party that asserts collateral estoppel - in this instance Kitsap county and the county has failed to meet its initial burden that there is no unresolved issues,

² Summary Judgment hearing where Young's CR56(f) motion was granted. During the January 30th 2017 hearing the court asked Mr. Young if there were any additional documents that the court should consider to which Mr. Young: replied those filed before the hearing.

IV. CONCLUSION

Shown above this case should have been dismissed for want of prosecution,
And if not it has been demonstrated the county failed to meet its burden at
Summary judgment and the matter should be returned for trial.

Respectfully submittedm December 18 2017,

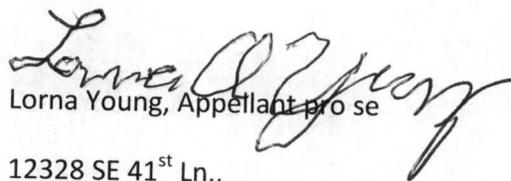


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