

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
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NO. 41158-0-II

Appeal from the Superior Court for Thurston County
Case No. 03-2-01871-3

JOHN BURNELL,

Plaintiff/Appellant,

v.

THURSTON COUNTY,

Defendant/Respondent.

BRIEF OF RESPONDENT

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May 19, 2011

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I. ISSUES ON APPEAL

1. Appellant's Appeal of the August 6, 2010 denial of a Motion to Continue the summary judgment hearing is without merit.
2. The Court did not err in granting the August 27, 2010 Order Granting Thurston County's Motion for Summary Judgment.

II. RELEVANT FACTS

Respondent Thurston County is a political subdivision of the State of Washington. Appellant's Complaint for Damages was filed on September 18, 2003. Appellant claimed causes of action under 42 U.S.C. § 1983 for denial of due process of law, denial of equal protection of the law, taking of property, conversion of fees, tortious interference with a contractual relationship, and civil conspiracy.

A. History of County's Prosecution of Appellant.

Appellant's issues on appeal arise from land use issues on the following parcels owned by John Alton Burnell at:

- a) 2923 Kaiser Road, tax parcel #09370043000;¹
- b) 2930 Kaiser Road, tax parcel #09370052000;
- c) 2934 Kaiser Road, tax parcel #09370052001; and
- d) 2940 Kaiser Road, tax parcel #09370053000.

These parcels, and the alleged illegal land use thereof, were part of an ongoing prosecution by Thurston County in *Thurston County v. Burnell*, Thurston County Superior Court Cause No. 03-2-00586-7, filed March 31, 2003. [CP 80.] Thurston County obtained a summary judgment against Appellant on August 1, 2003. [CP 108.] The issue was remanded by the Court

¹ This parcel was sold by Appellant after the Summary Judgment Order was issued, but prior to the writing of Appellant's Opening Brief.

of Appeals on the issue of Service. [CP 127.] After the issue of proper service was concluded at hearing, the summary judgment was reinstated. A Warrant of Abatement was issued by the Superior Court on November 30, 2007. [CP 136.] A supplemental Warrant of Abatement was issued on March 13, 2008. [CP 139.] Appellant was found in contempt of the Court's order on March 28, 2008, and reconsideration of the warrant of abatement was denied. [CP 143.] Appellant challenged these actions to the Court of Appeals. All decisions of the Superior Court as to the State's cause of action in *Thurston County v. Burnell* were affirmed by the Court of Appeals on March 30, 2010. [CP 147.] Mandate was received by Thurston County as to this decision on May 28, 2010. [CP 154.]

In the underlying case herein, *Burnell v. Thurston County*, Thurston County moved for summary judgment on July 13, 2010, alleging no issues of material fact under the doctrines of res judicata, collateral estoppel, failure to exhaust administrative remedies, qualified immunity, and other legal doctrines. [CP 54.] Summary Judgment was granted in favor of Thurston County on August 27, 2010. [CP 50.]

The Appellant's Complaint against Thurston County was filed on September 18, 2003, alleging "Conversion, Tortious Interference with Contract, and Civil Rights Violations." [CP 158.] The allegations of the complaint alleged improper actions by Thurston County related to the exact same parcels of property noted above in *Thurston County v. Burnell*, Cause No. 03-2-00586-7. The complaint in *Burnell v. Thurston County* was filed 48 days after summary judgment was obtained by Thurston County in *Thurston County v. Burnell*. Appellant cites all four parcels of land noted above as the subject of his complaint, [CP 160-163], and as the basis for his cause of action alleging civil rights violations, unlawful taking, tortuous interference, and

conspiracy. [CP 167.] All of the actions alleged in *Burnell v. Thurston County* commenced prior to the filing of *Thurston County v. Burnell* on March 31, 2003.

On May 29, 2003, Appellant filed a Response to Thurston County's Complaint under *Thurston County v. Burnell*, Cause No. 03-2-00586-7. Appellant asserted, among other issues, that Thurston County did not have "jurisdiction to claim violations ... without all due process on each property" [CP 90]; that the Appellant, since buying the property in 1987 "has attempted to change land use to acceptable, lawful use and has been unlawfully denied" [CP 91]; that the property was "a commercial wrecking yard" [CP 92]; that the Thurston County Code allows "lawful non-conforming uses, provided compliance with the non-conforming use section, and I am in compliance" [CP 92]; that (appellant) "is not now in violation by way of a grandfathered lawful nonconforming use" [CP 94]; that "Thurston County, by unlawfully refusing to accept building and development applications has directly caused the continuation of any and all actions ... and has resulted in permanent loss of land uses that could have been established by application at any tome [sic] before the downzone" [CP 97-98]; and that "(A)ll action and uses complained of herein would have been eliminated by SS 2435 development application in 1990, instead it was delayed and never set [sic] to the hearings examiner for FIVE YEARS then summarily denied without a hearings examiner." [CP 98.]

