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CASE NO. 50361-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KITSAP COUNTY,

Respondent,

vs.

LORNA A. YOUNG a/k/a LORINA YOUNG and "JOHN DOE"
YOUNG, husband and wife and the marital community composed thereof;
and COLIN F. YOUNG and "JANE ROE" YOUNG, husband and wife
and the marital community composed thereof,

Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KITSAP COUNTY
Superior Court No. 12-2-01123-2

RESPONSE BRIEF OF APPELLEE KITSAP COUNTY

TINA R. ROBINSON
Prosecuting Attorney

LAURA ZIPPEL
NICHOLAS KIEWIK
Deputy Prosecuting Attorneys
614 Division Street
Port Orchard, WA 98366
(360) 337-4992

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I. INTRODUCTION

This case is about a property located in Kitsap County (“Property”) which has been found to be a nuisance on multiple occasions by both the local Hearing examiner and several Washington Courts since 2004. Throughout the various proceedings, the Youngs cannot and have not provided any evidence showing the property is not a public nuisance and should not be subject to abatement for the benefit of the public health, safety, and welfare. Instead, the Youngs rely on allegations of procedural errors to justify their delay in remedying the nuisance conditions on the Property.

The majority of the procedural errors alleged by the Youngs are ultimately irrelevant to the final disposition of the case. Based on the “ample evidence” submitted by Kitsap County to the trial court that the property violates Kitsap County Code because of the junk vehicles and vehicle parts permanently stored on it, the trial court granted Kitsap County’s amended summary judgment motion declaring the property a public nuisance, enjoining future nuisance activities on the property, and ordering that Kitsap County is entitled a warrant of abatement to be issued at a later date.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court err when it did not dismiss under CR 41 when no undissipated issues of law or fact remained and Kitsap County moved for summary judgment prior to the motion for dismissal under CR 41? (Assignments of Error 1 and 2).

2. Did the trial court err in entering a preliminary injunction when it found that the nuisance conditions were present and ongoing, Kitsap County was likely to prove the nuisance violations alleged in its complaint, and no other available legal remedy was likely to protect the plaintiff's rights due to the lack of prior compliance with enforcement actions? (Assignments of Error 3a and 3b).¹

3. Did the trial court err granting summary judgment when it found that there were no issues of material fact, the subject property was previously found to be a public nuisance, and the conditions on the property were found to be nuisances *per se*? (Assignments of Error 5 and 6).

4. Did the trial court err in not considering Mr. Young's Declaration and Memorandum in Support of Show Cause when Mr. Young failed to comply with Kitsap County Local Rule 7(b)(1)(A), did not file or serve either document until the summary judgment hearing, and

¹ There are two assignments of error numbered 3. Kitsap County refers to them as 3a and 3b.

stated on the record that he had no additional documents to submit for summary judgment? (Assignment of Error 4).

III. STATEMENT OF THE CASE

A. Procedural History

This case was originally filed on May 17, 2012 by Kitsap County after various other attempts to clean-up the Property failed, including the hearing examiner process. CP 1-15. In May, 2012, the Court granted a preliminary injunction against Colin Young's continued use of the Property for junk vehicle storage and as an illegal vehicle lot, determining that there was evidence of junk vehicles and vehicle parts on the Property and that Kitsap County would likely prevail on its nuisance allegations. CP 370-372.

After the preliminary injunction was entered, Mr. Young filed a motion for reconsideration and a motion to clarify the preliminary injunction. CP 272-275. The trial court denied the motion for reconsideration but did clarify three orders in the preliminary injunction to ensure that the Youngs could lawfully dispose of the vehicles and vehicle parts on the property to begin cleaning-up the nuisance conditions. CP 330-331.

Kitsap County filed a motion for summary judgment on November 4, 2013. In response, on December 9, 2013 Mr. Young filed a motion to

dismiss for want of prosecution, a motion for a continuance due to a pending criminal case charging Mr. Young with illegal vehicle wrecking, and a response to Kitsap County's motion for summary judgment. CP 333. Ms. Young did not file a response to the summary judgment motion. The trial court denied Mr. Young's motion for dismissal but did continue Kitsap County's summary judgment until Mr. Young's criminal case was fully adjudicated. CP 370-372.

On December 30, 2013, after the summary judgment against Mr. Young was continued, Kitsap County filed a motion for default judgment against Ms. Young who had yet to respond or appear in the case. CP 887-890. In January, Ms. Young filed her answer to Kitsap County's complaint. CP 386-391. Also in January, 2014, Mr. Young filed a motion for reconsideration of his motion to dismiss, which the trial court denied. CP 438-439.

After Mr. Young's criminal case concluded in March, 2016, Kitsap County filed an amended summary judgment motion to restart the case and update the trial court with the current conditions of the property. CP 720-730. Filed with the summary judgment motion were additional declarations of Kitsap County Department of Community Development ("DCD") staff documenting the conditions of the property from 2011 to 2016. CP 541-586. Mr. Young filed his answer to Kitsap County's

compliant on October 7, 2016. On October 10, 2016, the Youngs filed responses to Kitsap County's amended motion for summary judgment and a motion for a CR 56(f) continuance to conduct discovery. CP 593-606; CP 607-621. The trial court granted the Youngs' motion for a continuance and reset the hearing on summary judgment to January 30, 2017. CP 681-682.

On January 30, after hearing oral argument from Mr. Young and counsel for Kitsap County, the trial court granted Kitsap County's amended summary judgment motion, declared the Property a public nuisance, entered a permanent injunction prohibiting nuisance activities on the property including the storage of vehicles and vehicle parts, and authorized a warrant of abatement be issued to Kitsap County at a later date. CP 720-730.

