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NO. 52531-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

RICHARD SORRELS, APPELLANT

v.

PIERCE COUNTY , RESPONDENT

BRIEF OF RESPONDENT PIERCE COUNTY

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I. INTRODUCTION

Appellant Richard Sorrels is appealing the issuance of an Order on Show Cause and a Warrant of Abatement based upon a permanent injunction contained in an Order previously appealed and affirmed by this Court. The Order and Warrant being appealed are directed to abate a long-standing nuisance property still riddled with nuisance activity and still a blight on the community.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the Show Cause motion properly served with all filed documentation?
2. Can an injunction be enforced beyond ten years?
3. Can Appellant appeal the issuance of the 2002 Judgment and Order on Trial a second time?
4. Is the County entitled to costs and reasonable attorney fees?

III. STATEMENT OF THE CASE

Richard Sorrels[1] owns property in Pierce County that is inundated with solid waste including junk vehicles. CP 108-109, 183-185, 223-227. On November 27, 2002, after a two-day trial, the Court found that Mr. Sorrels and his codefendants were maintaining public nuisances on three

[1] Henceforth, any reference herein to "Mr. Sorrels" shall mean Appellant, Richard Sorrels unless otherwise specified.

properties. CP 107-109, 183. An "Order and Judgment on Trial" was issued containing several orders including judgments and injunctive relief. CP 107-113. This Order contains injunctions against all named Defendants including Mr. Sorrels. CP 110-111. The Order was appealed and upheld by this Court on January 11, 2005, in COA 29812-1 II and 30609-3 II. (See *Pierce Cty. v. Sorrels*, 125 Wn. App. 1005 (2005), *cert. denied* 156 Wn.2d 1007, 132 P.3d 146 (2006)). Specifically, this Court addressed issues of ownership of the property, appropriate parties, and the elements and evidence to support a finding of nuisance. *Id.*

The most recent code enforcement effort regarding these injunctions came with the November 7, 2017, filing of a Motion for an Order to Show Cause (why a warrant of abatement should not issue directed at the property located at 9406 Glencove Rd KPN, Gig Harbor, Washington). CP 118-123. The parties, both represented by counsel, appeared at a hearing on December 15, 2017, CP 133-134. This hearing was continued—initially to January 19, 2018, to address issues including service. *Id*. On January 19, 2018, the hearing was continued again—to February 2, 2018.[2] CP 218-219. Mr. Sorrels was present on January 19, 2018 and additionally was sent notice of that new hearing date at multiple

[2] Mr. Sorrels' counsel did not appear for this or the March 2, 2018 hearing. CP 160-163.

addresses (provided by Mr. Sorrels). *Id*. That same date, in open court, Mr. Sorrels received and signed for a notice complying with the requirements of CR 5(b)(5). CP 220. The hearing to determine whether to issue an order to show cause was ultimately held February 2, 2018[3]. CP 157-159. On February 2, 2018, the Court scheduled the show cause hearing for March 2, 2018, and Mr. Sorrels' counsel signed for the order and had notice of that hearing in open court. *Id.*

On March 2, 2018, the parties appeared for the show cause hearing, which was continued to May 4, 2018, to allow ample time for Mr. Sorrels to respond in writing. CP 160-163. Mr. Sorrels signed that order in open court. *Id*.

On May 4, 2018, after hearing argument and testimony of the County and Mr. Sorrels (again without counsel), the Court issued an Order on Show Cause and a Warrant of Abatement. CP 165-169. Specifically, the Court heard the testimony of Pierce County Code Enforcement Officer Mark Luppino regarding the reappearance of nuisance activities on the property. RP 31, 33-35 (See also CP 182-217, 223-227). The Order on Show Cause specifically affirms that Mr. Sorrels is an occupant of the

[3] The County conceded that the Declaration of Mark Luppino was initially filed without referenced attachments. CP 178-181. A corrected copy was filed on January 12, 2018. CP 182-217. This corrected version was served before the February 2, 2018, hearing. CP 218-219.

property, that his re-accumulation of solid waste is a public nuisance and a violation of the injunction, and that a Warrant of Abatement should issue. CP 166.

IV. ARGUMENT

A. Standard of Review

Rulings on questions of law are reviewed "de novo." See, e.g., *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172, 322 P.3d 1219 (2014). The "de novo" or "error of law" standard of review permits the appellate court to substitute its judgment for that of the decision maker whose decision is being reviewed. *Skamania County v Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

Factual questions are reviewed utilizing a "substantial evidence" standard of review. *See e.g., Thorndike v. Hesperian Orchards, Inc*., 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence exists if "the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *King County v. Wash. State Boundary Review Bd*., 122 Wn.2d 648, 675, 860 P.2d 1024 (1993) (quoting *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987).

"Pro se litigants are bound by the same rules of procedure and substantive law as attorneys." *Holder v. City of Vancouver*, 147 P.3d 641,

642, 136 Wn.App. 104, 106 (2006) (quoting *Westberg v. All–Purpose Structures*, 86 Wn.App. 405, 411, 936 P.2d 1175 (1997) (citing *Patterson v. Superintendent of Public Instruction*, 76 Wn.App. 666, 671, 887 P.2d 411 (1994), review denied, 126 Wn.2d 1018, 894 P.2d 564 (1995))).