Appellant responded to Thurston County's First Motion for Summary Judgment and included the following arguments:

The lawful non-conforming use regulations require the vehicle or the number of vehicles allowed, be maintained or be lost forever, thereby until the Court Rules on number and/or placement of same, they must remain.

[CP 104];

Defendant has after 1987 attempted to develop this and the additional property in conformance with the codes.

Every application has met with refusal to accept the application, in violation of State and federal law, or when accepted, refusal to process lawfully a lawful application.

At no time did County agree that compliance of any kind would result in lawful process of an application, indeed the County has delayed and denied defendant's applications for the purpose of "taking" this property for the 'public benefit' by downzoning from minimum four units/acre to one unit to 5 acres.

[CP 105.]

Appellant's first appeal on the issue of the granting of summary judgment in *Thurston County v. Burnell*, Cause No. 03-2-00586-7 [Court of Appeals No. 30808-8-II] included the following issue on appeal:

b) Can the County enforce and abate against an alleged preexisting nonconforming use when no hearing has been held to allow defendant to present evidence of non-conformity and the extent of non-conformity?

[CP 116-17.]

The brief of Appellant argued this alleged non-conforming use as an appeal issue. [CP 123-24.] The Court of Appeals considered and rejected this issue in its non-published opinion. [CP 132-33.] The Court acknowledges the rejection in the first footnote in their unpublished opinion dated March 30, 2010 denying Appellant's appeal as to the warrant of abatement. [CP 147.]

B. History of Permits Sought by Appellant.

Thurston County does not deny that Appellant has previously made attempts to subdivide his property. Appellant has never submitted a complete application allowing him to vest. [CP 72.]

When Appellant has submitted application fees in previous attempts, his delays and failure to provide the necessary information expended the fees due to the amount of time county staff had to work on his project. [CP 72-74, 77-78.]

In August 2001, Appellant submitted an incomplete permit application on the same day the Board of County Commissioners changed the zoning of Appellant's parcels. [CP 73.] Appellant had previous notice of this change, as he attended the public hearing held by the Board on the subject. [CP 73.] Appellant did not administratively appeal this zoning change in any way. [CP 73.] Due to the near-timeliness of the submission of the incomplete application, the Board of Commissioners determined to allow extra time for Appellant to complete and perfect his application which would allow him to vest under the old zoning regulations. [CP 73, 75-76.] Appellant failed to do so, and eventually was informed by the County that his application attempt had failed. [CP 73.] Appellant has not availed himself any measures available to him administratively to appeal the change in zoning. [CP 73-74.] Appellant has never submitted a complete application for subdivision of his property. [CP 72, 74.] Appellant has never provided any documentation or exhibits that would indicate an administrative land use appeal of Thurston County decisions. Appellant still has use of his property to develop single-family residences and accessory uses. [CP 73.]

C. Appellant's Responsive Briefing to Thurston County's Second Motion for Summary Judgment.

Appellant's "Response to Motion for Summary Judgment" was filed by Appellant on August 10, 2010. [CP 43.] No Affidavits, Declarations or Exhibits were attached to that Response. The entire argument of Appellant defending against the second motion for summary judgment were based solely upon the statements of Appellant and were wholly unsupported by fact.

III. STANDARD OF REVIEW

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County, State of Wash.*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000), citing *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997).

Civil Rule 56 provides that summary judgment should be granted where:

The pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material facts and the moving party is entitled to judgment as a matter of law.

CR 56(c).

The purpose of a motion for summary judgment is to examine the sufficiency of the evidence supporting the Plaintiff's formal allegations so that unnecessary trials may be avoided when no genuine issue of material fact exists. *Island Air, Inc. v. LeBar*, 18 Wn. App. 129, 566 P.2d 972 (1977). The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *See Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 255, 770 P.2d 182 (1989).

In *Young v. Key Pharmaceuticals, supra*, the Court cited with approval *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986), in which the United States Supreme Court held that a summary judgment is appropriate if the moving party establishes an absence of evidence to support the nonmoving party's case. The *Young* court held:

If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial, then the trial court should grant the motion. [Citation omitted.]