B. Statement of Relevant Facts

1. The Property Has Previously Been Declared A Nuisance

The Property was first found to be a public nuisance in 2004 by the Kitsap County Hearing Examiner. *Young v. Kitsap County*, 137 Wn. App. 1003 (2007) (unpublished); CP 720. The Mason County Superior Court upheld the Hearing examiner's finding that the property was an unpermitted vehicle storage lot and a public nuisance *per se. Id.*

The Property was also found to be a private nuisance in 2007 in a Superior Court action brought by former neighbors of the Property who were aggrieved by the ongoing nuisance conditions caused by long-term storage and dumping of junk vehicles and parts on the Property. CP 810.

In 2011, after it was clear that the first two decisions did not solve the problems on the property, Kitsap County again attempted to abate the nuisance conditions through the Hearing examiner process pursuant to Chapter 9.56 Kitsap County Code (“KCC”). CP 136-137. After hearing oral testimony from both Mr. Young and Kitsap County, written testimony from Ms. Young, and reviewing photographic and documentary evidence, the Hearing examiner affirmed nuisance conditions on the property and further ordered:

Colin F. Young shall abate all violations of the Kitsap County Code (KCC) Sections 17.381.060.B.6, 9.56.020(9), 9.56.020(10)(b)(iii), 17.381.040(E) and 9.56.020(10)(b)(iv) on the property located at Big Valley Road in Kitsap County identified by Tax Assessor’s Parcel No. 262701-4-010-2004 within 60 calendar days of the issuance of this order.

CP 149.

Mr. Young failed to comply with the Hearing examiner’s orders and the Property continues to serve as the storage place for vehicles and parts placed there by, or on behalf of, Mr. Young.

2. Ample Evidence from 2011 to 2016 Documents the Nuisance Conditions on the Property

As specifically noted by the trial court, there is ample evidence in the record documenting the nuisance *per se* conditions on the property from 2011 to 2016 even if the May 2, 2012 search pursuant to a criminal search warrant is not considered. RP 32-33. This evidence includes photos and statements by DCD staff Stephen Mount documenting accumulation of vehicles and vehicle parts from July and March, 2016, May, 2013, January, 2012, and December, 2011. CP 541-592. As can be seen from the photographs attached as exhibits to Mr. Mount's declarations, many of the vehicles were present on the Property in the same location for over four years, are extremely damaged, and are apparently inoperable. The vehicle and vehicle parts are also visible from neighboring properties as well as from Big Valley Road, are within 250 feet of the property line, and are not screened. Id.

3. DCD Staff Did Not Trespass On Private Property

Despite the Youngs' allegations, there is no evidence in the record that DCD staff, particularly Mr. Mount, ever trespassed on the Property or on neighboring properties. There is also no evidence of any violations of search and seizure laws. In contrast, there is evidence that Mr. Mount made his observations from lawful vantage points including public right-

of-way (Big Valley Road) and from neighboring properties after obtaining consent from the owners of the neighboring properties. CP 669.

IV. ARGUMENT

A. **Summary Judgment Was Proper Because there are No Issues of Material Fact and the Property is a Public Nuisance Per Se**

1. **Standard of Review**

Summary judgment is reviewed de novo. *Weden v. San Juan Cty.*, 135 Wn. 2d 678, 689–90, 958 P.2d 273 (1998). “An order granting summary judgment is appropriate if ‘the pleadings, affidavits, depositions, admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party’ demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* (quoting *Higgins v. Stafford*, 123 Wn.2d 160, 169, 866 P.2d 31 (1994)); CR 56(c). Kitsap County bears the initial burden of demonstrating there is no genuine issue as to any material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The burden then shifts to the Youngs to demonstrate that there is a genuine issue of material fact. *Young*, 112 Wn.2d at 225-26. Any claim of a material issue of fact must be supported by citation to specific facts in the record, conclusory statements or speculation are not enough to defeat a

summary judgment motion. *Elcon. Const., Inc. v. Eastern Washington University*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012) (“Conclusory statements and speculation will not preclude a grant of summary judgment.”).

2. Trial Court Properly Declared the Property to Be a Public Nuisance

The trial court entered summary judgment in favor of Kitsap County on two grounds, that the vehicles and vehicle parts on the Property documented by Kitsap County through declarations constitute public nuisances *per se* and that collateral estoppel may be applied to the hearing examiner’s 2011 finding that the property is an unpermitted vehicle storage lot and a public nuisance *per se*. CP 725-727; RP 32-33. While the Youngs’ brief argues that the trial court’s application of collateral estoppel to find the property a public nuisance was in error, they do not present any evidence contradicting Kitsap County’s photographs of the presence of junk vehicles and vehicle parts on the property from 2011 until 2016. The Youngs do not and cannot cite to any evidence in the record which creates a material issue of fact.

At the trial court level, Kitsap County met its burden of proof as the moving party and the burden shifted to the Youngs to show a material issue of fact which would preclude summary judgment. On appeal, instead

of providing facts showing that the vehicles on the Property are not junk vehicles, or otherwise raising genuine issues of material fact as to the nuisance conditions on the property, the Youngs instead make conclusory and unsupported statements regarding the qualifications of Kitsap County staff and the alleged but unsupported claim of trespass onto their property. These contentions do nothing to contradict the photographs and descriptions of the vehicles in Mr. Mount's declarations that clearly show that the vehicles meet the definition of "junk vehicles" under Kitsap County Code and that the property is an unpermitted vehicle storage lot under both Chapter 9.56 KCC (public nuisance) and Title 17 KCC (zoning).²

i. Violations of Chapter 9.56 KCC and Title 17 KCC are Public Nuisances Per Se

A nuisance *per se* "is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance." *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). Engaging in any activity or business in defiance of a law regulating or prohibiting the same is a nuisance *per se*. *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138, 720 P.2d 818 (1986). The Washington legislature expressly permits counties "to declare by ordinance what shall

² Kitsap County Code is available online at <http://www.codepublishing.com/WA/KitsapCounty/>.

be deemed a nuisance within the county.” RCW 36.32.120(10). Once Kitsap County has determined what acts or conditions constitute a public nuisance, the Court must follow that determination:

Where the legislative arm of the government has declared by statute and zoning resolution what activities may or may not be conducted in a prescribed zone, it has in effect declared what is or is not a public nuisance. What might have been a proper field for judicial action prior to such legislation, becomes improper when the law-making branch of government has entered the field.

