IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN A. BURNELL, Appellant, v. THURSTON COUNTY, a Municipal Corporation and a Political Subdivision of the State of Washington, Respondent.	No. 41158-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Thurston County and John Alton Burnell had a long-standing dispute over his use of his property as a junk and salvage yard. In 2003, Thurston County filed a summons and complaint seeking an injunction, a declaratory judgment, and damages against Burnell for unlawful storage of junk vehicles, unlawful placement of mobile homes, unlawful accumulation of solid waste, and public nuisances. While Burnell sought appellate review of the summary judgment granted to Thurston County in that case, he filed a civil suit against the County—the matter currently before us—which stalled at the superior court level as both parties awaited the final outcome in Thurston County's case against Burnell.

Following our May 28, 2010 mandate terminating review of Thurston County's case against Burnell, Thurston County successfully moved for summary judgment in the present action.

Burnell appeals the trial court's summary judgment, contending that there are genuine issues of material fact remaining in his case and Thurston County was not entitled to judgment as a matter of law. Because Burnell fails to establish the existence of genuine issues of material fact, Thurston County was entitled to summary judgment and we affirm.

FACTS

On March 31, 2003, Thurston County filed a summons and complaint seeking an injunction, a declaratory judgment, and damages against Burnell for a host of sanitary code violations. At a May 23 hearing on a motion for default judgment filed by the County, Burnell argued that Thurston County had not properly served him notice. In light of this, the trial court denied the County's motion for default judgment and directed Burnell to file an answer to the County's complaint by May 29. In his answer, Burnell maintained that the County had not properly served him and that his use of the property was a legal, nonconforming use. On June 20, the County filed a motion for summary judgment. On August 1, the superior court granted Thurston County's motion for summary judgment. Burnell appealed that decision to this court. On July 7, 2004, we delivered our decision in that appeal. *Thurston County v. Burnell*, noted at 122 Wn. App. 1021 (2004).

While our decision in Thurston County's case was pending, Burnell filed a separate complaint[1] against Thurston County alleging that (1) Thurston County violated 42 U.S.C. § 1983 when it treated him in an arbitrary, capricious, and disparate manner in not processing land use applications submitted by him and, further, by denying him equal protection of the laws; (2)

[1] Counsel represented Burnell when he filed this complaint. At other times throughout this proceeding, Burnell acted pro se.

Thurston County violated § 1983 by intentionally refusing to process his land use applications until the use applied for became unlawful, thereby taking his property without due process or compensation; (3) Thurston County illegally converted his application fees; (4) Thurston County committed tortious interference with a contractual relationship when it wrongfully and intentionally attempted to prevent insurance coverage of a fire loss suffered by him on one of his properties; and (5) Thurston County committed civil conspiracy to deny his civil rights under both state and federal law.

Sometime in 2004, Thurston County moved for summary judgment in this suit.[2] The trial court denied the motion "based upon [its] determination that there [were] factual issues still pending" related to Thurston County's collateral proceeding against Burnell. Report of Proceedings (RP) (Aug. 6, 2010) at 5. The collateral matter, Thurston County's complaint against Burnell, was not complete until we mandated that case on May 28, 2010. On July 13, 2010, Thurston County moved for summary judgment, for a second time, in Burnell's civil suit. With the motion, Thurston County submitted a lengthy memorandum in support of summary judgment along with a declaration from Thurston County Development Services Planning and Environmental Section Manager Mike Kain.

On July 23, Burnell submitted a "motion to continue all motions" in response. Clerk's Papers (CP) at 32-36. In that document, Burnell moved for a continuance of the motion for summary judgment and trial arguing that a "motion to continue and a trial date for October allows time to prepare and / or obtain representation." CP at 33 (capitalization omitted and spelling

[2] The record does not clearly indicate when the hearing on this motion for summary judgment occurred.

corrected). Burnell also alleged that the County continued to deprive him of his basic civil rights. On August 6, the trial court held a hearing on Burnell's motion. At the hearing, Burnell clarified that he was seeking to continue Thurston County's motion for summary judgment because he wanted to obtain counsel. The trial court denied Burnell's motion for a continuance, noting, "I think that you've had adequate time to prepare to meet that motion. You have generated many, many documents just in the last couple of weeks, and we're going to proceed with the summary judgment next week." RP (Aug. 6, 2010) at 7.

On August 10, just three days before the summary judgment hearing, Burnell submitted his response to Thurston County's motion for summary judgment. In his response, Burnell argued that "no particular facts or questions" decided in Thurston County's case against him had any effect on his civil suit. CP at 43. Burnell also argued that issues of material fact existed because the "already filed affidavitt's [sic] of John Burnell and James Burnell, and Robert Patrick" established that Burnell attempted to obtain permits for his property in January 2000, but that Thurston County refused to process them. CP at 44.

