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THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 34606-4-III

Spokane Superior Court No. 15-2-00545-1

In re:

ALLAN AND GINA MARGITAN,

Plaintiffs/Petitioners,

vs.

SPOKANE REGIONAL HEALTH DISTRICT, et al,

Defendants/Respondents.

AMENDED PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS

The Petitioners are Allan and Gina Margitan.

II. DECISION BELOW

Petitioners seek review of the *Opinion* entered July 24, 2018 (attached as *Appendix 1)*, and the *Order Denying Motion to Publish and Amending Opinion* entered September 13, 2018 (attached as *Appendix 2).*

III. ISSUES FOR REVIEW

A. Whether the Opinion is in conflict with the decisions of this Court pursuant to RAP 13.4(b)(1) governing an unconstitutional takings analysis.

B. Whether the Opinion is in conflict with the decisions of this Court pursuant to RAP 13.4(b)(1) governing tort liability and the public duty doctrine.

C. Whether the Opinion is in conflict with the decisions of this Court pursuant to RAP 13.4(b)(1) governing the analysis of a claim for interference with a business expectancy.

D. Whether Division III erred under RAP 12.3 when it denied the Margitans' motion to publish the Opinion, which fundamentally alters Washington law.

IV. STATEMENT OF THE CASE

On March 19, 2002, *Short Plat 1227-00* was approved by Spokane County. (CP 13.) It contained three parcels, Parcels 1, 2, and 3. *Id.* A forty-foot easement for ingress, egress, and utilities for the three parcels was designated on the map. *Id.* Spokane Regional Health District ("SRHD") required the

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parcels to be serviced with public water through the utility easement. (CP 13, 1201-1202.)

The Hannas purchased Parcel 2, and, in 2002, as part of construction on their home, the Hannas applied for a permit to install an on-site septic system, which SRHD approved in 2003. (CP 27-28, 65.) During construction, the Hannas knowingly instructed their contractor to install the septic system in the forty-foot easement serving Parcel 3. (CP 65, 1090.)

On February 1, 2010, the Margitans purchased Parcel 3. (CP 990.) An old house existed on Parcel 3 which the Margitans intended to remodel into a high-end rental property. (CP 1043.)

In October of 2012, the Hannas filed suit against the Margitans and sought to reduce the easement from forty feet to twenty feet. (CP 1175.) During discovery, the Hannas produced a diagram titled "As Built," which indicated where the septic system was constructed. (CP 25.) That diagram incorrectly designated the forty-foot easement as being twenty feet and confirmed the septic system's location within the easement. (CP 25, 65.)

Upon learning that the septic drainfield was located within his utilities easement, Mr. Margitan had concerns about water safety and contacted SRHD and Spokane Building and Planning. (CP 437-440, 1178-1181.)

WAC 246-272A requires an on-site septic system to be a minimum of five (5) feet from any easement. (CP 67.)

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In May of 2013, Mr. Margitan obtained a copy of the "As Built" septic system diagram; he dropped it off with a package of documents at SRHD for the supervisor of the septic system department, Steve Holderby on July 8, 2013. (CP 436-37.) Mr. Holderby called Mr. Margitan the same day to discuss the documents. (CP 437.) Mr. Margitan inquired as to whether his complaint would be kept confidential, and Mr. Holderby assured him it would. (CP 437.) Mr. Margitan asked Mr. Holderby if he was the right person to talk to, explaining that he needed to get the easement encroachment issue cleared up quickly so he could get Spokane County Building and Planning to sign off on his permit. (CP 437.) Mr. Holderby confirmed that he was the department head and would get it done the fastest; he also admitted that since it was his department that had permitted the illegal septic system in the first place, it was his department that was responsible for getting it moved. (CP 437.) Mr. Holderby said he understood why Spokane County Building and Planning had concerns regarding the septic tank drainfield in the easement and he indicated he knew the building inspector and could make a call if needed. (CP 437.)