Shields v. Spokane School Dist. No. 81, 31 Wn.2d 247, 254, 196 P.2d 352 (1948) (quoting *Robinson Brick Co. v. Luthi*, 115 Colo. 106, 169 P.2d 171 (1946)).

Kitsap County’s public nuisance code is Chapter 9.56 KCC. KCC 9.56.010 includes vehicles and vehicle parts as potential public nuisances:

This chapter provides for the abatement of conditions which constitute a public nuisance where premises, structures, **vehicles, or portions thereof** are found to be unfit for human habitation, or unfit for other uses, due to dilapidation, disrepair, structural defects, defects increasing the hazards of fire, accidents or other calamities, inadequate ventilation and uncleanliness, inadequate light or sanitary facilities, inadequate drainage, or due to other conditions which are inimical to the health and welfare of the residents of Kitsap County. (emphasis added).

Chapter 9.56 KCC also enumerates several nuisances *per se*, including visible accumulations of solid waste (e.g. tires), accumulations of six or more junk motor vehicles outside of a building, and unpermitted vehicle lots. KCC 9.56.020(10)(b)(iii)-(iv).

ii. *The Property Is an Unpermitted Vehicle Lot*

Unpermitted vehicle lots are defined by Kitsap County code as public nuisances. KCC 9.56.020(10)(b)(iv). A vehicle lot is “a single tax parcel where more than ten vehicles are regularly stored without approved land use by the department.”³ KCC 9.56.020(19). The photographs attached to Mr. Mount’s 2016 declaration clearly show that more than ten vehicles are regularly stored on the property and have been since at least 2011. CP 541-586. The Youngs have never applied for, or received, a permit from DCD for a vehicle lot on this property. CP 271. There is no issue of material fact that the Property meets the definition of a vehicle lot and is therefore a nuisance *per se* pursuant to KCC 9.56.020(10)(b)(iv).

iii. *The Storage of Junk Vehicles on the Property is a Public Nuisance Per Se*

KCC 9.56.020(9) defines “Junk motor vehicle” as a motor vehicle meeting at least three of the following requirements:

- (a) Is three years old or older;

³ “The department” is defined as the Department of Community Development (DCD). KCC 9.56.020(5). DCD is Kitsap County’s building department which handles land use and construction permits.

(b) Is extensively damaged, such damage including, but not limited to, any of the following: a buildup of debris that obstructs use, broken window or windshield; missing wheels, tires, tail/headlights, or bumpers; missing or nonfunctional motor or transmission; or body damage;

(c) Is apparently inoperable; or

(d) Has an approximate fair market value equal only to the approximate value of the scrap in it.

“Junk motor vehicle” does not include a vehicle or part thereof that is stored entirely within a building in a lawful manner where it is not visible from the street or other public or private property, or a vehicle or part thereof that is stored or parked in a lawful manner on private property in connection with the business of a licensed dismantler or licensed vehicle dealer and is fenced according to the requirements of RCW 46.80.130.

As evidenced in the photographs attached to Mr. Mount’s declaration, many of the vehicles on the property are three years old or older, are damaged, and are apparently inoperable. CP 541-586. Several vehicles are present in the photographs from 2011 until 2016, proving that they are over three years old. CP 134-210; CP 541-586. Additionally, many of the vehicles have sat on the property for several years with no evidence that they were ever moved during that time, supporting Kitsap County’s position that they are apparently inoperable. CP 543. Lastly, the photographs show the damage to the vehicles including body damage,

broken or missing bumpers, broken or missing mirrors, and missing wheels. CP 134-210; CP 541-586. Tellingly, Mr. Young who owns the vehicles and has regular access to the Property, did not provide any evidence on summary judgment that the vehicles are three years old or less, are operable, or are not heavily damaged.

Because many of the vehicles meet at least three out of four of KCC 9.56.020(9)'s criteria, they are junk vehicles by law under Kitsap County Code and must meet the requirements for storage of junk vehicles. Storage of junk vehicles is allowed if the vehicles are housed within a building. KCC 9.56.020(10)(iii). Alternatively, less than six junk vehicles are allowed to be stored outside if they are completely screened to the satisfaction of the director of DCD or are over 250 feet from a property line. *Id.* To be properly screened, the vehicles cannot be visible from "any portion or elevation of any neighboring or adjacent public or private property, easement or right-of-way." KCC 9.56.020(17). Any owner of junk vehicles stored outside must enter into an environmental mitigation agreement with DCD as provided in KCC 9.56.070. KCC 9.56.020(10)(iii). Any junk vehicles stored without meeting this criteria is a public nuisance *per se*. *Id.*

The junk vehicles on the Property do not meet KCC 9.56.020(10)(iii)'s requirements. As can be seen in the photographs they

are not housed within a building and are not screened because they are visible from both Big Valley Road and from the neighbor's property. CP 134-210; CP 541-586. As stated in Mr. Mount's declaration the vehicles are also well within 250 feet of the property line, sitting almost on top of the Property's boundaries. CP 544. The storage of junk vehicles on the Property is a violation of Kitsap County Code and a public nuisance *per se* in accordance with KCC 9.56.020(10)(b)(iii).