In *Celotex*, the United States Supreme Court examined this result:

In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

477 U.S. at 322-23. The *Celotex* standard comports with the purpose behind the summary judgment motion:

To examine the sufficiency of the evidence behind the plaintiff's formal allegations in hope of avoiding unnecessary trials where no genuine issue as to material facts exists.

Young, supra at 225.

IV. ARGUMENT

A. **Much of the Information Contained in the Clerk's Papers Should Not be Considered by this Court.**

Thurston County's Second Motion for Summary Judgment contained factual assertions supported by numerous attachments and the Declaration of Mike Kain. Appellant's Response to Thurston County's Second Motion for Summary Judgment is a three-page document with no attachments, Declarations or Affidavits. Appellant refers in their Clerk's Paper's to documents in support of their appeal, specifically CP 158-168, 169-173, 174-175, but these documents were not attached or appended to Appellant's Response in any way. CR 56(e) states, in part that

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In his Response, Appellant cites to numerous materials presented at various times by himself during the course of the two separate cause numbers involving himself and Thurston County, including a Declaration by a Robert Patrick filed August 26, 2004. [CP 174-175.] This Declaration was not included in Appellant's Response to the Second Motion for Summary Judgment. Except for facts cited by Appellant that are included in the attachments from

Thurston County's own Second Motion for Summary Judgment, any other factual assertion should not be considered by this Court as they were not properly in front of the trial court when summary judgment was considered. The Court's *de novo* review can only be of the information properly in front of it. Clerk's Papers Nos. 158 through 175 were not.

B. Res Judicata and Collateral Estoppel.

In the original Complaint, Appellant claimed that his due process and equal protection rights were violated as retaliation for "failing to renounce his rights to a non-conforming use" and "refusing to comply with unlawful demands." Appellant's 42 U.S.C. § 1983 claims are barred by the legal doctrines of res judicata and collateral estoppel, as these issues have been previously asserted and argued by Appellant in a separate cause of action.

"The law of res judicata ... consists entirely of an elaboration of the obvious principal that a controversy should be resolved once, and not more than once." *Hilltop Terrace Homeowners Ass'n v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995), quoting 4 Kenneth C. Davis, Administrative Law Treatise, Sec. 21:9 at 78 (2d ed. 1983).

Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Hilltop* at 32 citing *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 765 (1983).

"By its nature, res judicata applies to what has been decided." Davis, Sec 21:5, at 65 ... *But see* Phillip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805 (1985) at 813-14 (contending claim preclusion, unlike issue preclusion, applies to claims that should have been raised, as well as those actually litigated)." *Hilltop* at 32.

"When a subsequent action is on a different claim, yet depends on issues which were

determined in a prior action, the relitigation of those issues is barred by collateral estoppel.” *Hilltop* at 31 citing *Trautman* at 812. See also *Reninger v. Dep’t of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998).

“To prevail on collateral estoppel ... the [moving party] must establish that identical parties litigated identical issues to a final judgment on the merits and that no injustice results from applying the bar.” *Reninger* at 449.

1. Res Judicata.

The four issues cited by *Hilltop* in order to find res judicata are: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. As cited by *Hilltop* and *Trautman*, issues that *should* have been raised in the preceding action are barred by res judicata as well.

a. Subject Matter.

The underlying subject matter in both this action and in Thurston County Cause No. 03-2-00586-7 is the use of the four parcels owned by Appellant: 2923 Kaiser Road, tax parcel #09370043000; 2930 Kaiser Road, tax parcel #09370052000; 2934 Kaiser Road, tax parcel #0937005200; and 2940 Kaiser Road, tax parcel #09370053000. In the original prosecution by Thurston County, unlawful land use by Appellant was alleged by the County. Appellant asserted and defended his alleged lawful non-conforming use and illegal County action in denying his permit applications in his response to the Complaint, in his Response to Thurston County’s Motion for Summary Judgment, and in his Appeal. In each case the arguments were denied by the trier of fact. This subject matter is identical to the 42 U.S.C. § 1983 claims asserted by Burnell in his Complaint and in his briefing to the Court of Appeals.

b. Cause of Action.

Appellant did not specifically assert 42 U.S.C. § 1983 in defense of his initial action, but did claim a lack of “due process” in his Response to that Complaint [CP 90, 92, 95, 96] and by asserting that Thurston County did not allow him his claimed lawful, conforming use or the ability to obtain permits. [CP 92, 93, 95, 97.] Appellant also argues an equal protection claim by stating that “the rule (as applied to him) was more restrictive than the actual rule ...” [CP 92, 98], and cited a violation of his “civil rights.” [CP 96.]