Mr. Margitan repeatedly asked when the septic drainfield would be moved, and Mr. Holderby indicated that he would need to investigate and confirm the width of the easement and allow the Hannas to comment. (CP 438.) Mr. Holderby indicated that if the septic system really was within the easement, he would see test holes for the Hannas' new system within a month. (CP 438.) He confirmed that the law allowed him to suspend the operation of a

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noncompliant septic system. (CP 438.) Mr. Holderby provided Mr. Margitan with his direct telephone number and assured him again that if the septic drainfield was really in the easement, he would have it removed within three to four weeks. (CP 438.)

Several days later on July 15, 2013, Mr. Margitan again spoke to Mr. Holderby who confirmed that the septic drainfield was in fact within the easement and indicated he had turned the matter over to the attorney general. (CP 438-439.) Mr. Holderby again reassured Mr. Margitan the drainfield would be removed within a few weeks. (CP 439.)

Mr. Holderby contacted Mr. Margitan on July 22, 2013, and asked whether the court had reduced the easement to 20 feet. (CP 439.) Mr. Margitan indicated it had not, and Mr. Holderby again reassured him that he would have the septic drainfield removed within a week or so. (CP 439.)

On July 25, 2013, Mr. Holderby called Mr. Margitan and indicated that he had not heard from the Hannas yet but assured him that he would get the septic system drainfield out of the easement. (CP 439.)

On August 7, 2013, Mr. Margitan faxed a copy of the judge's order to Mr. Holderby, confirming that the easement was forty feet. (CP 439.)

On August 8, 2013, Mr. Holderby called Mr. Margitan and confirmed the septic system would be removed shortly. (CP 439.) He apologized for not having it moved yet, saying that the legal system works slowly. (CP 439.) Mr. Margitan indicated he needed to close out his construction loans and get a

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mortgage, which he could not do until he obtained a Certificate of Occupancy. (CP 439.) Mr. Holderby then suggested that Mr. Margitan agree to reduce the easement to twenty feet. (CP 440.) Mr. Margitan then told Mr. Holderby that the Hannas had recently amended their complaint and were requesting the court to remove the home on Parcel 3 in apparent retaliation for his complaint to SRHD. (CP 440.) Mr. Holderby assured Mr. Margitan that he had and would keep the information confidential and would not release it unless ordered. (CP 440, 482-483.)

On November 29, 2013, in light of the lack of progress, Mr. Margitan requested SRHD shut down the illegal septic system or post a bond. (CP 440.) He also requested copies of documents in SRHD's possession regarding the septic system through a public disclosure request. (CP 440.)

On December 9, 2013, counsel for SRHD contacted Mr. Margitan and instructed him to channel all communication through her. (CP 441, 485.)

On December 10, 2013, Mr. Margitan requested an administrative hearing to address his request regarding the septic system and to exhaust his administrative remedies. (CP 441-442, 487.)

On December 14, 2013, Mr. Margitan received the documents he requested. (CP 441.) Mr. Margitan then discovered that on October 9, 2013, the SRHD and the Hannas had entered into a private agreement not to move the drainfield until after the Hannas' lawsuit against the Margitans was resolved. (CP 385-386, 441, 499-500.) SRHD never spoke with the Margitans

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or got permission to leave the septic system in their utilities easement. (CP 265, 785.) Mr. Margitan received a copy of an email confirming the agreement had been negotiated and approved by Mr. Holderby himself as of September 23, 2013. (CP 442, 502.)

Mr. Margitan also received confirmation that not only did the SRHD fail to keep his complaints confidential as promised, but SRHD's attorney emailed a copy of Mr. Margitan's second complaint directly to the Hannas' attorney with whom she shared a great deal of information. (CP 442.)

On January 27, 2014, SRHD responded to Mr. Margitan's request for a hearing with a letter decision, written by the head of the Spokane Regional Health District, Dr. Joel McCullough. (CP 61-62, 442.) The letter decision denied the Margitans' request to move the drainfield at that time, but it appeared to require the Hannas to locate the waterline in reference to their drainfield; however, discovery confirmed the letter was never sent to the Hannas, and Dr. McCullough later confirmed that the letter decision was entirely enforceable. (CP 61-62, 443, 522-523, 530-540.)