iv. The Storage of Vehicles on the Property is a Violation of Kitsap County Zoning Code

Kitsap County has declared all land uses in violation of Title 17 KCC to be public nuisances, subject to abatement under a civil action. KCC 17.610.030. Throughout this case the Property has been zoned rural protection. CP 722. The land use tables codified at KCC 17.410.040 provide the allowed uses of property zoned rural protection in Kitsap County. The land use tables prohibit the use of the Property for many vehicle related uses including vehicle and equipment storage. KCC Table 17.410.040(A)(542). Vehicle and equipment storage is defined as "an indoor or outdoor area for parking or holding of motor vehicles and boats or wheeled equipment for more than seventy-two hours" excluding "automotive sales and rentals, automotive service and repair shops, and auto wrecking yards." KCC 17.110.690.

The only relevant exception to the prohibition on vehicle storage for properties zoned rural protection is provided in KCC 17.410.060(B)(6)(a):

Storage of junk motor vehicles on any property outside of a legally constructed building (minimum of three sides and a roof) is prohibited, except where the storage of up to six junk motor vehicles meets one of the following two conditions:

(1) Any junk motor vehicle(s) stored outdoors must be completely screened by a sight-obscuring fence or natural vegetation to the satisfaction of the director (a covering such as a tarp over the vehicle(s) will not constitute an acceptable visual barrier). For the purposes of this section, "screened" means not visible from any portion or elevation of any neighboring or adjacent public or private property, easement or right-of-way; or

(2) Any junk motor vehicle(s) stored outdoors must be stored more than two hundred fifty feet away from all property lines.

As stated in Mr. Mount's declaration and evidenced in the photographs, there are more than six junk vehicles on the Property. Even if there are less than six junk vehicles on the property, the junk vehicles are not stored within a legally constructed building, are not screened from either the neighboring property or Big Valley Road, and are within 250 feet of the property line.

If the Court finds there are no junk vehicles on the property, the property is still being used for vehicle storage in violation of Kitsap County's zoning code and is a public nuisance *per se*.

3. Kitsap County Never Unlawfully Searched the Youngs' Property

The Youngs argue, without any citation to authority or evidence in the record, that all of Kitsap County's evidence required an administrative warrant which creates a material issue of fact. Because the Youngs do not specify whether they are challenging the County's alleged search under the Fourth Amendment of the United States Constitution or article 1, section 7 of the Washington State Constitution, to avoid redundancy Kitsap County focuses its argument on the Washington State Constitution which provides greater protection for individual privacy. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73, 78 (1999) ("It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment."); *State v. Young*, 123 Wn.2d 173, 179-181, 867 P.2d 593 (1994) (under the *Gunwall* factors, article 1, section 7 affords greater protection against government intrusion into an individual's "private affairs").

Kitsap County's evidence was properly obtained by DCD staff from lawful vantage points outside of the Property boundaries and did not

require an administrative warrant. Like criminal searches, warrants are required for administrative searches that would otherwise violate article 1, section 7's privacy protections. *City of Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134 (1994) (*McCready I*) (nonconsensual inspection of residential apartments without a valid warrant violates article 1, section 7 of the Washington State Constitution). Also like criminal searches, warrant exceptions apply to civil inspections, including consent. *City of Seattle v. McCready*, 124 Wn. 2d 300, 303-308, 877 P.2d 686 (1994) (*McCready II*) (tenants have authority to consent to searches of both private residences and common areas in an apartment building). Under the open view doctrine, a warrant is not required when evidence is obtained using an inspector's senses, including an "unaided eye," from a lawful vantage point because there is no search. *Young*, 123 Wn.2d at 182. A street or road is a lawful non-obtrusive vantage point. *Id.* at 183.

All of the evidence presented by Kitsap County documenting the conditions of the Property that the trial court relied on for summary judgment was obtained from either neighboring properties or from Big Valley Road. As stated in Mr. Mount's declaration, whenever Mr. Mount entered a neighboring property he obtained voluntary consent from the owners and residents of that property. Mr. Mount affirmatively declared that he never entered the Property without a warrant. CP 544.

Further, the photographs taken by Mr. Mount clearly show the vehicles and vehicle parts were not screened in any way from the neighboring properties or from Big Valley Road. The property is also not used as residence, further reducing the Youngs privacy interest. The Youngs had no privacy interest in the vehicles and no warrant was required to view them from lawful vantage points.

4. The Trial Court Properly Applied Collateral Estoppel To the Hearing Examiner's Finding that the Property is an Unpermitted Vehicle Storage Lot

“Whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo.” *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). Claim preclusion, also called *res judicata*, bars relitigation of an entire cause of action whereas issue preclusion, also called collateral estoppel, bars relitigation of specific issues or determinative facts. *Id.* at 306. The party claiming collateral estoppel bears the initial burden of establishing that collateral estoppel applies. *Id.*

The trial court properly applied collateral estoppel to find the property was being used as a vehicle storage lot, a public nuisance *per se*. Even if the trial court's finding of collateral estoppel was in error, the error did not impact the outcome of the case. The trial court independently declared the Property a public nuisance based on the evidence presented

by Kitsap County in support of summary judgment. *See e.g. City of Bremerton v. Sesko*, 100 Wn. App. 158, 164, 995 P.2d 1257 (2000) (application of collateral estoppel did not affect the outcome of the case because two trial courts also received evidence and concluded independently from the finding of collateral estoppel that the subject property was a public nuisance).

i. The Hearing Examiner's Finding Meets the Elements of Collateral Estoppel

Collateral estoppel from an administrative decision is proper when seven elements are met; (1) the issues are identical; (2) there was a final judgment on the merits; (3) the parties are the same or in privity with the former parties; (4) the doctrine does not work an injustice on the party against whom the doctrine is applied; (5) the agency acted within the scope of its competence in making the final determination; (6) the procedural differences between the agency and court are minimal; and (7) policy considerations support application of the doctrine. *City of Bremerton*, 100 Wn. App. at 163-164.

