

No. 283160

MAY 13 2011

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

LLOYD A. HERMAN and LINDA J. HERMAN,
husband and wife, individually and their marital community,

Appellants,

vs.

STATE OF WASHINGTON, et al.,

Respondents.

**BRIEF OF RESPONDENTS SPOKANE COUNTY, WILLIAM AND
JANE DOE MOSER AND THOMAS AND JANE DOE MOSER**

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1. Identity of Responding Parties.

Respondents County of Spokane, Thomas Moser and William Moser, hereinafter collectively referred to as "Spokane County."

2. Assignments of Error.

Spokane County respectfully submits that the Assignments of Error and Issues Pertaining To Assignments of Error in the Brief of Appellants Herman fail to frame specific issues for analysis on this appeal, other than to state that the Appellants are dissatisfied with the result in the Trial Court. Spokane County does not cross-appeal but rather seeks an order affirming the decisions of the Trial Court.

Spokane County submits a *Motion On The Merits* with this brief.

3. Statement of the Case.

Spokane County will not repeat the history of this case but rather will rely upon the Statement of the Case presented in the State Respondents' *Motion On The Merits*, filed herein, and this Court's decision in *Herman v. State of Washington*, 149 Wn.App. 444, 204 P.2d 928 (2009), *review denied* 166 Wn.2d 1029 (2009). Spokane County will however draw this Court's attention to the following facts.

The initial development disputes between the Hermans and the State of Washington was settled by agreement between the parties in the form of a *Stipulation and Agreed Order of Dismissal*, dated May 4, 1995.

CP 631-634. This is admitted by the Hermans. CP 44-47. On May 17, 2004, the State Department of Ecology ("DOE") had issued Shoreline Violation Order No. 1038 to Mr. Herman, for his alleged shoreline-related construction activities, failure to comply with the *Agreed Order of Dismissal*, further shoreline-related construction activities and for failure to comply with applicable permitting regulations. CP 137-141. Order No. 1038 was co-signed by both the DOE and Spokane County. CP 141. By *Notice Of Disposition* dated August 23, 2004, the State Shorelines Hearings Board upheld that Order No. 1038. CP 142-143. Once again that *Notice* was co-signed by an official with Spokane County. CP 142. Mr. Herman appealed to the Superior Court. That case eventually wound up before this Court, which affirmed the rulings of the SHB against Mr. Herman in all respects. *Herman v. State of Washington*, 149 Wn.App. 444, 204 P.2d 928 (2009), *review denied* 166 Wn.2d 1029 (2009).

While that appeal was pending in this Court the Hermans filed this suit on January 3, 2008. CP 1-28. The basis of the *Complaint* and later the *Amended Complaint* (CP 29-79) were the same facts and the cornerstone issue before this Court in *Herman v. State of Washington*, 149 Wn.App. 444 (2009); namely, that the actions of the State in dealing with the Hermans shoreline development from the early 1990s forward was "arbitrary and capricious." In the present lawsuit the Hermans go to great

lengths to argue that type of conduct by the State defendants (CP 32-79), seeking the same relief as in the first *Herman v. State* lawsuit, but additionally complaining:

126. The actions of the Defendants wrongfully and illegally ignored the Plaintiffs' fundamental constitutional rights to reasonably develop and use their property and to be free of arbitrary and irrational decision-making.

127. The actions of the Defendants as applied to the Plaintiffs violated their rights to equal protection under the law. . . .

. . .

133. [Hermans] have a fundamental and constitutionally protected right to own and reasonably develop real property and to be free of irrational government decision-making.

CP 58, 60. In *Herman v. State*, 144 Wn.App. 444, the Hermans were asking for relief from the SHB decision. In this lawsuit the Hermans challenge the actions of the State under a variety of civil claims for the same purpose – to obtain relief from the SHB decision – and additionally claim money damages. That is the only difference between the two cases.

