ORIGINAL

NO. 42917-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES BYRON HOLCOMB, individually
And as Personal Representative
Of the Estate of Karen R. Holcomb (1)

Appellants,

-vs-

ASSIGNED JUDGE FOR THE KITSAP COUNTY DISTRICT COURT IN NO. 1002203333; et. al.

Respondents.

J. Byron Holcomb, Pro Se
P. O. Box 10069
Bainbridge Island, WA 98110
Tel: (206) 842-8429
Fax: Same

(1) Karen Holcomb died January 18, 2011, and was alive during most of the events described herein.

TABLE OF CONTENTS

Page

Table of Contents..... i

Introduction..... 1

Assignment of Error..... 2

Statement of the Case..... 3

Argument..... 10

U. S. Constitution:
5th Amendment..... 14
14th Amendment.....11, 12, 14, 16, 18

Statutes Cited:
124 Stat. 119..... 10
R.C.W. 7.16..... 11
R.C.W. 70.05..... 12
R.C.W. 70.118..... 12
R.C.W. 70.118A..... 12

Cases cited:
Allied Structural Steel Co. v. Spannus,
438 U.S. 234 (1978)..... 13
Armstrong v. U.S., 346 U.S. 40 (1960)..... 13
Calder v. Bell, 3 U.S. 388 (1800)..... 12
E. Enterprise, 524 U.S. 522 (_____)..... 14
Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625
67 L.Ed. 1042 (1923)..... 12
Nat'l. Fed. Of Business v. Sebelius,
567 U. S. _____ (2012) 10, 12
648 F.3d 1235 (11th Cir 2011)..... 10

Trustees of Dartmouth College,
17 U.S. 518 (1819)..... 13
Van Horne's Lessee, 2 U.S. 310 (____)..... 13

Other Authority:
3 *Joseph Story, Commentaries on the*
Constitution of the United States..... 12, 13

Conclusion..... 18

INTRODUCTION

This is an appeal from an erroneous, if not wholly misunderstood, ruling on a Petition for Mandamus and Prohibition by the Superior Court of Kitsap County, Haberly, J., "denying" the Petition without deciding Count III, which was the core issue in the Petition, even denying it after a Motion for Reconsideration was specifically directed to the issue. Count III petitioned for both Prohibition and Mandamus to the lower court, acting Infraction jurisdiction, on the Constitutionality of an alleged administrative regulation of the Kitsap Health District forcing a property owner to contract for an "inspection" of an on-site septic system from a list of "approved" inspectors by said District for a fee.

This Court must be advised that the Director of the Health District was named and served as a party and is subject ex officio to Count III as the administrator of the regulation at issue. The Court below obviously did not consider this. Moreover, this Court has its own jurisdiction over these Writs.

ERRATA
ASSIGNMENTS OF ERROR

1. The Court below erred in remanding the case to the Infraction Court without deciding the Constitutionality of administrative regulations of the Kitsap County Health District properly raised in Count III of the Petition for a Writ of Prohibition and Mandamus directed to the Director when named as a party separately from the Infraction Court.

2. This Court possess jurisdiction independent of the Court below to entertain said Writs and decide the Constitutionality of said administrative regulations.

ISSUE:

Whether the administrative regulations of the Kitsap County Health District adopted pursuant to State law are unconstitutional under the liberty, property, and due process clauses of the Fourteenth Amendment when forcing a property owner having a septic tank system to contract to have an "inspection" of that system with a private "inspector"?

STATEMENT OF THE CASE

Appellants ("Holcomb") own a house and property on waterfront on Bainbridge Island, Washington. CP 18 Since the early 1980's to 2001, Holcomb and the Respondent ("Health District") have been engaged in a dispute over whether the septic tank system on said property needs to be "repaired". The system was a simple septic tank with an associated drain field. There had been no failure of the system, no complaints, no evidence of smell, no evidence of leakage, and it worked properly. Notwithstanding, the Health District remained persistent. The first series of visits from the Health District occurred while a divorce was in process with Holcomb's first wife threatening "repair", and the second series began in 1995 immediately after his second marriage to Karen. The Director of the Health District at both times was a close friend of Holcomb's first wife. Despite repeated threats, no alleged "repair" was ordered. There were still no problems evident from his system. CP 1-17.