The seven elements are met here: (1) the issue of whether there is a vehicle storage lot on the Property is identical; (2) a final judgment was made by the Hearing examiner; (3) the parties are the same; (4) there is no injustice to either Ms. or Mr. Young because they have already been

ordered on numerous other occasions to clean-up and discontinue using the Property for vehicle storage and they had the opportunity to fully litigate the previous decision; (5) the Hearing examiner's decision was made within the Hearing examiner's competence as the "Violations Hearing examiner;" (6) while the hearing examiner process differs from a court process it still provides adequate opportunity for the Youngs to fully litigate their positions by providing testimony and documentary evidence as well as an opportunity for appeal to a superior court; and (7) policy considerations of judicial efficiency and economy support not relitigating this matter which has already been litigated in not only in front of the Hearing examiner but also in a separate private nuisance suit.

ii. The Youngs are Not Prejudiced by the Application of Collateral Estoppel

The injustice element of collateral estoppel serves to protect the procedural, not substantive, rights of parties. *Christensen*, 152 Wn.2d at 309. It ensures that the parties have a fair and full opportunity to litigate the issues and that the disparity of relief between the two forums is not so different as to lull the parties into not fully litigating the issues in the first forum. *Id.* It also accounts for the role of public policy and legislative intent in the application of collateral estoppel. *Id.* at 309-310.

The Youngs are unable to show any injustice in applying collateral estoppel in this case—the Youngs had the full opportunity to litigate the issues in front of the Hearing examiner, Mr. Young had standing to appeal the Hearing examiner’s decision, and constitutional issues are not at issue in either the Hearing examiner’s decision or in the current case.

In front of the Hearing examiner, the Youngs were given every opportunity to present their case including the ability to call witnesses, submit documentary or other evidence, cross-examine County witnesses, and otherwise defend themselves against the County’s nuisance abatement order. CP 142-149. The Youngs also had incentive to fully litigate the issues in both forums because the consequences of the Hearing examiner’s decision and a court decision were similar. The consequences of the hearing examiner process was a final decision that the Property was a public nuisance, an order to discontinue the public nuisance, and an abatement order. *Id.* The consequence of the trial court decision was a declaratory judgment that the property is a public nuisance, an injunction enjoining the future public nuisance use of the Property, and a warrant of abatement. CP 720-730.

While true that the hearing examiner did not have the authority to hear constitutional challenges, the Youngs do not allege a constitutional defense to the finding that the Property is being used as an unpermitted

vehicle storage lot. The Youngs only constitutional challenges in the current case are that all of Kitsap County's evidence should be excluded because it was obtained without an administrative warrant, and that the 2012 criminal search warrant was invalid. However, as argued above, administrative warrants are not required when evidence is clearly visible from legal vantage points. Further, the hearing examiner decision was in 2011, prior to the 2012 criminal search warrant. Additionally, the Youngs had the opportunity to appeal the hearing examiner decision to a superior court to address their constitutional concerns and choose not to.

Mr. Young was able to appeal the 2011 hearing examiner decision to Superior Court. KCC 9.56.050(8) allows any person with standing to bring a Land Use Petition Act (LUPA) petition under Chapter 36.70C RCW to appeal a hearing examiner decision. RCW 36.70C.060(2) allows a person who is not the owner of the property at issue to bring a petition when they are "aggrieved or adversely affected by the land use decision. . . ." Persons claiming to be aggrieved or adversely affected must meet the following criteria:

- (a) The land use decision has prejudiced or is likely to prejudice that person;
- (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
- (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or

likely to be caused by the land use decision; and
(d) The petitioner has exhausted his or her
administrative remedies to the extent required by
law.

RCW 36.70C.060(2).

Mr. Young clearly meets these criteria. Mr. Young was a party of interest in the hearing examiner decision and presented evidence and testimony on his and his mother's behalf. CP 141-147.

The hearing examiner decision expressly requires Mr. Young, not Ms. Young, to abate the public nuisance by removing the vehicles from the Property. CP 149. A judgment in his favor on appeal would reverse an order of the hearing examiner directed specifically at Mr. Young meeting subsections (a) and (c) of RCW 36.70C.060(2). Further, Kitsap County was required to address Mr. Young's interests because he was the owner of the vehicles and, according to evidence presented by the Youngs, responsible for the nuisance conditions on the Property. CP 144-148. Since Mr. Young appeared and participated in the hearing examiner decision, he also meets subsection (d), exhaustion of administrative remedies.

The Youngs did not provide any evidence or legal reasoning that supports their argument that the trial court's finding of collateral estoppel is prejudicial or causes an injustice. There is no procedural, public policy,

or other reason to relitigate whether the Property is being used as an unpermitted vehicle storage lot. The trial court's finding of collateral estoppel as to the presence of an unpermitted vehicle storage lot should be upheld.

iii. The Mason County Superior Court Case Found the Property to Be a Per Se Public Nuisance

The Youngs also fail to show how a Mason County Superior Court decision finding the Property to be a public nuisance in 2005 bars Kitsap County's current case and precludes a finding of public nuisance by the trial court. While the Mason County Superior Court decision is not in the record, the Court of Appeals decision on the matter makes it clear that the Mason County trial court affirmed a 2004 hearing examiner decision finding the Property was being used for a vehicle storage lot and was therefore a public nuisance *per se*. *Young v. Kitsap County*, 137 Wn. App. 1003 (2007) ("The Mason County Superior Court reversed the hearing examiner's decision on the presence of junk motor vehicles, but affirmed the existence of a vehicle lot."). CP 816.