The Margitans appealed the letter decision to the Spokane County Health District Board of Health. (CP 64-68.) The board affirmed the letter decision as written. (CP 68.)

The Margitans appealed the order to Spokane County Superior Court. (CP 443.) The Hannas submitted a brief to the Spokane Superior Court on July 15, 2014, in which they admitted that their septic system was within ten feet of the

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Margitans' water line. (CP 443.) Mr. Margitan emailed a letter to SRHD's attorney informing her of the concession; she did not respond. (CP 443, 548.) She did, however, immediately email the Hanna's counsel and informed him that if that information were true, the SRHD would be required to do something. (CP 443, 550-559.) The SRHD's attorney then coordinated information with the Hannas' attorney and amended the concession in the brief. (CP 550-568.)

SRHD did not, at any point, engage in a site visit to investigate the Hannas' encroachment nor did it determine whether the reserve area was available to move the septic system. (CP 248, 261, 784.) The Hannas had a reserve area designated on the "As Built" diagram where the septic system could be moved if necessary. (CP 191.)

SRHD never researched easements that impacted the Hanna property nor did it make any effort to determine whether the Margitans' water supply was impacted by the septic drainfield. (CP 252, 323.) SRHD admitted that it was responsible to enforce compliance with the Washington Administrative Code governing septic systems and that the agreement was merely a way of easily resolving the complaint. (CP 176, 265, 798.)

On February 13, 2015, having exhausted their administrative remedies, the Margitans filed a complaint against SRHD in Spokane County Court, alleging negligent and intentional refusal to enforce WAC 242-272-0210. (CP 1-28.)

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On July 11, 2016, the Margitans filed an amended complaint and added claims, including intentional interference with a business expectancy and a claim for an unconstitutional taking. (CP 1501-1515.)

On March 17, 2016, the trial court dismissed the Margitans' claims of negligence and intentional failure to enforce against SRHD and denied their motions for reconsideration. (CP 599-609; 610-612.)

On August 1, 2016, the trial court dismissed the Margitans' remaining claims and denied their motions for reconsideration. (CP 1463-1472.)

The Margitans filed their *Notice of Appeal* on August 2, 2016.

The Court of Appeals filed the *Opinion* on July 24, 2018, and the *Order Denying Motion to Publish and Amending Opinion* entered on September 13, 2018. The Margitans seek discretionary review.

V. ARGUMENT

STANDARD OF REVIEW: Each ruling before this Court is the result of a summary judgment order; therefore, the standard of review is *de novo* for each. *Torgerson v. One Lincoln Tower, LLC,* 166 Wn.2d 510, 517, 210 P.3d 318 (2009). This Court is to consider all facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Atherton,* 115 Wn.2d at 516. "The moving party is held to a strict standard," because "[a]ny doubts as to the existence of a genuine issue of material fact is resolved against the moving party." *Atherton,* 115 Wn.2d at 516. Summary judgment is subject to a burden-shifting scheme. *Young v. Key Pharms., Inc.,*

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112 Wn.2d 216, 225, 770 P.2d 182 (1989). The initial burden to show the nonexistence of genuine issues of material fact is on the moving party. *Young*, 112 Wn.2d at 225. If the moving party satisfies its initial burden, the inquiry shifts to the nonmoving party to "present evidence that demonstrates that material facts are in dispute." *Atherton*, 115 Wn.2d at 516. "Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden" under summary judgment. *Rice v. Offshore Sys., Inc.* 167 Wn.App. 77, 89, 272 P.3d 865 (2012). A plaintiff "must meet his burden of production to create an issue of fact but is not required to resolve that issue on summary judgment." *Rice*, 167 Wn.App. at 89.