4. Argument.

A. The Hermans' Claims Against Any Of The Defendants Expired By Operation Of The Applicable Statutes Of Limitations.

At the time of summary judgment proceedings in the Trial Court, Spokane County joined in the statute of limitations arguments made by the State defendants. CP 204-205. For the purposes of efficiency, Spokane

County again joins in the statute of limitations arguments made by the State Respondents herein, in their *Motion On The Merits*.

B. The Hermans Failed To Plead Or Present Any Facts Which Could Impose Any Liability On Any Of The Spokane County Defendants.

During summary judgment briefing and argument Spokane County challenged the Hermans to identify any facts which could possibly hold Spokane County in the litigation. CP 206-209, 376-378. Through 210 paragraphs of an *Amended Complaint* the Hermans mentioned Spokane County or one of its employees, Bill Moser, only in passing at *Amended Complaint* ¶¶ 104-106 and 114. CP 52-53, 55. Those allegations state only that the Hermans had a conversation with a County Building and Planning Department employee in June 2004. The only thing that might have occurred was that Spokane County employees were doing their jobs in relation to Mr. Herman's shorelines situation. What the Hermans seemed to be alleging is not a viable cause of action in Washington. See Taylor vs. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988).

When faced with the defense summary judgment motions, in an 88 paragraph *Affidavit* Mr. Herman failed to mention Spokane County or either of the Mosers even once. CP 237-255. In their *Memorandum* opposing summary judgment, not a single argument is made concerning any conduct by Spokane County. CP 316-375. It appears that the basis of

liability is that Spokane County was "part of the process" – the argument made herein.

In order to survive summary judgment, the plaintiff must produce facts which demonstrate an issue of material fact for the trier of fact. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). Everything Mr. Herman describes in the *Affidavit* that he produced in opposition to summary judgment (88 paragraphs over 19 pages) challenges the actions of the State defendants as tortious or violative of a supposedly recognized right. CP 237-256. Spokane County and "defendant Moser" are mentioned merely in passing. CP 248 ¶ 56, CP 251 ¶ 71. The Hermans lumped Spokane County in as "the State" but failed to present any evidence of conduct by Spokane County which might have survived the summary judgment inquiry into alleged arbitrary and capricious conduct.

The "part of the process" argument is buttressed one citation, being *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 967, 954 P.2d 250 (1998)", *Brief of Appellants*, p. 39, for the proposition that "the Spokane County officials also set in motion a series of acts by others that the actor knew or reasonably should have known would cause others to inflict the alleged constitutional injury." *Id. Mission Springs* page 967 quotes language from a United States Court of Appeals case, *Bateson v.*

Geisse, 857 F.2d 1300, 1303-1304 (9th Cir. 1988), wherein a developer in Billings, Montana, was blocked from obtaining a building permit even though he had met all requirements.

Like *Bateson*, *Mission Springs* involved the deliberate act of the City of Spokane refusing a developer a grading permit even though there was no just reason to delay or refuse to issue that permit to the developer. Rather, the City Council "arbitrarily refused to process Mission Springs' grading permit application and unlawfully withheld the permit as well." *Mission Springs*, 134 Wn.2d at 962. The Supreme Court held that it was obvious that the developer was entitled to the permit as a "constitutionally cognizable property right." *Id.* There are no facts in this case even remotely similar to those in *Mission Springs* or *Bateson*. Rather, it appears that Mr. Herman was the one who refused to meet regulatory requirements for the development of his shoreline at Liberty Lake. Not once but twice Mr. Herman went ahead with substantial development on his property without appropriate permits, and was cited for it by the DOE. The Hermans cannot possibly claim that they have a due process or equal protection right to develop their property illegally

Now, at p. 38 of the *Appellant's Brief* it is argued:

Factually, the record provides a plethora of documentation pertaining to Spokane County's involvement.