On or about 1999, the Health District began a further series of persistent actions to have his system "repaired", culminating in litigation in Superior Court of Kitsap County before visiting Judge Majhan from Jefferson County. Despite the testimony of 3 qualified experts for Holcomb testifying that his system did not have to be repaired, Judge Majhan ordered "repair". CP 166-167, Ex. C (2) In order to remain in his house and over strenuous objection, Holcomb then had an "alternative" system installed, called a "Glendon Biofilter" system at a cost of some $26,000 in 2001 dollars. CP-18

(2) Holcomb received a visit during this time from an alleged "finance" expert that he was there to buy Holcomb's property for 10¢ on the dollar, and said expert set forth an elaborate and very sophisticated scam of property owners, who were retired or about to retire, in Kitsap County using insider information from employees of the Health District. Holcomb provided authorities with a significant amount of circumstantial and other evidence that this scam existed, including some from a former Sheriff's deputy hired by him to investigate. An estimated million dollars was required to prosecute the scam. Nothing was ever done, even though some two years later certain employees of the Health District were convicted of crimes in relation to releasing insider information on matters on a different claim. CP 11-23

Nothing in that Order, or subsequently, contained a provision to obtain an "Operation and Maintenance" ("O&M" herein) agreement, at issue in this appeal. However, the Glendon installer forced Holcomb to sign such an agreement, although Holcomb never paid the sum set forth in the contract nor was an "inspection" ever done. CP 15-18

This O&M agreement is required annually. CP 112-144 For some 10 years thereafter and from time-to-time, the Health District sent Holcomb notice that he had to obtain such an agreement, and each time Holcomb objected.. Nothing was ever done, and nothing of the kind has been done to this date.

However, in January, 2011, the Health District sent a letter to Holcomb that he had to obtain such an agreement. (There was no record of this provided by the Director in the Court below, but this is not contested) Holcomb refused. On or about June, 2011, an "infraction" notice was served on him, calling on him to pay a fine of $624.00.

When it became apparent that the Infraction court did not have the necessary procedural, jurisdictional, and Constitutional authority, Holcomb filed the within Petition for the Writs in the Superior Court. Holcomb included Ex's. A-Q in support of his Petition. CP 1-86

The Commissioner of this Court, who must have also been confused as to what was at issue in terms of Constitutional relief not available in the Infraction court or available in this Court, refused to stay this action pending this appeal. Accordingly, a hearing was held on June 27, 2012, at which time Holcomb presented 8 different defenses running from statute of limitations to government misconduct, but not including the Constitutional issue in this appeal, since the Court indicated that it had no jurisdiction for this issue. The Court has not yet issued its decision.

It is plain from CP 24 that the Health District does not need the O&M contract with an "inspector", since it already has the capability and manpower to do it on its own. It is also plain

that the Infraction court, either by statute or practice, does not have equity jurisdiction nor declaratory jurisdiction as to Constitutional claims. The Health District has not contested the unconstitutionality of this O&M requirement this nor presented any authority below to contest it, either in the Infraction court or the Court below. The regulations at issue, but more properly some of the regulations at issue, are attached to the Answer of the Respondent. CP 112-144. However, what is missing is the actual process of "inspecting" a system as contained in, what is called, the "Field Manual". The Court below over objection did not rule on this. This Field Manual sets forth what is meant by that word "inspection", as well as who can be approved "inspectors", and the price regulation of the amount to be paid to them as $300.00.

What is equally objectionable is Ex. "K" (CP 33) to the Petition herein, which is the alleged "operation and maintenance" contract at issue in 2001. Page 2, and any subsequent pages, are not included. In any case, Holcomb

signed that contract then over protest in that this was not required by the Court Order. As indicated above, the fee additionally was never paid nor was there any "inspection" of the system thereafter. There is no evidence that the Health District ever objected to that lack of payment or the lack of inspection, then or later, to date. The Health District does not have, apparently, a form contract for O & M contractors. They do provide a list of "approved" O&M contractors, but a property owner has to go to their alleged "website" (if they have a computer) to obtain that list. Holcomb never did that, as he objected to this whole O&M procedure ab initio.

Holcomb has never had an "inspection" since the Glendon system was installed. There has never been a failure

or complaint or need for such an O&M agreement. (3)

This matter is otherwise ripe for review factually on the Constitutional issue.