A. The Opinion conflicts with decisions of this Court that govern unconstitutional takings pursuant to RAP 13.4(b)(1).

Section 16 of Article 1 of the state constitution provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner." "This provision is so plain and mandatory that it seems impossible to construe it." *State v. Superior Court of King County*, 26 Wn. 278, 286, 66 P.3d 385 (1901). In 1901, this Court observed:

> There can be but one question, if any, and that is, what is meant by the word "property?" It is used in the constitution in a comprehensive and unlimited sense, and so it must be construed. It is not any particular kind of property that is mentioned, but the wording is, "no private property." It need not be any physical or tangible property which is subjected to a tangible invasion. The right to the use and possession of a lot abutting onto a public street is property. The right to light and air and access is equally property. These

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are rights that are a part of the consideration when the property is purchased."

Court of King County, 26 Wn. at 286. If property, then, consists not merely in tangible things, but in certain rights "in and appurtenant to" those things, "it follows that when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed..." *Court of King County*, 26 Wn. at 287.

"The constitution contains no requirement that the damage be permanent." and "[a]lthough there are some judicial pronouncements to the contrary, this court has generally held compensable damages for a temporary taking under the constitutional provision." *Miotke v. City of Spokane*, 101 Wn.2d 307, 347, 678 P.2d 803 (1984). "[E]ven if the Government physically invades only an easement in property, it must nonetheless pay compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

In this instance, the government actor, SRHD, expressly facilitated the continued interference with the Margitans' non-possessory property interest.

Because the Opinion does not explain its reasoning, it is difficult to provide a useful analysis of how Washington law was applied here.

(1) SRHD knew the septic drainfield encroached on the Margitans' easement when it entered into a private agreement with the Hannas.

The Opinion is internally inconsistent with respect to this fact on appeal. The Opinion states in its recitation of the facts that the Margitans filed a

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complaint with SRHD in July of 2013 alleging that the Hannas' drainfield was inside the utilities easement. (*Opinion*, pg. 3.) Then, in its analysis of the Margitans' claim for an unconstitutional taking, the Opinion indicates that "[w]hen SRHD entered into this agreement, it did not know that the Hannas' drain field encroached into the Margitans' easement." (*Order Denying Motion to Publish and Amending Opinion*, pg. 2.) These statements are in conflict and the latter statement does not comport with the record on appeal. It is undisputed that Mr. Margitan's complaint about the drainfield's encroachment on the utilities easement is the event that originally brought this matter to the attention of SRHD in the first place. It is undisputed that the Hannas' septic drainfield actually encroached on the utilities easement. It is similarly undisputed that the SRHD entered into the agreement with the Hannas subsequent to receiving Mr. Margitan's complaint. Therefore, this observation by the Opinion is both puzzling and inaccurate.

(2) SRHD's decision to enter into a private agreement with the Hannas does not advance the legitimate governmental interest of avoiding lawsuits.

Here, again, it is puzzling that the Opinion fails to acknowledge that while it may be wise not to breach agreements if one wishes to avoid a lawsuit, it is ill-advised in precisely the same way to enter into inappropriate agreements in the first place. This is particularly so when the agreement is entered into contrary to the stated purpose of the government agency and its governing directives with the apparent intention of benefitting one private party by

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interfering with the non-possessory property rights of another (the party who originally approached the SRHD seeking help in response to a concern about health and safety). The Opinion's analysis appears to adopt the reasoning of someone who seeks congratulations for fixing something that he himself broke.

The Opinion notes that the agreement between the Hannas and the SRHD may not qualify as a regulatory taking, but it then declines to address that issue, which is precisely the question brought before this Court.

(3) The economic impact on the Margitans is a question of fact for the jury.

The Opinion concludes there was no excessive economic impact on the Martigans, but the question of whether there was economic impact and whether it was excessive are disputed questions of fact, which are appropriately determined by a jury and not by the appellate court on appeal.[1]

(4) Actual interference with the Margitans' water is not required.

The Opinion provides no reasoning or citation to authority to support its conclusion that actual interference would be required in order to show interference with a nonpossessory property interest in an easement.

