

FILED
SUPREME COURT
STATE OF WASHINGTON
7/10/2024 9:51 AM
BY ERIN L. LENNON
CLERK

No. 1031564

SUPREME COURT
OF THE STATE OF WASHINGTON

STEPHEN LUDWIG, a single man; ROSS KINGELE and
ARRIETTE BURN, a marital community,

Petitioners,

vs.

CITY OF MOUNTLAKE TERRACE, a municipal corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent is the City of Mountlake Terrace (“City”).

II. COURT OF APPEALS’ DECISIONS

A copy of the Court of Appeals’ unpublished opinion affirming the decisions below and finding the trial court properly dismissed Appellants Ludwig, Kingle, and Burn’s (collectively “Ludwig”) Complaint on claim preclusion grounds and did not abuse its discretion by awarding attorney fees and imposing sanctions is attached as Appendix 1 to Ludwig’s Petition for Review (“Petition”). A copy of the Court of Appeals’ Order Denying Motion for Reconsideration is attached as Appendix 2 to Ludwig’s Petition.

III. ISSUES PRESENTED FOR REVIEW

A. Whether this decision conflicts with Sigurdson v. City of Seattle, 48 Wn.2d 155, 292 P.2d 214 (1956), or Pruitt v. Douglas Cnty., 116 Wn. App. 547, 66 P.3d 1111 (2003). *No.*

B. Whether this decision presents an issue of substantial public interest that should be decided by the Supreme Court. *No.*

IV. FACTS RELEVANT TO PETITION

A. Predecessor Case and Prior Action for Injunction.

Ludwig owns property abutting Hall Creek located within the City. CP 84, ll. 10–12. In 2017, Ludwig sued the City (“2017 Lawsuit”) for damages related to the City’s actions in 1969 and 1970, alleging work scoured their channel bank, damaged their bulkhead, and impacted their ability to sell their property. CP 8, ll. 2–4. Ludwig claimed that, in 2014, they discovered alleged damage to their property which they contend was caused by the City. CP 62, ln. 1. The 2017 Lawsuit was thoroughly and completely litigated. CP 85. Ludwig moved for injunctive relief against the City in the 2017 Lawsuit on October 20, 2020, related to Hall Creek; Ludwig admits they “moved for a Preliminary Injunction” which “would have required the City to abide by its duty . . . and make appropriate repairs of Hall Creek’s east bank armor near their home.” CP 87 (emphasis added). The Hon. David A. Kurtz denied the Motion for Mandatory Injunction on November 10, 2020, stating, “It is hereby ordered that the

Plaintiffs' Revised Motion for a Mandatory Injunction is respectfully denied." CP 98. As summarized in the Petitioners' Complaint in the instant case:

After five Motions for Summary Judgment, one Motion for a Mandatory Injunction, three motions for reconsideration and one aborted trial (case dismissed on a zoom trial technicality, with dismissal subsequently vacated), case# 17-2-04430-31 was finally tried on September 13, 2022. Plaintiffs alleged negligence on the part of the City for damage to the bank armor that defended the west foundation wall of their house. Stormwater exiting the culvert outlet at 226th Place SW was being cast against the east bank of Hall Creek causing scour and erosion (as described above).

CP 85. The Honorable Karen D. Moore found Ludwig met their burden regarding the City's alleged breach of duty, but that Ludwig did *not* meet their burden to establish elements of causation or damages. CP 96. Ludwig moved for and was denied reconsideration. CP 43–44. The 2017 Lawsuit was not appealed.

Ludwig was represented by attorney Robert J. Siegel throughout the 2017 Lawsuit. CP 97.

The trial court filed the Findings of Fact and Conclusions of Law in the 2017 Lawsuit on February 3, 2023. CP 35.