(3) In passing this Court should note that this Infraction jurisdiction does not provide the relief the Health District seeks in requiring Holcomb to have an O&M agreement. The relief, if awarded, is a fine only, which Holcomb can pay, if required, and still not have such an agreement. This absence of an appropriate provision to the issue was another reason Holcomb filed the within Petition in Superior Court, since it was this Superior Court which issued the "repair" Order in the first place in 2001 and was the Court which had jurisdiction to Order Holcomb to obtain such an agreement. Why the Court below ignored this is inexplicable. The Health District has never filed this matter in Superior Court for reasons, or the lack of them, that are equally inexplicable, as well as its proceeding under Infraction jurisdiction. Mr. Wachter, Respondent's attorney herein, indicated to the Infraction Court on June 27, that the "Health District is not out to get Holcomb." Holcomb invites Mr. Wachter to repeat this assertion to this Court. But by proceeding the way it has, the Health District is clearly trying to do so.

ARGUMENT

The core argument in this Appeal is that the forced requirement for a property owner to have O&M agreement is unconstitutional and within the jurisdiction for both Writs in Superior Courts and for this Court also. (4).

The wording of the last Order of the Court below on Reconsideration was specifically directed to the

(4) Holcomb moved for and the Court herein granted a rather long extension for the purpose of reviewing the U. S. Supreme Court decision in *National Federation of Business v. Sibelius,* 567 U. S. _____ (2012) ("NFB"). The Court decided this on Thursday, June 27, 2012. The Affordable Health Care Act ("ACA") 124 Stat. 119 was at issue. The Florida District Court struck down the individual mandate provision of that act, and one of the reasons was forcing a citizen to contract, in that case for health care coverage. This same briefing occurred on appeal before the 11th Circuit, and that Court affirmed the lower court @ 648 F. 3d 1235 (2011). Much of the authority cited below is from the briefing before the 11th Circuit and, to Holcomb's belief and informal information, this briefing was also filed with the Supreme Court. Indeed, the Supreme Court decision was on certiorari from that Court. Holcomb anticipated that the Supreme Court would rely on that decision and the briefing in reaching its decision.

Holcomb has reviewed several times all 193 pages of the decision and, unfortunately and inexplicably, finds no reference at all to the forcing of a contract, as aforesaid. How such a major issue can be ignored by both the majority and dissent is highly puzzling, but such is the case. Thus, and with thanks to this Court in the process for this extension, no reference will be made any further to *NFB, id.,* in this Argument as to this case.

Constitutionality of the O&M regulation at issue deserves special quoting for this Court's information:

> "The Motion for Reconsideration focuses on Petitioner's argument that this Court should determine the constitutionality of the Health District regulation. A claim is made that the District Court (sic) does not have jurisdiction to determine the constitutionality of a regulation, and this issue has "great public impact" as it affects "thousands of property owners. Whether or not these arguments have merit, the Petitioner has not invoked the jurisdiction of this Court to decide such issues....The action filed by the Petitioner is simply a request for issuance of the three Writs described above and nothing more and gives no jurisdiction to this Court beyond that requested."

With respect to the Court below, this is, at best, baffling and a confused Order. It is plainly in error. R.C.W. 7.16 authorizes these Writs, both there and in this Court.

The O&M contract requirement is a violation of the Fourteenth Amendment to the U. S. Constitution, wherein it states, in part: "no state...shall deprive any person of life, liberty or property without due process of law."

The seminal case prohibiting States from forcing a citizen to contract comes within the concept of liberty, which

term includes "the right of the individual to contract..." *Meyer v. State of Nebraska,* 262 U.S. 390, @ 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). A Nebraska statute forced a teacher under contract to use only the English language.

The Health District derives its existence and authority from State of Washington statute, Chapters 70.05, 70.118, and 70.118A. The Fourteenth Amendment, perforce, applies to the Health District. (5)

Other authority applies. In *Calder v. Bull,* 3 U.S. 388 (1800), the Court warned against presuming that "the people [have] entrusted[ed] a legislature" with the power to "take property from A. and give it to B." (p. 390) .

Moreover, in 3 *Joseph Story, Commentaries on the Constitution of the United States,* the writer stated in § 1393, p. 268 (1833), with reference to *Calder, id.,* that even "independently of the Constitution of the United States," such

(5) The Attorney General of the State of Washington, Mr. McKenna, appeared in and concurred in the briefs filed on behalf of the *NFB, id.,* in opposing forced contracts

laws contravene "the nature of republican and free governments."

