

65624-4

65624-4

NO. 65624-4-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

CHARLES ROBERT GARNER, Appellant,

v.

CITY OF FEDERAL WAY, Respondent.

RESPONSE TO BRIEF OF RESPONDENT

CHARLES R. GARNER

Appellant, Pro Se

29811 Marine View Dr. SW

Federal Way, WA. 98023

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COURT OF APPEALS
DIVISION 1

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CASE LAW

State v. Inglis, 32 Wn.App.700,649 P.2d 136 (Div.1, 1982)

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STATUTE:

RCW 19.27.180Page 9

I. INTRODUCTION

Respondent's introduction alleges that Appellant (herein after "Mr. Garner) has a long history of suing the respondent (herein after "the City"), while the records reflect only one other lawsuit filed against the City with respect to the property at 31616 6th Ave. SW in Federal Way, Washington. That lawsuit has been identified by Case No., Court Name, and Judge in Appellant's Brief, and because its cause of action was "failure of due process" it did not meet the criteria for the *res judicata* action before the King County Superior Court No. 09-2-09440-3 KNT which is a lawsuit seeking damages for a "reverse condemnation". The alleged *Previous Lawsuit* was an appeal of the City of Federal Way Appeals Commission of an "unfit building" ruling.

II. REGARDING THE CITY'S RESPONSE TO

ASSIGNMENT OF ERROR

The City set forth in its Motion for Summary Judgment, the request for Oral Argument and that request was noted and annotated on all correspondence from the Court. The Court took oral arguments from both parties and as such are part of the record forwarded to this Court.

The Order Granting Motion for Summary Judgment, signed by the Honorable Hollis R. Hill, was annotated by the City's Counsel and became part of the Order. Such annotation reads: "Plaintiff's Responsive Brief is stricken as untimely." (Emphasis added) which was added and signed at the conclusion of the Oral Arguments.

It is of note that now the City's Counsel seeks to redefine RAP 9.12 by stating that "...Mr. Garner's summary judgment response was untimely and was to be stricken from the record. (RB p.1) (Emphasis added) Neither party objected to the Oral argument, nor to the taking of testimony or evidence at the hearing which would become part of the record. RAP 9.12 states in part; "...the appellate court will consider

only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order *shall* be made a part of the record by supplemental order of the trial court or by stipulation of counsel.”

(Emphasis added) The City’s counsel then switches back to, “Thus, the City asserts that the only assignment of error to the lower court can be whether Mr. Garner’s response brief was properly stricken from the record.” (RB pg. 2) Mr. Garner stipulated which files from the lower court were to be forwarded to this Court, which would include oral argument testimony and evidence, and thus should be considered.

Referencing (RB pg 2) 2. The doctrine of claim preclusion and *res judicata* are well established. Mr. Garner has stated to this court the accepted criteria; 1.) Identity in the thing sued for; 2.) Identity of the cause of action; 3.) Identity of persons and parties to the action; 4.)

Identity of the quality in the persons for or against whom the claim is made.

The City echoes those four properties as criteria. (RB 15)

The City properly coded the Administrative Proceedings of Complaint 08-102099-00-VO to which Mr. Garner became a defendant to the City's action. A hearing was held and the findings published. Per FWRC an appeal was filed to the Federal Way Appeals Commission where upon Mr. Garner became an Appellant. The Federal Way Appeals Commission denied the appeal, where upon Mr. Garner was compelled to file an appeal to satisfy the requirements of Administrative Proceedings to exhaust all remedies, unless it is obviously futile, before filing for an Adjudicative Proceeding. The Appeal was identified by Case No. 08-2-37690-7-KNT with Mr. Garner the Appellant. This case number is being characterized by Respondent as a *Previous King County Lawsuit*. (RB pg. 3-5) As argued on summary judgment, "...takings law applies to land use regulation, not code enforcement. (CP 30-33)" (RB pg. 16) The City states, "The ordinances

and actions taken by the City have nothing to do with regulating the use of his property". (RB Pg. 16)

Revisiting the requirements for *res judicata*:

1.) Identity in thing sued for: Current lawsuit – monetary damages for taking. Alleged lawsuit – reversal of administrative ruling.