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[1] If a factual issue as to whether probable cause exists, the question must be submitted to the jury. *Bender v. City of Seattle*, 99 Wn.2d 582, 594, 664 P.2d 492 (1982); *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)(the question of proximate cause is generally a question for fact for the jury). The determination of damages "is primarily and peculiarly within the province of the jury, under proper instructions," therefore, "the courts should be and are reluctant to interfere with the conclusion of a jury, when fairly made." *Baxter v. Greyhound Corporation*, 65 Wn.2d 421, 438, 397 P.2d 857 (1964). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Herron v. King Broadcasting Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989).

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(5) It was not reasonable for the SRHD to facilitate the Hannas' ongoing encroachment on the Margitans' known easement for the purpose of avoiding the potential encroachment on some unknown third party's hypothetical easement.

First, the Opinion does not explain why the reasonableness of SRHD's decision would be a question of law for the court and not a question of fact for a jury. (The reasonable use of land is generally a question for the jury. Thompson v. Smith, 59 Wn.2d 397, 408, 367 P.2d 798 (1962).

Further, it is unclear why it concludes that SRHD would be reasonable to enter into a private agreement for the purpose of avoiding potential encroachment on a hypothetical, unknown third person's easement interest when SRHD had specific knowledge that entering into the agreement would facilitate the actual, ongoing encroachment of a known party's easement interest – the party whose complaint was the basis of the entire inquiry in the first place. The Opinion fails to connect its observations to any particular legal analysis as set forth in the decisions of this Court.

B. The Opinion is in conflict with decisions of this Court governing tort liability and the public duty doctrine. pursuant to RAP 13.4(b)(1).

With respect to the intentional tort pleaded by the Margitans, the public duty doctrine does not apply where intentionality can be demonstrated, as here; however, in the Margitans argued the public duty doctrine alternatively.

"Municipal corporations are liable for damages arising out of their tortious conduct or the tortious conduct of their employees to the same extent as if they were a private person or corporation." Munich v. Skagit Emergency

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Communications Center, 175 Wn.2d 871, 878, 288 P.3d 328 (2012). When the defendant in a negligence action is a governmental entity, the public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular and was not the breach of an obligation owed to the public in general; i.e., a duty owed to all is a duty owed to none." *Munich*, 175 Wn.2d at 878. In this case, the SRHD owed a duty to protect public health.

There are four exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Munich*, 175 Wn.2d at 879. The Margitans claim all but the rescue doctrine.

Legislative Intent: The Opinion states that because there is nothing in the enabling statute or regulations at issue in this case that explicitly safeguards people from the possibility of contaminated water, the Margitans do not qualify for the exception. (Opinion, pgs. 12-13.) This is puzzling, however, because as the Opinion itself recognizes, the purpose of the governing WAC regulations is to minimize the potential for exposure to sewage form on-site sewage systems and the adverse health effects that result from discharge getting into ground and surface water. WAC 246-272A-0001. Therefore, there *is* "something" in the enabling regulation at issue in this case that explicitly safeguards people from the possibility of contaminated water.

Failure to Enforce: A government's obligation to the general public becomes a legal duty owed to the plaintiff when (1) government agents who are responsible for enforcing statutory requirements actually know of a

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statutory violation; (2) the government agents have a statutory duty to take corrective action but fail to do so, and (3) the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). A duty of care exists with reference to those persons or class of persons residing within the ambit of danger involved. *Bailey*, 108 Wn.2d at 270; *Campbell*, 85 Wn.2d at 13.

The purpose of the governing WAC regulations is to minimize the potential for exposure to sewage form on-site sewage systems and the adverse health effects that result from discharge getting into ground and surface water. WAC 246-272A-0001. It follows, therefore, that the Margitans, as people residing within the ambit of danger (waterpipes running through sewage), SRHD had a duty to enforce the regulations for their benefit.