B. Relitigation: the Present Case.

Twenty-one days after the Findings of Fact and Conclusions of Law were filed, Ludwig filed a “new” claim for damages with the City on February 24, 2023, realleging the City’s actions caused flooding at and damage to Ludwig’s property. CP 29. In response, on March 21, 2023, the City, through counsel, warned Ludwig against filing a new lawsuit based on the same facts and causes of action:

Any attempt to relitigate this claim is prohibited under Washington law by the doctrine of claim preclusion, or *res judicata*. Pederson v. Potter, 103 Wn. App. 62, 67 (2000). This doctrine prevents repetitive litigation of the same matters, ensuring integrity and finality in the legal system. Id. at 71. Likewise, your claim is barred by the doctrine of collateral estoppel. 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 this doctrine. City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 164 Wn.2d 768, 791-92 (2008).

If you file a lawsuit based on the claims in your February 23, 2023 tort claim form, that lawsuit will be frivolous.

“A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.” Tiger Oil, 88 Wn. App. 925, 938 (1997). Under RCW 4.84.185, the City will be entitled to reasonable expenses, including its attorneys’ fees, incurred in opposing a frivolous lawsuit. Please consider this letter formal notice that the City will pursue sanctions under RCW 4.84.185 if you file a lawsuit based on the allegations in your tort claim form.

If you retain counsel to file suit, the City requests you provide a copy of this letter to them, as under CR 11 any attorney filing a frivolous lawsuit on your behalf will be subject to the same sanctions, including attorneys’ fees, that will be recoverable against you personally.

CP 32–33 (emphasis in the original). The City received no response. CP 29.

Despite this warning, Ludwig, again represented by Mr. Siegel, filed the present lawsuit on April 26, 2023. CP 82. The Complaint filed in this case quotes extensively from the Findings of Fact and Conclusions of Law in the 2017 Lawsuit, essentially realleging damages already litigated. CP 84–90. The Complaint sought an injunction ordering:

1. The City of Montlake Terrace shall cease and desist directing concentrated and damaging stormwater against Hall Creek’s vulnerable east channel bank near Plaintiffs’ house, without also providing proper protection for said bank.
2. The City of Mountlake Terrace shall be required to immediately maintain, repair or replace Hall Creek’s already damaged bank armor along Plaintiffs’ property to current standards in accordance with its established duty.

CP 90. Ludwig again based their Complaint entirely on the City's actions in 1969 and 1970, realleging that the work scoured their channel bank, damaged their bulkhead, and impacted their ability to sell their property. CP 88–89. Despite not seeking financial compensation in the present case, fundamentally, Ludwig's request for injunctive relief arises once more from allegations of negligence—the very same cause of action for which Judge Moore determined Ludwig failed to prove causation in the 2017 Lawsuit. CP 96. Here, the relief requested would require the City to spend money to correct the alleged defects in Hall Creek—relief that was specifically considered and rejected in the 2017 Lawsuit.

As promised in the City's March 21, 2023, letter to Ludwig (CP 32–33), the City moved for dismissal shortly after the new Complaint was filed. Judge Mary Beth Dingledy granted the City's Motion to Dismiss, and the matter was dismissed on June 21, 2023. CP 50–51. Ludwig's subsequent Motion for Reconsideration (CP 13) was denied. CP 1.

The City then moved to recover its attorneys' fees and costs. CP 18. That motion was granted on June 29, 2023. CP 2. The court specifically found Ludwig's lawsuit was barred by res judicata and the statute of limitations. CP 3. The court determined:

[F]iling of this lawsuit was frivolous and advanced without reasonable cause; thus, Plaintiffs shall pay the City's attorneys fees and costs pursuant to RCW 4.84.185.

The filing of this lawsuit is neither well-grounded in fact, nor warranted by existing law, Plaintiffs and Plaintiffs' attorney therefore violated CR 11.

CP 3. The court awarded the City its attorneys' fees and costs in the amount of \$5,826.08 and granted CR 11 sanctions against Ludwig and their attorney in the amount of \$1,000. CP 4.

V. ARGUMENT FOR DENIAL OF REVIEW

A. Ludwig Fails to Satisfy RAP 13.4(b).

RAP 13.4(b) provides:

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

...