Appellant again cites his allegation of “lawful, nonconforming use in his Response to Thurston County’s Motion for Summary Judgment in Cause No. 03-2-00586-7 [CP 104], and also cited his assertion that Thurston County’s refusal “to accept the application, in violation of State and Federal law. Or when accepted, refusal to process lawfully a lawful application.” [CP 105.] Appellant again asserts the issue of preexisting non-conforming use in its first appeal dated January 8, 2004, specifically citing that alleged non-conforming use and the subsequent violation of due process as an “Issue on Appeal.” [CP 116, 123-124.] The Court of Appeals acknowledged this argument and rejected it in its unpublished opinion on the subject. [CP 132-33.]

Failure to specifically cite 42 U.S.C. § 1983 is wholly the fault of Plaintiff, and is barred by the ruling in *Hilltop et al.* under the theory of “should have” been raised.

In addition, Appellant previously raised the issues of unlawful taking of his property by Thurston County’s changing of the zoning regulations in the prior case. Under Appellant’s “Fourth Causes of Action,” “permanent loss of land uses that could have been established by application at any tome (sic) before the downzone now in place inside the G.M.A. and in violation of the comprehensive plan and all generally considered development regulations.” [CP

97-98.] This is again asserted in the Response to Thurston County's Motion for Summary Judgment,

At no time did County agree that compliance of any kind would result in lawful process of an application, indeed the County has delayed and denied defendants application for the purpose of "taking" this property for the "public benefit" by downzoning from minimum four units/acre to one unit to 5 acres.

c. Persons and Parties.

The parties are identical in both *Thurston County v. Burnell* and *Burnell v. Thurston County*.

d. Quality of the Persons for or Against Whom the Claim is Made.

The assertion against Thurston County in the Complaint is against the body politic of Thurston County. While the actors may not be identical in each cause, the alleged Defendant is the same and the individual members are indistinguishable based upon the Complaint.

Appellant has already asserted or should have asserted all issues related to his 42 U.S.C. causes of action, as well as any claim of unlawful taking and he should now be barred by the doctrine of res judicata.

2. Collateral Estoppel.

"The distinction between claim and issue preclusion is not absolute. Rather, '[t]he distinction between an issue and a claim is often one of degree and emphasis in applying a deeper principle that an original misadventure cannot be retrieved for a second chance.'" *Hilltop* at 31, footnote 4, citing Charles A. Wright et al., Federal Practice Sec. 4402 at 1 (supp. 1994).

Summary judgment was granted under Thurston County Cause No. 03-2-00586-7 against Appellant as to any civil rights claims raised by his subsequent Complaint and this appeal. This Summary Judgment was upheld by the Court of Appeals. Even if the civil rights issues weren't

specifically cited as a “1983 claim,” they were argued in his pleadings as such. Appellant’s option on the ruling of the Court of Appeals as to the summary judgment was to petition the Supreme Court. Appellant did not do so. When the Superior Court found in favor of Thurston County on the issue of service, Appellant’s option was to appeal again to Division Two. Appellant did not do so.

Appellant should be barred from receiving a second chance at his “original misadventure” as labeled by Charles A. Wright by the doctrine of collateral estoppel.

C. 42 U.S.C. § 1983 Claims.

If the Court finds the arguments under res judicata and collateral estoppel unconvincing, the Court should still rule in favor of Thurston County as to all 42 U.S.C. § 1983 claims. Appellant has failed to establish a factual case as a matter of law according to all the pleadings that this Court is entitled to consider under a *de novo* review.

In order to state a claim under section 1983, [appellant] must show that the appellees acted under color of law, and that their conduct deprived him of a constitutional right. Constitutionally protected liberty interests can arise under either state law or the Due Process clause.

Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996) citing *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987). According to the pleadings filed under Thurston County’s Second Motion for Summary Judgment, the only evidence for the trier of fact to consider, was that Thurston County in fact went above and beyond what was required under local and State zoning laws.

1. Failure to Obtain Permits Wholly Appellant’s Fault.

Appellant cites “due process” “equal protection” and “taking of property” as his interests that were deprived as a result of the County’s action. As Mike Kain states in his Declaration, [CP 72-74] not only was Appellant’s application considered by Thurston County, Appellant was given special consideration and extra time beyond the date that the zoning laws officially

changed to complete his application process. Any failure to comply with the requirements was wholly the fault of the Appellant. Mike Kain also states in his Declaration, with accompanying attachments, that Appellant's previous failed attempts at submitting applications were wholly the fault of the Appellant. According to the Declaration, which is uncontroverted in the pleadings this Court can consider, Appellant had not, at the time the Declaration was prepared, ever filed a complete land use application. Appellant has failed to provide any evidence for the Court to consider that Thurston County, under color of law, has deprived him of any constitutional right.

