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No. 101241-1
(Court of Appeals No. 37747-4-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BROCK MASLONKA and DIANE MASLONKA, a marital
community,

Plaintiffs/Appellants/Cross-Respondents,

v.

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY,

Defendant/Respondent/Cross-Appellant.

**ANSWER TO THE AMICUS CURIAE BRIEFS FILED
BY THE WASHINGTON DEPARTMENT OF
TRANSPORTATION AND THE WASHINGTON PUBLIC
UTILITY DISTRICTS ASSOCIATION**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. IDENTITY OF RESPONDENT.....	1
II. INTRODUCTION	1
III. ARGUMENT	4
A. The Court of Appeals Decision Does Not Conflict With Prior Opinions.	4
B. Public Policy and Public Interest Favors Protecting Private Property Owners From a Governmental Taking Without Payment of Just Compensation.	8
IV. CONCLUSION.....	10

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Crystal Lotus Enterprises Ltd. v. City of Shoreline,</u> 167 Wn. App. 501 (2012).....	6
<u>Ex parte Simpson,</u> 36 So.3d 15, 22–25 (Ala. 2009)	2, 3, 7
<u>Hoover v. Pierce County.,</u> 79 Wn. App. 427, 435 (1995).....	6, 8
<u>Maslonka v. Pub. Util Dist. No. 1 of Pend Oreille Cnty.,</u> 23 Wn. App. 2d 1 (2022).....	5
<u>Wolfe v. State Dep't of Transp.,</u> 173 Wn. App. 302, 307 (2013).....	6

I. IDENTITY OF RESPONDENT

Brock and Diane Maslonka, (“Maslonkas”), Appellant/Cross-Respondents below, offer this Answer to the Amicus Curiae Briefs submitted by the Washington Department of Transportation (“WSDOT”) and the Washington Public Utility Districts Association (“WPUDA”).

II. INTRODUCTION

The briefs submitted by the Amicus parties add nothing new of substance or value to this case. Instead, the WPUDA and WSDOT simply rehash and attempt to bolster the same arguments and cite to the same or similar cases as the Public Utility District No.1 of Pend Oreille County (“PUD”).¹ As discussed below, these cited cases are inapplicable to the unique factual and evidentiary issues that were properly addressed in this case by the Court of Appeals.

¹ Notably, the PUD is one of the WPUDA’s fewer than thirty constituent members.

Moreover, careful scrutiny of the cases cited by the Amicus parties confirms that they failed to carefully review and analyze the facts, issues, and holdings of those cases. In one circumstance, the opinion was actually materially misrepresented to this Court. Indeed, the WPUDA misrepresents that Ex parte Simpson, 36 So.3d 15, 22–25 (Ala. 2009) stands for the proposition that “*plaintiff ‘has no standing to bring this cause of action for actions which occurred prior to the conveyance’.*” WPUDA’s Amicus Brief, pg. 4. In reality, the Alabama Supreme Court was quoting from, **not** adopting, the briefing submitted by the Defendant Town of Gurley. Indeed, the quoted portion of the opinion states in totality:

*The Town correctly notes that the general warranty deed by which M & N conveyed the property to Vulcan Lands contained “no reservation of any rights to the alleged condemned property.” Town’s petition, at 13 (case no. 1081027). **The Town then argues:** “As there were no reservations in the deed ..., all of M & N’s rights to the property were conveyed and ... lost.... Therefore, it is clear that M & N has no standing to bring this cause of action for actions which*

*occurred prior to the conveyance....” Town’s petition, at 13 (case no. 1081027). **We disagree.***

Ex parte Simpson at 23 (emphasis added). The WPUDA completely ignored and failed to disclose to this Court that the Alabama Supreme Court expressly **rejected** the legal assertion argued by the Town of Gurley and now by the WPUDA.

It is clear that the Amicus parties are unfamiliar with the facts of this case and are ill prepared to address the issues properly decided by the Court of Appeals. Moreover, the Amicus parties’ briefing confirms that the Court of Appeals decision did not create any conflict in the law and does not warrant further review by this Court. Thus, the PUD’s Petition for Discretionary Review should be denied.

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III. ARGUMENT

A. The Court of Appeals Decision Does Not Conflict With Prior Opinions.

The Amicus parties' arguments misapprehend the nuanced facts and posture of the Maslonkas' claims against the PUD. Consequently, they each similarly ignore the relevant issue that was properly decided by the Court of Appeals.

It is self-evident that that in order for the “subsequent purchaser” rule to apply in an inverse condemnation proceeding—there must first have been a governmental taking that occurred **prior** to the plaintiff property owner's acquisition of the property. It would be an absurd result for the Maslonkas' to bear the burden of proving a “new” governmental taking **before** the PUD had bothered to establish that there had ever been an “original” taking. It is in this scenario, the Court of Appeals properly held that the PUD bears the burden of establishing the actual existence of an initial governmental taking affecting the Maslonkas' property **prior** to the

Maslonkas acquiring their property.² Maslonka v. Pub. Util Dist. No. 1 of Pend Oreille Cnty., 23 Wn. App. 2d 1 (2022).