B. Service

The service of a motion and notice of hearing date is commonly done by mail pursuant to CR 5. There were several continuances in this matter, however before the hearing that ultimately set the Show Cause hearing, Mr. Sorrels was sent notice of the hearing and all associated pleadings (including exhibits). CP 218-219. Mr. Sorrels or his counsel was present to receive notice of hearings at all hearings subsequent to this January 19, 2018, hearing. CP 157-163.

With regard to the particular notice required for hearings subsequent to final judgment, CR5(b)(4) states:

> A party, rather than the party's attorney, must be served if the final judgment or decree has been entered and the time for filing an appeal has expired, or if an appeal has been taken (i) after the final judgment or decree upon remand has been entered or (ii) after the mandate has been issued affirming the judgment or decree or disposing of the case in a manner calling for no further action by the trial court. This rule is subject to the exceptions defined in subsection (b)(6).

This rule mentions neither "personal service" nor service of process as contemplated in CR 4 and the RCW sections referenced therein. Rather,

CR5(b)(4) draws a distinction between serving an attorney on behalf of a party and actually serving the party with notice of a hearing—all of which may be done by mail. In this case, the party was served at multiple locations on January 19, 2018. CP 218-219. A fair-minded, rational person would conclude that the court rules were followed, and Mr. Sorrels had proper notice of all hearings in this matter.

The County conceded that the Declaration of Mark Luppino was initially filed without the proper attachments. CP 178-181. A corrected copy was filed on January 12, 2018. CP 182-217. This corrected version was served before the February 2, 2018, hearing. CP 218-219. A fair-minded, rational person would conclude that Mr. Sorrels had all documentation needed for subsequent hearings.

CR 5(b)(5) does indeed require a notice that was not present in the initial filings—the County acknowledges that. The notice required is:

> …[N]otice to the party of the right to file written opposition or a response, the time within which such opposition or response must be filed, and the place where it must be filed; (ii) state that failure to respond may result in the requested relief being granted; and (iii) state that the paper has not been served on that party's lawyer.

CR 5(b)(5). Compliant notice was mailed along with the other corrected documents before the February 2, 2018, hearing. CP 218-219. In addition, Mr. Sorrels received and signed for this notice in open court on January

19, 2018. CP 220. A fair-minded, rational person would conclude that Mr. Sorrels received the CR 5(b)(5) notice well ahead (nearly four months) of the hearing at which the Order on Show Cause was issued.

Moreover, Mr. Sorrels had actual notice of all hearings in this matter, essentially curing any alleged insufficiency of the very first notice. Mr. Sorrels or his counsel appeared for every hearing, effectively waiving any challenge. Mr. Sorrels challenges notice of a hearing, but this Court has found that even challenges to service of process can be waived. "Under the doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law...[i]t can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior." *Lybbert v. Grant Cty., State of Wash*., 141 Wn. 2d 29, 38–39, 1 P.3d 1124, 1129 (2000) (citing *Romjue v. Fairchild*, 60 Wn.App. 278, 281, 803 P.2d 57, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991)).

C. <u>Injunction</u>

Mr. Sorrels erroneously references several provisions of the RCW with the assertion that the injunction has "expired." RCW 4.56.210 operates to extinguish a lien based on an underlying judgment providing: "No suit, action or other proceeding shall ever be had *on any judgment* rendered in this state *by which the lien* shall be extended or continued in

force for any greater or longer period than ten years." RCW 4.56.210 (emphasis added). There is no authority to suggest this applies to a permanent injunction. RCW 6.17.020 operates to limit the amount of time a party may seek execution, garnishment, etc. against a judgment debtor. There is no authority to suggest this applies to a permanent injunction.

An injunction is neither a lien nor a judgment. Injunctive relief is an equitable remedy addressed under an entirely different title of the RCW (Title 7, specifically Chapter 7.40), is a *special* proceeding/action, and is given a wide berth:

> Some fundamental principles applicable to a request for an injunction must be considered. (1) The proceeding is equitable and addressed to the sound discretion of the trial court. (2) The trial court is vested with a broad discretionary power to shape and fashion injunctive relief to fit the particular facts, circumstances, and equities of the case before it. Appellate courts give great weight to the trial court's exercise of that discretion... *Washington Fed'n of State Employees v. State*, 99 Wn.2d 878, 665 P.2d 1337 (1983); *Port of Seattle v. International Longshoremen's Union*, 52 Wn.2d 317, 324 P.2d 1099 (1958).

Brown v. Voss, 105 Wn.2d 366, 372–73, 715 P.2d 514, 517–18 (1986).

In its November 27, 2002 Order and Judgment on Trial, the court states:

> IT IS FURTHER ORDERED that each defendant is *permanently* enjoined from bringing or storing upon any of the subject parcels any man-made object outside legally constructed and permitted buildings. The injunction is also a permanent mandatory injunction directing the defendants

> to remove all man-made objects from outside legally constructed and permitted buildings. This injunction includes vehicles. Any vehicles which come upon the property must be in street-legal operating condition, bear valid and current licensing and have valid and current proof of insurance from a properly licensed insurance company doing business in the State of Washington.

