IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN R. WYSS, Appellant, v. GRAYS HARBOR COUNTY, Respondent.	No. 41298-5-II UNPUBLISHED OPINION

Van Deren, J. — John Wyss appeals the trial court's order granting summary judgment to Grays Harbor County, asserting that the trial court erred because (1) the County failed to timely appeal his purported 1999 subdivision of property within the city of Hoquiam and (2) the county assessor lacked authority to rescind Wyss's earlier illegal and invalid attempted property subdivision via quitclaim to his minor son. Because Wyss is collaterally estopped from asserting the validity of his attempted property subdivision, the trial court properly dismissed his claims. We affirm and award attorney fees to the County for having to defend against Wyss's frivolous claims.

FACTS

Wyss owned an eight-unit apartment building located in Hoquiam, Washington, against which Hoquiam initiated condemnation proceedings in August 1999. In September 1999, Wyss

attempted to transfer the north 40 feet of the property on which the apartment building was located to his son by recording a quitclaim deed in the Grays Harbor County Auditor's office. When Wyss filed the quitclaim deed, the county assessor's office assigned a new tax parcel number to the north 40-foot portion of Wyss's lot. In December 1999, Hoquiam issued a final decision condemning Wyss's apartment building.

Wyss attempted to appeal Hoquiam's condemnation decision but the trial court found Wyss's appeal untimely under the land use petition act (LUPA), chapter 36.70C RCW. We affirmed the trial court's decision to dismiss Wyss's appeal in April 2002, in an unpublished opinion.[1]

In October 2002, Wyss sued Hoquiam in United States District Court, alleging that Hoquiam's condemnation action was an unconstitutional taking and that it denied him due process of law. The federal court disagreed and entered a summary judgment order in favor of Hoquiam in November 2003. In its summary judgment order, the federal court declined to exercise its supplemental jurisdiction over Hoquiam's claim that Wyss's transfer of a portion of his property to his son was illegal under Washington law.

Following the federal court's summary judgment order, Hoquiam sued Wyss in Grays Harbor County Superior Court to nullify Wyss's attempted transfer of property to his son. In October 2005, the superior court entered a summary judgment and declaratory judgment order in favor of Hoquiam, finding that Wyss's attempted 1999 transfer of a portion of his property was unlawful and invalid. We affirmed the trial court's 2005 summary judgment order in an

[1] *Wyss v. City of Hoquiam*, noted at 111 Wn. App. 1001 (2002).

unpublished opinion in 2006.[2]

In 2007, Hoquiam assessed a tax lien against Wyss's property.[3] On March 11, 2009, Hoquiam notified the county assessor of the 2005 trial court judgment, invalidating Wyss's transfer of the 40 foot section of property to his son. On receiving notice of the 2005 trial court judgment, the county assessor recombined the two tax parcel numbers associated with Wyss's property into a single tax parcel number. Wyss then sued the County, asserting that the county assessor did not have "legal authority to rescind Wyss'[s] subdivision" of his property and requesting a declaratory judgment as well as injunctive relief. Br. of Appellant at 12. The trial court dismissed Wyss's claims with prejudice. Wyss appeals the trial court's dismissal of his suit against the County.

ANALYSIS

Wyss contends that the trial court erred by dismissing his claim against the County because the County failed to timely appeal the county assessor's 1999 assignment of a new tax parcel number to a portion of his property, which assignment Wyss characterizes as a land use decision subject to LUPA's statute of limitations. Wyss concedes that the 1999 transfer of his property was illegal and he acknowledges our 2006 unpublished opinion holding that the transfer of his property was illegal and thus invalid. But despite conceding that his attempted transfer has been adjudicated as illegal, Wyss asserts that the County was required to appeal the county assessor's assignment of an additional tax parcel number in 1999 within LUPA's 21-day statute of

[2] *City of Hoquiam v. Wyss*, noted at 136 Wn. App. 1011 (2006).

[3] The issue of Hoquiam's tax assessment lien against Wyss's property was the subject of another appeal before us, *Grays Harbor County v. Wyss*, No. 41691-3-II. We dismissed Wyss's appeal on December 12, 2011, based on Wyss's failure to comply with RCW 84.64.120.

limitations and, because the County did not appeal, his illegal division of the lot stands.

Wyss also contends that the trial court erred in dismissing his claim because the county assessor lacked authority to "rescind" his 1999 subdivision when, in 2009, the assessor recombined the two tax parcel numbers associated with his property into a single tax parcel number.

I. Standard of Review

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, entitling the moving party to judgment as a matter of law. CR 56(c). We may affirm a trial court's summary judgment ruling on any correct ground, even if the trial court did not consider that ground, "provided that it is supported by the record and is within the pleadings and proof." *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003).

II. Collateral Estoppel

All of Wyss's arguments in this appeal rely on his persistent assertion that he can maintain that his property was legally subdivided into two separate parcels by the county assessor's 1999 assignment of an additional tax parcel number to a portion of his land. This issue has been fully addressed and resolved by a final judgment on the merits; thus, it is barred by collateral estoppel.

Collateral estoppel, or issue preclusion, prevents relitigation of any issue that was actually litigated to final conclusion in an earlier lawsuit. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300 (2002). The requirements for applying collateral estoppel to a

claim are:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom [collateral estoppel] is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Malland v. Dep't of Ret. Sys., 103 Wn.2d 484, 489, 694 P.2d 16 (1985). All of these requirements are met here.