Even if the 2005 Mason County Superior Court decision did preclude the trial court's 2016 finding regarding junk vehicles, it also supports the trial court's finding of a vehicle storage lot and serves to exemplify that the Property has been a public nuisance since at least 2004.

5. The Show Cause Memorandum and Declaration Were Not In Front of the Trial Court on Summary Judgment

The Youngs' brief argues, without citation to legal authority, that the trial court erred in not considering Mr. Young's show cause filings as part of the record on summary judgment. Arguments unsupported by legal citation do not merit judicial consideration. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012) (Conclusory arguments unsupported by fact or legal citation do not justify judicial consideration); RAP 10.3(a)(6).

Pursuant to CR 56(c), the Youngs had the opportunity to file "opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing." The Youngs filed responses to Kitsap County's amended motion for summary judgment on April 23, 2014. Mr. Young filed his show cause memorandum and declaration minutes before the summary judgment hearing. Kitsap County Local Rule 7(b)(1)(A) requires that all motions, briefs, declarations, or memorandum of authorities be filed at least five days prior to a hearing. There was no legal or procedural reason for the trial court to consider Mr. Young's show cause memorandum and declaration, filed minutes prior to the summary judgment hearing and served to Kitsap County's counsel at the hearing. If

the trial court did so, it would both be a violation of court rules and prejudicial to Kitsap County who had no opportunity to respond.

If the trial court's disregard of the show cause filings was in error, it was invited error. The invited error doctrine bars a party from voluntarily acting and then appealing an error the act caused. *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004) (party's willful refusal to follow the trial court's pretrial order caused the alleged error and therefore was invited error on appeal).

All continuances of the summary judgment hearing were at the request of Mr. Young. The Youngs had the opportunity to file responses to Kitsap County's motions for summary judgment and did so. CP 626-640; CP 680. At the January summary judgment hearing, Mr. Young affirmatively stated that he had filed no additional documents related to summary judgment after his continuance was granted. RP 3-4. Thus, if there was any error, it was invited by the Youngs and should not be considered on appeal.

B. The Trial Court Properly Denied Mr. Youngs's Motion to Dismiss under CR41(b)(1)

The Youngs argue that the trial court erred by denying their motion to dismiss under CR 41(b)(1) due to failure to consider undissipated issues of law or fact. Specifically, the Youngs rely on two declarations filed on

May 24, 2012, and June 11, 2012, respectively. The first declaration was filed in response to The County's motions for preliminary injunction, declaratory judgment, and abatement of nuisance. CP 236-237. The second declaration was filed in support of the Youngs' motion for reconsideration of the trial court's order granting preliminary injunction. CP 286-327.

After the trial court granted the County's motion for preliminary injunction and denied the Youngs' motion for reconsideration of the trial court's order, no further pleadings or substantive docket entries are made until the Clerk's notice of dismissal pursuant to CR 41 on October 3, 2013. CP 333. On November 4, 2013, the County timely moved for summary judgment. On December 6, 2013, the Youngs moved for dismissal under CR 41, citing the County's failure to note the case for trial or hearing for more than one year after an issue of law or fact was joined. CP 333-340. The trial court denied the Youngs' motion, noting that while the definition of "junk vehicles" was a properly joined issue, the trial court's order for preliminary injunction dissipated the issue for purposes of CR 41.

CR 41(b)(1) applies where a plaintiff neglects to prosecute a case within one year after any issue of law or fact has been joined. The purpose of the Rule is to prevent the dilatory prosecution of an action and allow the

defending party to compel the prosecuting party to set a date certain for the trial or hearing on the merits. *Gott v. Woody*, 11 Wn. App. 504, 524 P.2d 452 (1974). The dismissal of an action for want of prosecution is in the discretion of the court in the absence of a guiding statute or rule of court. *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 167, 750 P.2d 1251 (1988) (citing *State ex rel. Dawson v. Superior Court*, 16 Wn.2d 300, 304, 133 P.2d 285 (1943)). However, dismissal is mandatory if CR 41(b)(1) applies. *Id.* at 167–169. The rule states in full:

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.

CR 41(b)(1) (emphasis added).

The application of CR 41 is triggered as additional issues of law or fact are joined by the parties:

[Each] case moves in and out of the operation of the time limit fixed by Rule 3 [the predecessor to CR 41] as issues of fact are raised and decided. Once the time has begun to run, it is terminated and ended when such issues are dissipated. It

commences anew when another such issue is raised.

Hayes v. Quigg, 46 Wn.2d 453, 282 P.2d 301 (1955) (citing *State ex rel, Washington Water Power Co. v. Superior Court*, 41 Wn.2d 484, 250 P.2d 536, 539 (1953)).

1. No Properly Joined and Undissipated Issues of Law or Fact Remained Before the Trial Court

The Youngs assert that it is undisputed that undissipated issues were introduced by Colin Young's responsive declarations and other pleadings to both the County's initial complaint and the trial court's order for preliminary injunction. The trial court's order denying dismissal directly disputes that undissipated issues of law or fact remained when the trial court declined to dismiss under CR 41. The order identifies the Young's disagreement with the trial court's designation of "junk vehicles" as a properly joined issue responsive to Kitsap County's pleadings. In the order denying the Young's motion to dismiss, the trial court indicates that the Young's responsive pleadings and declarations were considered, addressed, and thus dissipated by the trial court, noting that the Youngs "[have] not filed an answer or otherwise joined any additional issues since the Court granted the preliminary injunction, no new one-year time period commenced." CP 371-372.