Please note that this portion of the *Appellants' Brief* (pp. 38-40) is an exact cut-and-paste of the same argument presented by the Hermans on reconsideration, which was the only attempt the Hermans made at trying to tie Spokane County into the liability mix and of course was after an adverse ruling on summary judgment. CP 740-741. The "plethora" includes the State's Answers to Plaintiffs' Interrogatories, which fail to even mention Spokane County (CP 127-128), the Order and Notice letter sent by the State Department of Ecology to Mr. Herman on May 17, 2004 (CP 137-141), and the State's Notice of Disposition upholding the Order and Notice, dated August 23, 2004. CP 142-143. The "plethora" also includes a blanket reference to interrogatory answers by both the State DOE and Spokane County in the Shorelines Hearings Board case. CP 145-151 and 152-158. Finally the Hermans complain that Spokane County's Bill Moser testified at the SHB proceeding and allegedly made certain statements therein (*Brief of Appellants*, p. 39), but they failed to produce any transcript of testimony to support that bald claim. That was and is the totality of the case against Spokane County and Messrs. Moser, after summary judgment had already been granted to Spokane County.

A party opposing summary judgment cannot merely rely upon conclusory statements, argumentative assertions or statements of the ultimate fact to defeat that summary judgment request. *Doty-Fielding v.*

Town of South Prairie, 143 Wn.App. 559, 178 P.2d 1054 (2008). On appeal the dispositive issue is whether the Hermans were successful in their effort to set forth such facts as would be admissible into evidence at trial, as required by CR 56(e), in order to defeat the motion for summary judgment. *Vacova Co. v. Farrell*, 62 Wn.App. 386, 394, 814 P.2d 255 (1991). As pleaded, the Hermans would have to present evidence that Spokane County and its employees' conduct deprived the Hermans of a right to develop shoreline property without required permits. Such a right simply does not exist. Taken to its logical end, the mere involvement of Spokane County and its employees in the shorelines permitting process would expose Spokane County to limitless liability, regardless of the lack of evidence of specific acts of misconduct, negligence, or arbitrary or capricious conduct.

C. The Decision In The Previous Herman v. State Case Renders This Case Moot.

The damages claims in this present lawsuit hinge entirely on obtaining relief from Violation Order 1038, dated May 17, 2004. CP 51-52. Nowhere in the *Amended Complaint* or in any of the affidavits presented by the Hermans (CP 212-236, 237-255, 667-670) were facts alleged or presented which could by any stretch import liability upon the Spokane County Defendants – acts which demonstrate that the Hermans

were denied a right to develop their shoreline property without valid permits. The entirety of the Hermans' claims herein involves an attack on the Shoreline Violation Order 1038, dated May 17, 2004. *Amended Complaint* ¶¶ 99-120; CP 51-57. The Hermans' complaints were vented in various answers to discovery in this case and in the SHB proceeding. See CP 54-57, 125-135, 137-141, 145-146. No evidence was ever presented to demonstrate arbitrary or capricious conduct by any of the Defendants, State or County. Rather, the entirety of this present lawsuit is dissatisfaction with the SHB decision, which has since been affirmed by this Court. This appeal should have been dismissed immediately after the decision *Herman v. State of Washington*, 144 Wn.App. 444, 204 P.2d 928 (2009), was denied for review by the Supreme Court. *Herman v. State of Washington*, 166 Wn.2d 1029 (September 9, 2009).

It is impossible to impose liability against any of the Defendants under any of the civil claims made by the Hermans herein without the necessary cornerstone finding that the SHB acted arbitrarily and/or capriciously. This Court determined in February 2009 that the SHB had acted appropriately.

The [SHB's] decision here is not arbitrary or capricious. Indeed, its findings and conclusions reflect a thoughtful and thorough investigation of Mr. Herman's modifications to his shoreline.

Herman v. State of Washington, et al., 149 Wn.App. at 459. By that decision this lawsuit became a moot point and yet this appeal continues.

The doctrine of collateral estoppel is intended to prevent a second litigation of issues even if presented in a different claim or cause of action.