CP 110-111 (emphasis added). The word "permanent" does not imply any timeline—quite the opposite. "The duration and scope of an injunction are decided on the facts of each case at the trial court's discretion." *King v. Riveland*, 125 Wn. 2d 500, 515, 886 P.2d 160, 169 (1994) (citing *Boeing Co. v. Sierracin Corp*., 108 Wn.2d 38, 63, 738 P.2d 665 (1987); *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986)).

This is why permanent injunctions are only issued in special cases: "An injunction is distinctly an equitable remedy and is frequently termed 'the strong arm of equity,' or a 'transcendent or extraordinary remedy,' and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000) (quoting 42 Am.Jur.2d Injunctions § 2, at 728 (1969)). This is one of those clear and plain cases and the permanent injunction was properly honored and enforced.

D. <u>Remaining issues untimely</u>

Mr. Sorrels challenges the Court's jurisdiction with respect to the

RES Trust as well as the initial proof of the elements of a cause of action in the underlying case. The thirty days within which to file for appellate review has *long* since lapsed. *See* RAP 5.2. An appeal from final judgment must be taken within 30 days, or it will be dismissed. *See Davidson v. National Can Co*. (1928) 150 Wn. 370, 273 P. 185; *Nudd v. Fuller* (1928) 150 Wn. 389, 273 P. 200; *Rotheler v. Saint Martins Mineral Springs Hotel Co*. (1929) 154 Wn. 349, 282 P. 207. Mr. Sorrels' last two issues are directed at the underlying case and Order from 2002 rather than the 2018 Order and Warrant. "The notice of appeal is jurisdictional." *Kelly v. Schorzman*, 3 Wn. App. 908, 911, 478 P.2d 769, 771 (1970). This Court is without jurisdiction to consider these issues.

Further, the Order and Judgment on Trial issued November 27, 2002, was already appealed and this Court already considered issues surrounding ownership of the property, appropriate parties, and the elements and evidence to support a finding of nuisance. The Order was appealed and upheld by this Court on January 11, 2005, in COA 29812-1 II and 30609-3 II. (See *Pierce Cty. v. Sorrels*, 125 Wn. App. 1005 (2005), *cert. denied* 156 Wn.2d 1007, 132 P.3d 146 (2006)). Specifically, this Court addressed issues of ownership of the property, appropriate parties, and the elements and evidence to support a finding of nuisance. *Id.*

RAP 12.2 provides, in part, that:

> [u]pon issuance of the mandate ..., the action taken or decision made by the appellate court is effective and binding on the parties to the review and *governs all subsequent proceedings in the action in any court*, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule *so long as those motions do not challenge issues already decided by the appellate court*.

RAP 12.2 (emphasis added). See *Allyn v. Asher*, 132 Wn. App. 371, 378, 131 P.3d 339, 342 (2006). Issues raised by Mr. Sorrels in his last two issues pertaining to his lone assignment of error are substantially similar to those addressed by this Court and it is improper to re-litigate them here.

"Review of an earlier decision may be granted where the law has changed between the current and former proceedings. *Id*. Here, no change of law requires review." *State v. Roy*, 147 Wn. App. 309, 315, 195 P.3d 967, 970 (2008).

The sole question before this Court is the validity of the Order on Show Cause and whether the Warrant of Abatement was validly issued based upon violation of the 2002 injunction.

E. Attorney's Fees/Costs

RCW 4.84.185 authorizes a prevailing party to receive expenses for having to oppose a frivolous action. An appeal is frivolous "if no debatable issues are presented upon which reasonable minds might differ,

and it is so devoid of merit that no reasonable possibility of reversal exists." *State v. Parada*, 75 Wn. App. 224, 235–36, 877 P.2d 231, 238 (1994) (quoting *Chapman v. Perera*, 41 Wn.App. 444, 455–56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985)). In this case, the notion that a time limitation from a distinctly separate RCW Chapter would apply to RCW 7.40 is so devoid of merit that there is no reasonable possibility of reversal. Likewise, there is no question that any service defects were either nonexistent or amply cured and no reasonable mind might have differed on that. All other issues have been previously decided by this court and are not lawfully the subject of any appeal. Accordingly, this appeal was frivolous. Pierce County should receive costs and reasonable attorney's fees.

V. CONCLUSION

Mr. Sorrels had proper notice of and documentation for all hearings in this matter. The injunction remains valid, and the Order on Show Cause and Warrant of Abatement were properly issued. Mr. Sorrels cannot now contest the underlying court determinations made in 2002. The May 4, 2018, Order on Show Cause and Warrant of Abatement should be affirmed. This appeal is frivolous and Pierce County should receive costs and reasonable attorney's fees.

DATED this 19th day of APRIL, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I am over the age of 18 years, not a party to this action, and competent to witness herein. On the 19th day of April, 2019, a copy of the foregoing was forwarded by United States Mail, postage prepaid, to:

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Jennifer Crocker

PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

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