The Youngs' brief identifies only one undissipated issue believed to have been joined by paragraph 12 of The Declaration of Colin Young in support of Colin Young's motion for reconsideration. Brief at 13; CP 288. The Youngs summarize this issue as Kitsap County's allegation that, by statute, Mr. Young was operating a "wrecking yard" and thus subject to the fencing requirements of RCW 46.80.130. This inaccurately represents both the County's pleadings and the trial court's order denying dismissal under CR 41.

In paragraph 16, Kitsap County's initial complaint for abatement of nuisance and preliminary injunction reads in relevant part: "The above referenced junk vehicles have been established, upon reasonable belief by Kitsap County to be Public nuisance vehicles as they are located upon private properties." CP 7. The complaint continues to list the necessary elements for defining the vehicles as "junk vehicles" not stored in a properly licensed junk vehicle wrecking yard, junk vehicle dealer, or junk, salvage, or wrecking yard. CP 7-8. Kitsap County does not allege that Colin Young operates a wrecking yard. Paragraph 16(b) of the County's complaint, rather, supports the County's argument that the vehicles are properly classified as "junk vehicles" and "nuisance vehicles." CP 1-15. The trial court's order for preliminary injunction addresses and dissipates

this issue by agreeing that the vehicles meet the state and county statutory definitions for “junk vehicle.” CP 268-275.

The Youngs' brief additionally cites the Declaration of Steven Mount, filed in support of the County's complaint. Mr. Mount's declaration in support of preliminary injunction and nuisance abatement states that Mr. Mount does not believe or is not aware that Mr. Young has ever obtained a license to operate a vehicle wrecking yard or vehicle storage lot. CP 496. Mr. Mount's declaration does not characterize the property as wrecking lot or vehicle storage facility. Mr. Mount's declaration does, however, reference the 2011 hearing examiner decision, wherein the hearing examiner found that the property had operated as a vehicle storage yard without proper permitting contrary to the Kitsap County Code. CP 504-509.

Neither the County's complaint nor Mr. Mount's declaration assert that Mr. Young operated a vehicle wrecking yard. Both the complaint and declaration state that a number of junk vehicles or nuisance vehicles were located on a property that is not a licensed wrecking yard. CP 1-15; 494-500. The disputed status of the cars as “junk vehicles” for purposes of the County's complaint does not implicate the status of the property as a wrecking yard or permitted vehicle storage lot. Mr. Young has never contended that he operates a wrecking yard or permitted vehicle storage

yard, thus the only joined issue of fact or law was the disputed designation of the “junk vehicles.” That issue was fully dissipated by the trial court’s order for preliminary injunction. CP 268-275.

2. Kitsap County’s Timely Motion for Summary Judgment Prevents Dismissal under CR 41

Kitsap County timely filed a motion for summary judgment on November 4, 2013 CP 351-355. A motion for summary judgment, timely filed, tolls the operation of Rule of Pleading, Practice and Procedure 41.04W (the predecessor to CR 41). *Nicacio v. Yakima Chief Ranches, Inc.*, 63 Wn.2d 945, 948, 389 P.2d 888 (1964) (citing *Storey v. Shane*, 62 Wn.2d 640, 384 P.2d 379 (1963)). A motion for summary judgment provides an opportunity for final adjudication on the merits and is akin to trial of hearing, and this proceeding tolls the operation of CR 41 until a trial court has issued its order on the motion. *Storey*, 62 Wn.2d at 643.

No properly joined and undissipated issues of law or fact remained before the trial court when the Young’s motion to dismiss was denied. The County’s motion for summary judgment predated the Young’s motion to dismiss by 35 days. The Youngs’ motion to dismiss contained a simultaneous motion to continue summary judgment until a date following the resolution of Mr. Young’s criminal prosecution.

Even if Kitsap County's timely motion for summary judgment did not toll the operation of CR 41, the rule reads in relevant part: "Any civil action shall be dismissed, without prejudice, for want of prosecution... unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss." CR 41(b)(1). The Youngs effectively prevented the adjudication of the matter by moving to continue the County's motion to an unspecified future date. Additionally, the Young's brief cites a 14-month period of dilatory prosecution between the filing of the first Declaration of Colin Young and Kitsap County's motion for summary judgment. At no time during this alleged 14-month period did the Young's file additional responsive pleadings or take any other action in the case. The Young's only sought dismissal under CR 41 when presented with the County's attempt to seek adjudication of the matter.

3. Summary Judgment May Dissipate Properly Joined Issues of Law or Fact

Pretrial proceedings, including summary judgment, routinely dissipate issues of law or fact and the operation of CR 41 accounts for this by limiting dismissal to cases where undissipated issues have not yet been resolved. *Storey v. Shane* leaves no ambiguity as to whether a pretrial proceeding such as summary judgment may prevent the operation of CR 41, as the Court considers that "[a]ny proceeding which, under the rules of

procedure, may produce in due course a final adjudication on the merits is a trial or hearing within the rule.” *Storey*, 62 Wn.2d at 643. The language of CR 41(b)(1) concerning the effect of noting a trial or hearing is clear on its face and does not leave room for discretion. Dismissal under CR 41 is not permissible if the matter is noted for trial or hearing prior to the hearing on dismissal. *Snohomish Cty. v. Thorp Meats*, 110 Wn.2d 163, 168–69, 750 P.2d 1251 (1988). The operation of CR 41 is tolled pending the court’s ruling on summary judgment. *Nicacio v. Yakima Chief Ranches, Inc.*, 63 Wn.2d 945, 948, 389 P.2d 888 (1964). Therefore, the trial court’s denial of the Young’s CR 41 motion was proper.