Burnell's declaration in opposition to summary judgment—originally filed on August 26, 2004, in response to the County's first summary judgment motion—alleged that, since 1970, Burnell had attempted to develop his property but that the County always denied his permit applications. Burnell also alleged that the County committed tortious interference by attempting to provide Burnell's insurance company with misinformation about a building destroyed in a fire. Patrick's declaration averred that, at a presubmission conference on January 27, 2000, related to Burnell's application to subdivide his property, "County staff related that the county would not process an application for any such subdivision unless Mr. Burnell resolved what staff deemed

violations on the property to their satisfaction." CP at 175. Patrick stated that at another conference on July 26, 2001, the County repeated this position.

On August 27, the trial court issued its order granting summary judgment. In that order, the trial court stated that it had "considered the arguments of the parties" and the "declarations and pleadings filed in this action." CP at 50. The trial court specifically noted that it had considered Thurston County's second motion for summary judgment along with its memorandum of support and the declaration of Kain as well as Burnell's response to the motion for summary judgment. Burnell timely appeals.

DISCUSSION

Standard of Review

Because the superior court granted summary judgment for Thurston County against *all* of Burnell's causes of action, we review each cause of action de novo. *Torgerson v. One Lincoln Tower LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990) (citing *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974)). And we consider all facts submitted and the reasonable inferences from them in the light most favorable to the nonmoving party. *Atherton*, 115 Wn.2d at 516.

Tortious Interference

Burnell alleged in his complaint that Thurston County committed "[t]ortious interference with a contractual relationship by wrongfully and intentionally attempting to prevent insurance coverage" of a fire loss he suffered. CP at 167. Because undisputed facts bar a prima facie case

for tortious interference, we hold the trial court properly granted summary judgment on this issue.

To establish a prima facie case for tortious interference, Burnell needed to establish "(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 v. Knudtzon*, 65 Wn.2d 157, 162-63, 396 P.2d 148 (1964). All the essential elements must be established to support a claim of tortious interference. *See, e.g., Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Here, even assuming arguendo that Burnell's complaint established the first two elements of a prima facie case for tortious interference, the complaint itself defeats this cause of action as it clearly states that the insurance company covered the loss. Thus, Burnell could not meet the third element because no breach or termination of the relationship with his insurance company occurred. Because Burnell failed to establish all four elements required for a prima facie showing of tortious interference, his claim fails.

Civil Conspiracy

Burnell also alleged in his complaint that, in violation of the common law and 42 U.S.C. § 1985, "[a]ll the actions complained of were part of an unlawful and ongoing and openly admitted conspiracy to deny plaintiff's civil rights." CP at 167. Because undisputed facts

establish that Burnell failed to make even a prima facie showing of all of the elements for civil conspiracy under either state or federal law, his argument fails.[3]

A. State Law Claim

To establish a prima facie case for common law conspiracy, Burnell needed to show "that (1) 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. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). Moreover, "[t]o preclude summary judgment, a nonmoving party may not rely solely on speculation and argumentative assertions. Upon the submission by the moving party of adequate affidavits, the nonmoving 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. Bd. of Regents of Univ. of Wash.*, 25 Wn. App. 243, 247, 606 P.2d 280, *review denied*, 93 Wn.2d 1021 (1980).

Thurston County submitted Kain's declaration along with its memorandum in support of the motion for summary judgment. In that memorandum, contrary to Burnell's unsupported assertions, Kain stated that "[t]o ensure that Burnell had full opportunity to provide a completed application, the Board of County Commissioners agreed to allow Burnell fifteen extra days to complete his application. . . . Burnell failed to provide the information necessary to complete his application." CP at 73. Burnell failed to set forth specific facts to rebut Thurston County's contentions and, further, failed to provide competent evidence of anyone agreeing to conspire

[3] Burnell alleged that the County's actions violated RCW 9A.28.040, Washington's criminal conspiracy statute, and 18 U.S.C. § 241, the federal criminal conspiracy statute. But in the trial court and, again, on appeal, Burnell failed to explain how these criminal statutes apply in the present civil action. Accordingly, we do not address these claims. RAP 10.3(a)(6). *See also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

against him. Because Burnell failed to meet either element of the two-prong test for civil conspiracy, his claim fails.

B. Federal Law Claim

Burnell's federal civil conspiracy claim fails as well. To establish a claim under 42 U.S.C. § 1985,

> [a claimant] 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. City of Tukwila, 76 Wn. App. 32, 38, 882 P.2d 799 (1994). Because Burnell has not identified that he is a member of a protected class, his claim fails on its face.

Conversion of Application Fees

Burnell also alleged that Thurston County converted his application fees. In response to Thurston County's motion for summary judgment, Burnell provided no supporting evidence for his allegation that conversion of his application fees occurred. Accordingly, Burnell's conversion claim fails.

To establish a conversion claim, Burnell needed to show that Thurston County withheld or deprived him of his application fees without lawful justification. *See Paris Am. Corp v. McCausland*, 52 Wn. App. 434, 443, 759 P.2d 1210 (1988).