Before the doctrine of collateral estoppel can be applied, affirmative answers must be given to the following questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Lucas v. Velikanje, 2 Wn.App. 888, 894, 471 P.2d 103 (1970), cited in *Mead v. Park Place Properties*, 37 Wn.App. 403, 405-406, 681 P.2d 256 (1984). The core issue in *Herman v. State of Washington, supra*, is exactly the same issue presented here – alleged arbitrary and capricious conduct by the permitting agency. The case was tried to a final judgment on the merits, culminating in the decision of this Court to affirm the SHB in all respects. The Hermans were most certainly involved in the previous litigation as plaintiffs, making the same claims herein. Finally, it is difficult to imagine any injustice which might be argued on the Hermans' behalf, since they have now effectively tried the same issues twice and lost in both cases.

Since this Court upheld everything that the Shorelines Hearings Board required of Mr. Herman, it is impossible to understand how Spokane County could somehow be liable under any of the claims made in this case. Not forgetting that the Hermans have never alleged any specific facts or causes of action against Spokane County and that they have completely failed to present any evidence, by affidavit or exhibit, that Spokane County committed some culpable act, it is clear from the decision in *Herman v. State of Washington* that everything that the SHB decided regarding the Hermans' conduct at Liberty Lake was supportable in fact and law. There simply is no basis for any claim against Spokane County under the facts of the development of Mr. Herman's waterfront.

D. Request For Award Of Attorney's Fees And Costs.

The Hermans' cornerstone issue of arbitrary and capricious conduct was tried to the Shoreline Hearings Board, to the Spokane County Superior Court and then to this Court and ultimately resulted in a finding that the claim was without merit. *Herman v. State of Washington*, 144 Wn.App. 444, 204 P.2d 928 (2009), *review denied* 166 Wn.2d 1029 (2009). That decision completely nullified any of the core complaints herein, and yet this appeal continues.

RAP 18.9 and RAP 18.7 allow this Court to impose, as a sanction, an award of attorney's fees and costs incurred by the respondent to a

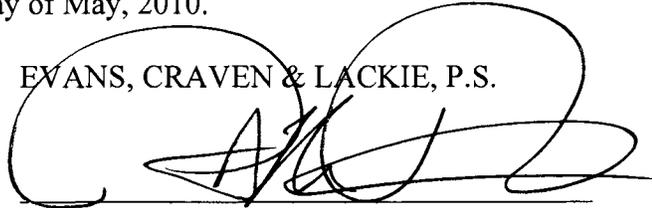
frivolous appeal. As one example this appeal was delayed for months while the Hermans sought to have the summary judgment hearing transcribed, and yet that transcript was never cited in their brief. As another example, the argument made in this appeal against Spokane County is word-for-word the same argument submitted in their *Motion For Reconsideration*. CP 740-741. Furthermore this Court denied the very relief that the Hermans seek herein over one year ago and yet the appeal of this case continues. Spokane County continues to incur costs and attorney's fees defending a frivolous appeal. Therefore, Spokane County respectfully requests an award of its attorney's fees and costs incurred in this appeal, under RAP 18.9, RAP 18.7 and RCW 4.84.185.

5. Conclusion.

Based upon the foregoing arguments and authorities, the complete lack of any evidence creating an issue of fact for the trial of claims against the Spokane County respondents, the statute of limitations argument made by Respondent State of Washington in its *Motion On The Merits*, and the fact that this case has already been finally decided in *Herman v. State of Washington*, supra, Respondents Spokane County, Thomas Moser and William Moser respectfully submit that this appeal should be dismissed, with an award of attorney's fees and costs on appeal to those Respondents.

DATED this 18th day of May, 2010.

EVANS, CRAVEN & LACKIE, P.S.



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CERTIFICATE OF SERVICE:

Pursuant to RAP 5.4(b), I caused the foregoing document described as *Brief of Respondents County of Spokane, William and Jane Doe Moser and Thomas and Jane Doe Moser* to be personally served/mailed on the 18th day of May, 2010, on all interested parties to this action as follows:

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