2. Taking of Property.

Appellant alleges a cause of action under 42 U.S.C. § 1983 for taking of property. Appellant cannot recover as to this cause of action. "Governmental regulation of property rights violates the property owner's right of substantive due process if the resulting interference with property rights is irrational or arbitrary." *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 828 P.2d 765 (1992).

Yet before Appellant can assert a takings claim under 42 U.S.C. § 1983, all administrative and state judicial remedies must be exhausted. "In addition, exhaustion of administrative remedies is necessary before a court can properly determine a takings claim." *Sintra* at 18 citing *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 80, 768 P.2d 462 (1989). Furthermore, "[U]nder federal law, if a landowner fails to seek compensation through *state* judicial procedures, a takings claim is said to be not yet ripe. [Emphasis theirs] *Sintra* at 19-20 citing *Williamson Cy. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 87 L.Ed.2d 126, 105 S. Ct. 3108 (1995) and Richard L. Settle, Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't, 12 U. Puget Sound L. Rev 339, 357 (1988-1989).

The Declaration of Mike Kain establishes unequivocally that Appellant never appealed the land use decision that converted the zoning in which his properties lie to 1/5 residential in 2002. Having failed to do so, Appellant failed to exhaust his administrative remedies or state court remedies, and therefore cannot assert a takings claim under 42 U.S.C. 1983.

Furthermore, for a claim of taking to prevail, Appellant must show that the property has no viable economic use. See *Sintra* at 16. The court in *Sintra* cited a three-part test to determine economic viability: 1) the economic impact of the regulation on the property, 2) the extent of the regulation's interference with investment-backed expectations; and 3) the character of the government's action. *Sintra* at 17 citing *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 335-36, 787 P.2d 907, *cert. denied*,

498 U.S. 911, 112 L.Ed.2d 238, 11 S. Ct. 284 (1990). As stated in the Declaration of Mike Kain, Appellant can still utilize his property for single-family residences and accessory uses. The overall character of Thurston County's rezone action is uncontested. The rezone affected a much larger area than Appellant's parcels. Summary judgment should be granted in favor of Thurston County as to all issues asserting "taking."

D. Appellant Cannot Recover Under Claims For Civil Conspiracy.

In the initial Complaint, Appellant asserts that Thurston County, through the totality of its actions, has acted in conspiracy to deprive Appellant of his numerous and previously discussed rights. Appellant cannot prevail on the elements, even when viewing the facts in the light most favorable to his cause.

1. State Common Law.

In Washington State, the elements of civil conspiracy are: (1) that two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by

unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. *All Star Gas, Inc. v. Berchard*, 100 Wn. App. 732, 740, 998 P.2d 267 (2000), citing *Wilson v. State*, 84 Wn. App. 332, 350-51, (1996) *cert. denied*, 522 U.S. 949 (1996). “Plaintiffs must prove these elements with clear, cogent and convincing evidence.” *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967). *See also Peterick v. State*, 22 Wn. App. 163, 598 P.2d 250 (1977). “Mere suspicion or commonality of interests is insufficient to prove a conspiracy.” *All Star Gas* at 740. “When the facts and circumstances relied upon to establish a conspiracy is as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient.” *Id* citing *Lewis Pac. Dairymen’s Ass’n v. Turner*, 50 Wn.2d 762,772, 314 P.2d 625 (1957). Finally:

To preclude summary judgment, a non-moving party may not rely solely on speculation and argumentative assertions. Upon the submission by the moving party of adequate affidavits, the non-moving party must set forth specific facts to rebut the moving party’s contentions and show that a genuine issue as to a material fact exists.

Allard v. Board of Regents, 25 Wn. App. 243, 247, 606 P.2d 280 (1980) citing *Peterick* at 181.

Appellant has presented no evidence to establish a genuine issue of fact as to either prong. All attempts to establish a “conspiracy” are based on mere conjecture or suspicion and are not based upon any factual exhibits, affidavits, or declarations. There is entirely no evidence of an agreement between anyone to accomplish or take a substantial step toward a conspiracy. The only “commonality of interest” is that at various times, Thurston County employees have dealt with Appellant’s issues.