The trial court made no such finding. Indeed, the trial court found “*the continuous use, continuous (inaudible) occurred no later than 1999, and has been ongoing.*” (RP 129)(emphasis added). Consequently, the trial court concluded that the PUD’s taking began no later than 1999—six years **after** the Maslonkas purchased the property in 1993. (CP 461-464 at 15:25-18:2; RP 60). Moreover, the Court of Appeals confirmed that the record on appeal was insufficient to establish as a

² Notably, the PUD’s and the Amicus parties’ theory that the “subsequent purchaser rule” is a question of standing rather than an affirmative defense was **never** raised nor argued by the PUD before the Court of Appeals in either the PUD’s initial briefing or in the PUD’s subsequent Motion for Reconsideration.

matter of law that the PUD had in fact taken the Maslonkas' property **prior** to the Maslonkas acquiring the property in 1993.

The Amicus parties completely ignore these fundamental shortcomings while self-servingly attempting to craft a “sky is falling” narrative regarding the Court of Appeals’ decision. Indeed, the Amicus parties rely primarily upon Wolfe v. State Dep't of Transp., 173 Wn. App. 302, 307 (2013), Hoover v. Pierce County., 79 Wn. App. 427, 435 (1995), and Crystal Lotus Enterprises Ltd. v. City of Shoreline, 167 Wn. App. 501 (2012). However, each of these cases is inapposite to the issues addressed by the Court of Appeals in this case. None of these cases identify or even suggest that the question of whether or not an initial governmental taking had occurred prior to the plaintiffs acquiring the subject property was in dispute. Indeed, a review of each case suggests that all parties agreed upon 1) what governmental conduct constituted the initial taking, 2) when the governmental action constituting the initial taking transpired, and 3) the extent of the initial governmental taking.

All three of these issues are in dispute in this case and material questions of fact exist as to each.

The WPUDA also cites a number of out of state cases which are equally unavailing. Indeed, none of these cases stand for the proposition that the PUD is relieved of the burden of establishing that a governmental taking occurred **prior** to the Maslonkas purchasing their property in order for the PUD to rely upon the “subsequent purchaser” rule. Moreover, as discussed above, the WPUDA materially misrepresented the Alabama Supreme Court’s holding in Ex parte Simpson.

The Court of Appeals decision in this case does not conflict with established Washington law. Had there been no material questions of fact regarding if, when, and to what extent the PUD had effectuated a governmental taking **before** the Maslonkas acquired the property, then the Maslonkas certainly would bear the burden of asserting and establishing “*a new taking cause of action*” arising from “*additional governmental*

action”.³ See Hoover at 427. However, the Court of Appeals correctly found the evidentiary record insufficient to determine as a matter of law if, when, and to what extent the PUD had effectuated a governmental taking on the property prior to the Maslonkas’ purchase.

B. Public Policy and Public Interest Favors Protecting Private Property Owners From a Governmental Taking Without Payment of Just Compensation.

No person...shall be deprived of...property, without due process of law; nor shall private property be taken for public use, without just compensation.—Fifth Amendment of the United States Constitution (1791) (emphasis added).

There is no doubt that the rights of individuals to be free from the tyrannical seizing of one’s property by the government without just compensation being paid for such loss is one of the most sacrosanct protections guaranteed by the United States

³ The Maslonkas have, in fact, also asserted and provided substantial evidence of the PUD’s additional action and historical changed use occurring **after** the Maslonkas purchased the property.

Constitution. Indeed, on December 2, 1829, addressing the Virginia Convention, James Madison stated:

It is sufficiently obvious, that Persons and Property, are the two great subjects on which Governments are to act: and that the rights of persons, and the rights of property are the objects for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.

The Amicus parties passionately plead the purported “struggle” and “administrative burden” in bearing the evidentiary burden that will be placed upon other governmental entities by the Court of Appeals opinion in this case. As previously discussed, such impassioned entreaties are little more than a “sky is falling” argument unsupported by the actual facts, issues, and holdings involved in this case. Nevertheless, any such difficulty, whether actual or perceived, placed upon governmental entities is decidedly outweighed by the rights of private landowners to ensure that they receive just compensation for property taken by the government for public

use. In the words of Thomas Jefferson, “*Government exists for the interests of the governed, not for the governors.*”

The Court of Appeals correctly applied the “subsequent purchaser” rule in this case and there is no need for this Court to grant further review on the matter.

IV. CONCLUSION

The Amicus parties have not provided the Court with anything of new or unique substance that was not previously raised and argued by the PUD in its Petition for Review, and which the Maslonkas rebutted in their Answer to the PUD’s Petition.

Based upon all of the above, as well as, the arguments and authorities discussed in the Maslonkas’ Answer to the PUD’s Petition for Review, Brock and Diane Maslonka respectfully request that the PUD’s Petition for Review be denied.

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Certification Under RAP 18.17

I certify that this brief contains 1562 words in compliance with RAP 18.17(c)(8).

RESPECTFULLY SUBMITTED this 18th day of November, 2022.

DUNN & BLACK, P.S.

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CERTIFICATE OF SERVICE

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