The Youngs rely on single case, *Day v. State*, which is easily distinguishable. *Day* held that a settlement offer did not toll CR 41. *Day v. State*, 68 Wn.2d 364, 366, 413 P.2d 1 (1966). The inability of settlement offers to toll CR 41 does not preclude a court’s ability to dissipate issues of fact or law in pretrial proceedings, including a preliminary injunction or a summary judgment. *Id.* at 643-644.

C. **Preliminary Injunction is An Appropriate Remedy to Prevent Imminent or Actual Injury Presented by Ongoing Public Nuisance Conditions.**

The Youngs argue that the trial court improperly ordered a preliminary injunction on the continued placement and dealing of junk vehicles on the Property as well moving or altering the junk vehicles

already known to be located on the property due to the execution of a criminal search warrant on May 2, 2012. CP 271. RCW 7.40.020 provides the statutory grounds for issuance of an injunction:

When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; **or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual;** or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion.

The trial court's injunction easily meets this standard. Injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law. *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982). No such remedy was available to the County at the time it moved for injunctive relief. The Youngs did not abate any of the nuisance conditions found on their property despite multiple orders to do so. In addition to finding that Kitsap County was likely to prove nuisance conditions alleged in its complaint, the trial court

found that the County was likely to prove that Chapter 9.56 KCC, Chapter 17.530 KCC, and RCW Chapter 7.48 had all been violated by the Youngs.

Contrary to the Young's assertions, Kitsap County did show injury. Washington courts have held that where an ordinance specifically provides for injunctions against violations of its provisions, the governing legislative body has already established that "the violation itself is an injury to the community." *King County ex rel. Sowers v. Chisman*, 33 Wn. App. 809, 818-19, 658 P.2d 1256 (1983).

Chisman involved an action by King County for injunction against the owner of a topless dancing establishment who continued to operate without a "public amusement/entertainment" license. King County code provided for legal or equitable relief to enjoin any acts in violation of the ordinance. *Chisman*, 33 Wn. App. at 818-19. Although the defendant applied for the license and was denied, the business continued to operate in violation of the county code. *Id.* at 811-12. The trial court granted King County's application for preliminary injunction to enjoin the operation of the business. *Id.* On appeal, the appellate court held that because the ordinance specifically provided for injunctions against violations of its provisions, the legislative body had already determined that the violation itself was an injury to the community. *Id.* at 818-19. The court further stated that "it is not the court's role to interfere with this legislative

decision.” *Id.* Former KCC 17.530.030⁴ allowed the prosecuting attorney to bring an action for injunction in order to abate the nuisance conditions. Due to the Youngs’ lack of compliance with previously ordered enforcement actions by Kitsap County and the code’s remedy for nuisance by injunction, preliminary injunction was appropriately ordered relief in the context of a nuisance abatement action.

Even if the trial court did not properly order preliminary injunction, the error was harmless in nature. On January 30, 2017, the trial court permanently enjoined the Youngs from continuing the nuisance activities on the property.

D. Assignments of Error 7-18 Are Waived

Assignments of error not supported by argument, authority, or citation to the record will not be considered by the Court on appeal. *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn. 2d 476, 496, 585 P.2d 71, 83 (1978); RAP 10.3(a). Assignments of Error 7-17 allege errors in the trial court’s findings supporting a preliminary injunction. The findings focus on the condition of the subject property, including the presence of junk vehicles. Assignment of Error 18 alleges an error in the preliminary injunction’s conclusion of law stating that Kitsap County is likely to prevail on the merits. While the Youngs argue in their briefing

⁴ Now codified at KCC 17.610.030.

the preliminary injunction was entered in error, they do not address the specific findings of fact or conclusion of law nine. Instead the Youngs focus on whether the injunction meet the standard of preventing specific harm or imminent injury.

The Youngs cannot fix the lack of argument in support of Assignments of Error 7-18 in their reply. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992). Because the Youngs failed to address Assignments of Error 7-18 in their opening brief, the assignments should be considered waived by the Court.

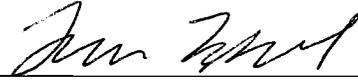
Even if not waived, the errors have no impact on the final adjudication of the case. They were not relied on by the trial court for summary judgment or used to determine the court's remedy for the public nuisance, a permanent injunction and order of abatement.

V. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's grant of summary judgment for Kitsap County, denial of the Youngs CR 41 motion, and grant of the preliminary injunction.

Respectfully submitted this 29th day of January, 2018.

TINA R. ROBINSON
Kitsap County Prosecuting Attorney



LAURA ZIPPEL, WSBA No. 47978
NICHOLAS KIEWIK, WSBA No. 47385
Deputy Prosecuting Attorneys
Attorneys for Respondent Kitsap County

CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

Colin Young 1785 Spirit Ridge Dr. NW Silverdale, WA 98383	Lorna Young 12328 SE 41st LN, #13 Bellevue, WA 98006
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<input checked="" type="checkbox"/> Via U.S. Mail	<input checked="" type="checkbox"/> Via U.S. Mail
<input type="checkbox"/> Via Fax:	<input type="checkbox"/> Via Fax:
<input checked="" type="checkbox"/> Via Email	<input type="checkbox"/> Via Email:
<input type="checkbox"/> Via Hand Delivery	<input type="checkbox"/> Via Hand Delivery

SIGNED in Port Orchard, Washington this 29th day of January,
2018.



Batrice Fredsti, Legal Assistant
Kitsap County Prosecutor's Office
614 Division Street, MS-35A
Port Orchard WA 98366
Phone: 360-337-7032

KITSAP COUNTY PROSECUTING ATTORNEY'S OFFICE - CIVIL DIVISION

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