2. Federal Law.

Appellant also claims civil conspiracy under federal law.

To recover under section 1985(3), (plaintiffs) must prove four elements: a conspiracy; a purpose of depriving them, as members of a protected class, directly or indirectly, of equal protection of the laws, or of equal privileges and immunities under the laws; an act in furtherance of the conspiracy; an injury to their persons or property or deprivation of any right or privilege of a citizen of the United States.

Torrey v. Tukwila, 76 Wn. App. 32, 38, 882 P.2d 799 (1994), citing *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 233 (6th Cir. 1991). Appellant's claim fails as to the first prong. As argued above, even taking the facts as described by the Complaint, no clear, cogent, or convincing evidence of a conspiracy exists. Also argued above, no evidence has been provided to establish that Appellant is a member of a "protected class" for the purposes of 42 U.S.C. § 1985 or that Appellant was at any time unlawfully deprived of a constitutional right.

E. Conversion of Fees.

Conversion, or "trover" involves willful interference with a chattel without lawful justification, whereby a person entitled to possession of the chattel is deprived of the possession of it. See Restatement (Second) Torts § 217. See *Merchants Leasing v. Clark*, 14 Wn. App. 317, 322 (1975). The intent required is the intent to exercise dominion over the Plaintiff's property. Restatement at § 223, comment (b).

To prove conversion, Appellant must show that the money was withheld without lawful justification. "A conversion is a willful interference with a chattel without lawful justification, whereby a person entitled thereto is deprived of the possession of it." *Paris Am. Corp v. McCausland*, 52 Wn. App. 434, 443, 759 P.2d 1210 (1988) citing *Olin v. Goehler*, 39 Wn. App. 688, 693, 694 P.2d 1129 (1985).

Appellant does not challenge the lawfulness of the fees themselves in the Complaint. Appellant alleges conversion because the fees were not returned. No factual evidence in support of the Response to Second Motion for Summary judgment supports this contention. As stated by

Mike Kain in his Declaration, the attachments thereto show that the original fees presented by Appellant were consumed by processing and the delays caused by Appellant. [CP 74, 77, 78.]

F. Tortious Interference with Contractual Relationship.

In the Complaint, Appellant makes a vague and unspecific claim that “agents” of Thurston County interfered with his insurer in relation to a fire-damaged house. No credible evidence has been provided in support of this claim, no County employees are mentioned, and no specific action is cited, other than comments alleged to have been made about the residence being “not built to code.”

The Supreme Court defined the requirements for intentional [tortious] interference with contractual relations in *Calbom v. Knudtson*, 65 Wn.2d 157 (1964). The four necessary elements for a prima facie case are: 1) the existence of a valid contractual relationship or business expectancy; 2) knowledge of the relationship or expectancy on the part of the interferor; 3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and 4) resultant damage to the party whose relationship or expectancy has been disrupted. *Calbom* at 162-63. *See also Pleas, et al. v. City of Seattle*, 112 Wn.2d 794, 800, 774 P.2d 1158 (1989).

It is asserted that with the complete lack of specifics in the Complaint or in defense of Thurston County’s Second Motion for Summary Judgment, Appellant has not come close to meeting his burden in even a prima facie case.

G. No Remaining Issues of Material Fact.

Appellant asserts in his briefing that there are remaining issues of material fact that would allow this Court to remand the case for further fact finding. All this Court should consider *de novo* are the pleadings and supporting evidence provided by the parties in the dispositive motion

for summary judgment. No evidence was provided by Appellant to support any of his claims in defense of the Second Motion for Summary Judgment. Appellant failed to cite any legal authority in support of his claims. Even taking the evidence in the light most favorable to the Appellant, all legal issues are disposed of in the above briefing, leaving no remaining issues of fact from the Appellant's initial complaint.

V. CONCLUSION

This appeal must be denied. Appellant provided no evidence at the summary judgment hearing that created a material issue of fact. All legal issues are dispositive and were correctly ruled upon by the trial Court.

Respectfully submitted this 19th day of May, 2011.

JON TUNHEIM
PROSECUTING ATTORNEY



DONALD R. PETERS, JR, WSBA #23642
Deputy Prosecuting Attorney
Attorney for Respondent Thurston County

A copy of this document was properly addressed and mailed, postage prepaid, to the attorney for appellant on May 19, 2011. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Olympia, Washington.

Date: 5-19-11
Signature: Linda J. Olsen

COURT OF APPEALS
STATE OF WASHINGTON
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