The Opinion argues that SRHD "enforced" the five-foot separation by requiring the Hannas to relocate their drain field immediately if it appeared to be a public health risk. But the regulations already determined that maintaining a septic drainfield within a utilities easement is a public health risk; further, SRHD admitted that it made absolutely no effort to inspect, monitor, or learn anything about the condition, so alleging such fail-safe rings utterly hollow.

SRHD simply agreed not to do its job because it was more convenient; it did so without any benefit to the public, and for the purely private benefit of the Hannas with known detriment to the Margitans.

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Special Relationship: A special relationship between a municipality's agents and a plaintiff exists and gives rise to an actionable duty if three elements are established: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public; (2) an express assurance given by the public official, and (3) justifiable reliance on the assurance by the plaintiff." *Munich*, 175 Wn.2d at 879. There is a clear distinction between assurances involving information and assurances promising action. *Munich*, 175 Wn.2d at 881. A definite assurance of future acts could be given without a specific time frame, with the government then failing to carry out those acts." *Munich*, 175 Wn.2d at 881. "[W]here the alleged express assurance involves a promise of action, the plaintiff is not required to show the assurance was false or inaccurate in order to satisfy the special relationship exception." *Munich*, 175 Wn.2d at 884. "Whether or not the assurances were ultimately truthful or accurate may be relevant, but only in relation to the issue of a breach, not to the establishment of a duty." *Munich*, 175 Wn.2d at 884.

Here, Mr. Margitan had numerous communications with Mr. Holderby and explicitly asked whether Mr. Holderby would require the removal of the septic system, when it would occur, and whether the request would be kept confidential. There was direct contact or privity between Mr. Holderby and the Mr. Margitan that set Mr. Margitan apart from the general public.

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Mr. Holderby repeatedly confirmed that he would unequivocally remove the septic system if it was located in the easement, that he would do so quickly, and that Mr. Margitan's request would be kept confidential.

Mr. Margitan justifiably relied on Mr. Holderby's assurances. Mr. Margitan waited to pursue any remedies in reliance on Mr. Holderby's assurances that the matter was being addressed (when in fact, he had made the exact opposite agreement with Mr. Hanna.) Mr. Margitan also relied on Mr. Holderby's assurances of confidentiality to his detriment as he became the victim of retaliatory legal action when confidentiality was broken.

The Opinion concludes: "However, the Margitans did not rely on this assurance," explaining that "[t]he record is undisputed that the Margitans purchased Parcel 3 and began remodeling the old house long before Mr. Holderby gave the Margitans any assurances." (*Opinion*, pg. 15.) It is unclear why that purchase of the house would be the only possible reliance here; regardless, the question of whether a party justifiably relied on the statement of another is an issue of fact reserved to the jury. *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 828, 959 P.2d 651 (1998).

C. *The Opinion is in conflict with decisions of this Court governing tortious interference with a business expectancy, pursuant to RAP 13.4(b)(1).*

This Court has identified five elements necessary to make a claim for tortious interference with a business expectancy:

(1) The existence of a valid contractual relationship or business expectancy;
(2) That defendants had knowledge of that relationship;

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(3) An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
(4) That defendants interfered for an improper purpose or used improper means; and
(5) Resultant damages.

In re Estate of Lowe, 191 Wn.App. 216, 237, 361 P.3d 789 (2015).

Here, for some reason, the Opinion focused solely on "improper means." (Opinion, pg. 17.). The Opinion relies on three observations: (1) that SRHD did not know about the potential issue with the water line, just the easement encroachment, (2) the agreement required the Hannas to immediately take corrective action if it appeared to SRHD that the drainfield posed a public health risk, and (3) there is no evidence that SRHD was motivated by considerations outside of its obligations or failed to act fairly and reasonably. (Opinion, pgs. 17-18.).

"[A] cause of action for tortious interference arises from either the defendant's pursuit of an improper objective of harming the plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." *Westmark Development Corp. v. Burien*, 140 Wn.App. 540, 558, 166 P.3d 813 (2007)(citing *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-804, 774 P.2d 1158 (1989)). "Interference can be 'wrongful' by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." *Pleas*, 112 Wn.2d at 804. "Therefore, plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a duty

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of non-interference; i.e., that he interfered for an improper purpose or used improper means." *Pleas*, 112 Wn.2d at 800.