2.) Identity of cause of action: Current lawsuit – Adjudicative lawsuit for taking which is prohibited by the Constitution without restitution. Alleged lawsuit- Administrative appeal of Appeals Commission ruling.

3.) Identity of persons and parties to the action: Current lawsuit- Charles Robert Garner, Plaintiff, vs. City of Federal Way, Defendant. Alleged lawsuit – Charles Robert Garner, Appellant, vs. City of Federal Way, Appellee. Additional parties relevant to the proceedings are the Federal Way Hearing Examiner and the Federal Way Appeals Commission.

4.) Identity of the quality in the persons for or against whom the claim is made: Current lawsuit- Charles Robert Garner, (Principal, Property Owner) vs CITY OF FEDERAL WAY, (Incorporated Municipality)

Alleged lawsuit- Charles Robert Garner, (Principal, Property Owner, Appellant) vs. CITY OF FEDERAL WAY, (Incorporated Municipality, Appellee) Acting on behalf of the City was the Hearing Examiner, not allowed to rule on legal issues. Acting on behalf of the City was the Appeals Commission which is restricted to act only on those issues held by Hearing Examiner.

The stated position of the City that, "Certainly, the subject matter is the same as the previous lawsuit." is not factual. (RP pg. 5 at 13).

Current King County Superior Court Lawsuit.

On March 31, 2009 Mr. Garner filed an adjudicative lawsuit as Plaintiff against the City of Federal Way, Defendant seeking monetary relief for a defacto taking and/or damages to his property by the City of Federal Way. Case No. 09-2-09440-3-KNT was filed in King County Superior Court on March 31, 2009 which was 177 days before the previous King County Superior Court appeal Order was issued on September 24, 2009. As such the outcome was unknown at the time of

the filing and as stated by the City, “Finally, as argued on summary judgment, takings law applies to land use regulation and not code enforcement.” (CP 30-33) (RB-16)

The City of Federal Way was incorporated in 1990, so any references to 1991 should be stricken. RCW 19.27.180 was in effect upon incorporation, but not adopted by the City, therefore a portion of the rulings in *Inglis* is appropriate, “*Id.* The court ruled that while a municipality may enforce its own police regulations its laws can not conflict with state laws where the state has exercised its jurisdiction.” (RB pg. 17) The application of that ruling can be seen as applying to any laws in conflict with state law where the state has exercised its jurisdiction. The City code contained such a conflict not germane to the “unfit building” appeal.

CONCLUSION

This appeal is not frivolous and there are issues of material fact that require a jury and trier of fact to adjudicate. The issue of *res judicata* as can be seen is in question. There does not appear to be any harmony of identity of any of the four tests. There has not been any definition on what *claims actually litigated and those that could have been raised* are. The question of whether RCW 19.27.180 is germane to the issues at hand is proper to the claim of taking requires further adjudication. It is the assertion of Mr. Garner that based on the information presented to and reviewed by Judge Hollis, by the City, that an error was made and the lower court abused its discretion by striking Mr. Garner's summary judgment brief. That statement is echoed by the City in its Brief of Respondent at page 23, "Even if the court does accept Mr. Garner's arguments, it is clear that (1) the lower court properly reviewed the record and *did* abuse its discretion by striking Mr. Garner's summary judgment response brief;....."(BR pg. 23) (Emphasis added)

As both parties are in agreement that the lower court did abuse its discretion in striking Mr. Garner's summary judgment response brief, it is proper for the Court of Appeals to reverse the Summary Judgment and remand the case back for adjudication at the lower level.

RESPECTFULLY SUBMITTED January 6, 2011.

A handwritten signature in black ink, appearing to read "Charles R. Garner", written over a horizontal line.

Charles R. Garner

Pro Se

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the following documents with the Clerks of The Courts:

Response to Brief of Respondent

NO. 65624-4-1

I hereby certify that on this date, I mailed by U.S. mail, postage prepaid those documents described above as to the following:

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Dated This Day: 6 January 2011

A handwritten signature in cursive script, reading "Charles R. Garner", is written over a solid horizontal line.

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