As further support on the issue of who should be responsible for payment of the O&M cost, the burden should not be on the individual and ought to be sustained by society at large. See, *Van Horne's Lessee,* 2 U.S. @ p. 310 and *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Also, neither the Congress nor a State legislature should be presumed to have the power to force a new contract on a citizen "without his assent, for the assent of all parties to be bound by a contract be of its essence." Cf. *Trustees of Dartmouth College,* 17 U. S. 518, pp. 662-663 (1819). *3 Story, id.,* adds this observation, "..creating a contract is within the mischief, and equally unjust and ruinous, as unconstitutionality impairing or destroying one." @ § 1392.

More recent authority supports the above contract as coming within the meaning of due process. In *Allied Structural Steel Co. v. Spannus,* 438 U.S. 234 (1978), a contract was

invalidated in a pension fund matter for basically the same due process reasons above. The Fourteenth Amendment's companion is the Fifth Amendment, and the latter also contains a "takings" clause as well as a "due process" clause. The said "due process" clause of the latter, parroting the same language in the Fourteenth Amendment, has interpreted contracts under this latter clause as prohibiting forced contracts. The majority in *E. Enterprises,* 524 U.S. @ 522-523 decided a contract issue under the "takings" clause, but Justice Kennedy in concurring reached the same conclusion under the "due process" clause. Holcomb relies on this decision in support of his arguments under the Fourteenth Amendment.

It is unassailable that the O&M contract provision is a forced contract. It is also unassailable that:

1. The Health District has the manpower, training, and capability to have one of its own personnel do this "inspection";

2. There is no negotiation, better said as contracting, between a property owner and an "inspector" over the price or even terms, as these are set by the Health District;
3. There is no provision for a property owner to obtain this service from a person of his choice, e.g., one who lives and works in a neighboring county (how many property owners in Kitsap County live in close proximity to a neighboring county?), or from a retired "inspector" who possess the alleged qualifications, or a relative somewhere who possess the same;
4. Requires it even when there is no failure of the system;
5. Not the least of the objections is that there is an inherent self interest for the "inspector" to find some problem, thereby requiring him to "repair" it, with the property owner having no recourse, no one knows the extent of this unnecessary repair, since the Health District takes it

for granted that the "inspector" is correct and there is no provision for review; and,

6. such a system is a prime process for corruption and bribery for an "inspector" to get on the list, or even give kickbacks (see footnote (2) above and attachment C & D (newspaper articles related to insider abuse) to Ex (g) to the Petition here). (6)

Asking this Court to decide whether this "fee" is a special "tax" not legislated or approved is not necessary for the above due process reasons. Moreover, the issue was never argued below.

Under the above authorities and Fourteenth Amendment due process, a State government agency is prohibited from forcing a

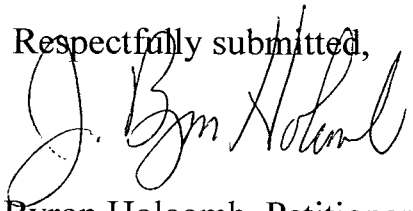
(6) The record shows that there are approximately 4,000 property owners in Kitsap County affected by this forced contract requirement. Calculating this number times $300 means that approximately $1,200,000 is extracted annually from property owners, much of said sum being wholly unnecessary without evidence of any "failure". Holcomb has had no failure.

citizens to contract for a service, especially when that service is part of the agency's capabilities to provide.

CONCLUSION

This Court should find that the Writs of Prohibition and Mandamus should be granted and order that these forced contract O&M provisions of the Health District are unconstitutional as a depriving a citizen of the liberty and property provisions protections, incorporating due process, of the Fourteenth Amendment. This Court should grant the Petition for Prohibition and Mandamus under its own authority or remand the case to the Superior Court ordering that Court to grant the same, accordingly, declare that the O&M contract regulations of the Health District are unconstitutional, and to direct dismissal of the Infraction notice.

Respectfully submitted,



J. Byron Holcomb, Petitioner

CERTIFICATE OF SERVICE:

On this 5th day of July, 2012, I mailed two copies of the above Errata by U. S. Mail, first-class postage prepaid, to the Clerk of the Court addressed to:

Clerk of the Washington State Court of Appeals
Division Two
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

With a copy of the same addressed to:

Lisa J. Nickel
Kitsap Prosecuting Atty's Office
MS-35A
614 Division St.
Port Orchard, WA 98366-46

J. Byron Holcomb, Appellant