Here, Kain's uncontroverted declaration established that Thurston County exhausted Burnell's application fees in processing his land use applications. Robert Smith's letter to Burnell further affirms that Thurston County employees exhausted Burnell's application fees in the course of reviewing Burnell's incomplete permit applications. Because Burnell did not challenge this

information, Burnell's conversion claim lacks merit. The County exhausted Burnell's application fees in a lawful manner and, accordingly, his claim fails.

42 U.S.C. § 1983: Takings Claim

Burnell also alleged in his complaint that a taking of his property occurred contrary to 42 U.S.C. § 1983. But Burnell fails, as a matter of law, to establish a § 1983 takings claim.

As the Washington Supreme Court explained in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329-30, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1991),

> In this state, a land use regulation which too drastically curtails owners' use of their property can cause a constitutional "taking" or can constitute a denial of substantive due process. These two constitutional theories are *alternatives* in cases where overly severe land use regulations are alleged. It is critical that these two grounds be separately considered and independently analyzed because the remedies for each of these types of constitutional violation are different.
>
> To determine which of these two constitutional tests to utilize, *the threshold inquiry* a court must make is whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area. A regulation which does that is to be contrasted with one that goes beyond preventing a public *harm* and actually enhances a publicly owned right in property. Secondly, the court should ask whether the regulation destroys one or more of the fundamental attributes of ownership—the right to possess, to exclude others and to dispose of property. *If a regulation does not infringe upon a fundamental attribute of ownership, and if it protects the public from one of the foregoing listed harms, then no constitutional "taking" requiring just compensation exists*.

(Fourth emphasis added; footnotes omitted.)

Here, our decision in *Thurston County v. Burnell*, noted at 155 Wn. App. 1013, 2010 WL 1223096, at *1, confirmed that Burnell's use of his property as a salvage yard was a public nuisance contrary to the health and safety of the public. Accordingly, we only determine whether Thurston County's zoning regulation destroyed one of Burnell's fundamental attributes of ownership in his property. Burnell and Thurston County both agree that the County rezoned

Burnell's property in 2001. But the zoning change "still allows Burnell to develop his property for residential use . . . by placing one primary dwelling and one accessory dwelling on each of" his parcels. CP at 73. Thus, the regulations do not deprive Burnell of the right to possess, exclude others from, or dispose of his property and, accordingly, no constitutional taking occurred when the County changed the zoning of the property and summary judgment was appropriate.

Burnell's Remaining 42 U.S.C. § 1983 claims

Last, Burnell claims that his civil rights were violated contrary to 42 U.S.C. § 1983 because the County treated him in an arbitrary, capricious, and disparate manner and refused to process his permit applications in retaliation for "not renouncing his rights to a non-conforming use and [his] refusing to follow unlawful demands" to bring his property up to code. CP at 166. Because the Thurston County Sanitation Code allows County officials to suspend permit-related operations whenever a landowner has created a public health hazard, Burnell's claim lacks merit and the trial court properly awarded summary judgment to Thurston County on this issue.

Here, Patrick's declaration asserts that on January 27, 2000, and on July 26, 2001, "County staff related that the county would not process an application . . . unless Mr. Burnell resolved what staff deemed violations on the property to their satisfaction." CP at 175. Burnell argues that this constitutes "evidence from a disinterested third party establishing a genuine issue of material fact." Br. of Appellant at 17. This contention, however, fails to recognize that Thurston County was within its rights in refusing Burnell's application.

Former Thurston County Sanitary Code, section 22.1.3 (effective Apr. 3, 1996)[4] provided,

> Whenever the health officer finds that a violation of this Article has created or is creating an unsanitary, dangerous or other condition which constitutes an immediate hazard or threat to public health or the environment, the health officer may suspend all permit related operations immediately.

Thurston County issued Burnell a civil infraction on January 13, 2000, for "prohibited storage of inoperable or unlicensed motor vehicles" after Code Compliance Officer David Farr inspected Burnell's property.[5] CP at 82. Thus, both alleged refusals to process Burnell's permits came *after* the County had the statutory right to suspend permit-related operations for Burnell's property. Having no obligation to consider Burnell's permits, Thurston County did not violate Burnell's rights. Accordingly, we hold that summary judgment was appropriate as a matter of law on this issue.

[4] The current version of the Sanitary Code (effective Aug. 2, 2004) has a nearly identical version of this provision at article V, section 28.1.3. Although neither party to this dispute seems to have been aware of the applicable portions of the Sanitary Code, our Supreme Court has asserted, "Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it." *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

[5] The County issued the citation after notifying Burnell three times, including twice by certified mail, that he was in violation of the junk vehicle provisions of the Thurston County Code. Those provisions maintain that outside storage of vehicles "shall be maintained in an orderly manner and shall create no fire, safety, health or sanitary hazard." TCC § 20.34.020(9a). Burnell unsuccessfully challenged this infraction in court.

Because Burnell has failed to present any genuine issues of material fact, we affirm the trial court's ruling that Thurston County was entitled to summary judgment on all claims as a matter of law. CR 56(c).

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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

WORSWICK, A.C.J.