In 2005, the Grays Harbor Superior Court entered a summary judgment order invalidating Wyss's attempted subdivision of the lot in the City, and we affirmed the superior court's summary judgment order in an unpublished opinion in 2006.[4] As we held in the 2006 opinion:

> The trial court properly found that the deed from Wyss to James was illegal. Wyss's transfer of the north 40 feet effectively divided the property and created a short subdivision. RCW 58.17.020(6). Therefore, Wyss had to comply with local regulations including Chapter 9.34 of the Hoquiam Municipal Code, before dividing his property. RCW 58.17.030[]. Because the short subdivision he attempted to transfer was not created legally, the transfer was illegal. *See* RCW 58.17.030.

City of Hoquiam v. Wyss, noted at 136 Wn. App. 1011, 2006 WL 3525277 at *4.

Wyss's attempted 1999 subdivision of the lot in Hoquiam was fully and finally determined to be improper and illegal and, thus, his property remains a single parcel. Wyss is therefore collaterally estopped from raising the issue again. Accordingly, we affirm the trial court's summary judgment order dismissing Wyss's claims.

[4] This court may consider unpublished opinions in examining issues such as collateral estoppel. *See Martin v. Wilbert*, 162 Wn. App. 90, 93 n. 1, 253 P.3d 108, *review denied*, 173 Wn.2d 1002 (2011).

III. LUPA

Although we need not address the merits of Wyss's LUPA claim on appeal, we note that the county assessor's assignment of tax numbers does not constitute a land use decision subject to LUPA's statute of limitations. Former RCW 36.70C.020(1) (1995) defined a "[l]and use decision" in part, as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." Here, the Hoquiam City Council, not the county assessor, had authority to make a final determination regarding Wyss's purported property subdivision.

Former RCW 58.17.020(6) (1995) defined a "[s]hort subdivision" as "the division or redivision of land into four or fewer lots, tracts, parcels, sites, or divisions for the purpose of . . . transfer of ownership. And RCW 58.17.030 provides that "[e]very short subdivision . . . shall comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060."[5]

The local regulation governing Wyss's purported subdivision of his property is found in Chapter 9.07 of the City of Hoquiam Municipal Code, which authorizes the city engineer to approve or deny applications for a short subdivision, and which authorizes the Hoquiam City Council to hear appeals from the city engineer's decision. HMC 9.07.060-.080.

Because the county assessor's office did not have "the highest level of authority to make [a short subdivision] determination," its actions in assigning and recombining tax parcel numbers to Wyss's property did not constitute land use decisions and was not subject to LUPA's statute of limitations.[6] Former RCW 36.70C.020(1). Wyss's claim regarding Hoquiam's failure to meet the

[5] Wyss ignores these relevant statutory provisions despite our reliance on them in our previous unpublished decision, affirming the trial court's 2005 summary judgment order invalidating his attempted illegal subdivision. *See Wyss*, noted at 136 Wn. App. 1011, 2006 WL 3525277 at *4.
[6] As we noted in Wyss's previous appeal when rejecting the same statute of limitations argument

LUPA deadline fails.

IV. Attorney Fees

The County requests attorney fees and costs under RAP 18.9(a) for defending against Wyss's frivolous appeal. RAP 18.9 allows this court to order a party to pay attorney fees and costs for filing a frivolous appeal. *See also Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442, 730 P.2d 653 (1986) ("This court's power to impose attorney fees and costs as a sanction for bringing a frivolous appeal is pursuant to RAP 18.9.").

"[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). Here, all of Wyss's

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Wyss raised against the City of Hoquiam:

> The statute of limitations does not bar the City's claim because the statute of limitations does not apply to actions brought "in the name or for the benefit of the state." RCW 4.16.160. Municipal actions are brought "for the benefit of the state" when those actions arise out of the exercise of powers traceable to the sovereign powers of the state that have been delegated to the municipality. *Wash. Pub. Power Supply Sys. (WPPSS) v. Gen. Elec. Co.*, 113 Wn.2d 288, 293, 778 P.2d 1047 (1989). The focus of the cases interpreting RCW 4.16.160 has not been on the municipal conduct's effect but on its nature and character. *WPPSS*, 113 Wn.2d at 293 . . .
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> The power to regulate platting is traceable to the state's sovereign powers. *See Oceanographic Comm'n of Wash. v. O'Brien*, 74 Wn.2d 904, 910, 447 P.2d 707 (1968) (sovereign power manifests itself by the power of taxation, the power of eminent domain, and through the government's police power). In Washington, the legislature has effectively delegated platting issues to the municipalities. RCW 58.17.030, .060(1). Therefore, because the City was acting for the state's benefit by enforcing the short plat regulations, the declaratory judgment action seeking to void the deed was not time barred because no statute of limitations applied. RCW 4.16.160.

Wyss, noted at 136 Wn. App. 1011, 2006 WL 3525277 at *4. (footnotes omitted).

It is also worth noting that, if we were to accept Wyss's argument that the county assessor's March 16, 2009, correction of tax parcel numbers associated with his property constituted a land use decision, his complaint, filed on February 19, 2010, would be beyond LUPA's 21-day statute of limitations. RCW 36.70C.040(3).

claims ignore our previous unpublished opinion, which clearly held that his purported subdivision of property was illegal and therefore void, and we also rejected his statute of limitations argument under LUPA. Accordingly, Wyss's appeal does not raise any "debatable issues upon which reasonable minds might differ," and we award the County attorney fees and costs for defending against Wyss's frivolous appeal. *Streater*, 26 Wn. App. at 435.

We affirm the trial court's summary judgment order dismissing Wyss's claims with prejudice. Additionally, we award the County attorney fees and costs under RAP 18.9 for defending against Wyss's frivolous appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Worswick, A.C.J.

Johanson, J.