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Ludwig fails to satisfy any of the criteria described in RAP

13.4(b) necessary to warrant review by this Court.

B. The Court of Appeals' Decision Is Wholly Consistent with the Decisions of this Court, the Courts of Appeals, and the U.S. Supreme Court (RAP 13.4(b)(1) and (2)).

Ludwig's Petition identifies the following issue presented

for review:

The Court of Appeals' decision affirming claim preclusion (4/15/2024) conflicts with a decision of the Washington State Supreme Court; *Sigurdson v. City of Seattle* (48 Wn.2d, 1956), and with a decision of the Appeals Court; *Pruitt v. Douglas County* (116 Wn. App. 547 Wash. Ct. App. 2003).

Petition at 6. Ludwig's comparison of those two cases is cursory at best. Id. at 10.

In Sigurdson, a landowner filed a negligence action against the City of Seattle for injury to property from a landslide due to water escaping from the City's wooden drainage pipe. 48 Wn.2d at 157. The Sigurdson case fails to address injunctive relief (sought in the present case's Complaint) or claim preclusion (the basis on which the trial court dismissed this matter). There is no conflict between the present case and Sigurdson.

In Pruitt, landowners brought negligent trespass and inverse condemnation claims against Douglas County, after the County's road improvements diverted surface water which flooded landowners' property. 116 Wn. App. at 552-53. Division Three of the Court of Appeals determined a genuine issue of material fact existed as to whether the County's road improvements constituted a taking, thus precluding summary judgment. Id. at 560. The case did not address injunctive relief

or claim preclusion. There is no conflict between the present case and Pruitt.

While both Sigurdson and Pruitt discuss flooding—which is alleged in both Ludwig’s 2017 Lawsuit for damages and the present case—neither opinion contains law relevant to the issues addressed by the Court of Appeals in the instant matter. Ludwig appears, again, to be relitigating the damage claims made in the 2017 Lawsuit. Ludwig fails to demonstrate review is warranted under RAP 13.4(b)(1) or (2).

C. No Significant Issue of Substantial Public Interest Exists Sufficient to Grant Review (RAP 13.4(b)(4)).

Ludwig’s second issue states, “The Petition involves an issue of substantial public interest that should be decided by the Supreme Court.” Petition at 6. Ludwig then notes:

Plaintiffs’ petition involves an issue of vital importance to riparian property owners, and by extension, to anyone who depends on infrastructure over which a municipal corporation or other entity has ministerial control: Can the duty of care bestowed by this control be curtailed short of divestment of said

control?

Petition at 13 (emphasis removed).

This is a straightforward case of claim preclusion. There is no widespread public interest involved. Ludwig fails to demonstrate review is warranted under RAP 13.4(b)(4).

VI. CONCLUSION

Ludwig's Petition fails to satisfy any of the criteria for review set forth in RAP 13.4(b). Ludwig's Petition should be denied.

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*This document contains 1,861 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 10th day of July, 2024.

KENYON DISEND, PLLC

By /s/ Hillary J. Evans

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DECLARATION OF SERVICE

I, Margaret C. Starkey, declare and state:

1. I am over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 10th day of July, 2024, I caused a true copy of the foregoing *Answer to Petition for Review* to be served on the following in the manner indicated below:

<i>Attorneys for Petitioners:</i> Robert J. Siegel Attorney at Law P.O. Box 155 Chimacum, WA 98325-0155	Served via Email: <input checked="" type="checkbox"/> siegelbob@gmail.com
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of July, 2024, at Palm Coast, FL.

s/ Margaret C. Starkey
Margaret C. Starkey

KENYON DISEND, PLLC

July 10, 2024 - 9:51 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 103,156-4
Appellate Court Case Title: Stephen Ludwig et al. v. City of Mountlake Terrace
Superior Court Case Number: 23-2-03052-2

The following documents have been uploaded:

- 1031564_Answer_Reply_20240710094953SC744272_7851.pdf
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