Here, the Opinion focused solely on "improper means." (Opinion, pg. 17.). The Opinion relies on three observations: (1) that SRHD did not know about the potential issue with the water line, just the easement encroachment, (2) the agreement required the Hannas to immediately take corrective action if it appeared to SRHD that the drain field posted a public health risk, and (3) there is no evidence that SRHD was motivated by considerations outside of its obligations or failed to act fairly and reasonably. (Opinion pgs. 17-18.)

Observations (1) is inaccurate as discussed earlier in this brief, and (2) was previously addressed in the analysis related to the unconstitutional takings analysis above. With respect to the third observation: ill will, spite, defamation, fraud, force, or coercion, on the part of the interferor, are not essential ingredients, although such may be shown for such bearing as they may have upon the defense of privilege. *Pleas*, 112 Wn.2d at 800. The Opinion fails to connect its observations to any governing legal analysis as set forth in the decisions of this Court.

D. Division III erred pursuant to RAP 12.3 when it denied the Margitans' motion to publish the Opinion, which fundamentally alters Washington law.

Division III erred when it denied the Margitans' motion to publish the Opinion. The Opinion drastically modifies an established principle of law, the outcome of which is of general public interest and importance (particularly

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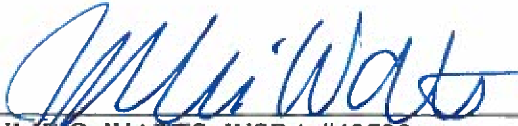
with respect to public confidence in government agencies); it is in conflict with numerous prior opinions of the Court of Appeals. Washington litigants are entitled to precedent upon which they can rely that accurately articulates the relevant law and indicates how cases are likely to be treated on appeal. The Margitans respectfully request that this Court modify the decision of the Court of Appeals to require publication of the Opinion.

IV. CONCLUSION

For the foregoing reasons, the Margitans respectfully request that this Court grant discretionary review.

RESPECTFULLY SUBMITTED this 31st day of OCTOBER, 2018,



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Appendix 1

FILED
JULY 24, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ALLAN MARGITAN and GINA MARGITAN, husband and wife, Appellants, v. SPOKANE REGIONAL HEALTH DISTRICT, a municipal corporation and SPOKANE REGIONAL HEALTH DISTRICT BOARD OF HEALTH, a municipal corporation, MARK HANNA and JENNIFER HANNA, husband and wife, Respondents.	No. 34606-4-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Allan and Gina Margitan appeal from the trial court's summary judgment order, which dismissed their claims against Spokane Regional Health District (SRHD). We affirm.

FACTS

Spokane County Short Plat 1227-00 consists of "Parcels" 1, 2, and 3. Parcel 1 is to the east of Parcel 2, and Parcel 2 is to the east of Parcel 3. The short plat map shows a 40 foot wide access and utility easement across Parcels 1 and 2 in favor of Parcel 3. A note on the map requires the applicant to secure public water for each of the three parcels.

In April 2002, the Margitans purchased Parcel 1. In May 2002, the Hannas purchased Parcel 2. One month earlier, Mr. Hanna mistakenly informed the contractor hired to build his house that the easement was 20 feet wide. On May 1, 2002, Mr. Hanna learned that the easement through Parcel 2 was 40 feet wide, not 20 feet wide. Mr. Hanna neglected to inform his contractor of this.

In June 2002, Larry Cook Excavating Inc. applied to SRHD for a permit to build an on-site sewage system on behalf of the Hannas. SRHD issued the permit in January 2003, and Cook Excavating built the septic system. In March 2003, Cook Excavating submitted an "as built" drawing of the septic system. Clerk's Papers (CP) at 82. The "as built" drawing erroneously depicts the easement as 20 feet, and shows an 11 foot separation between the depicted easement and the closest corner of the drain field. Had the actual 40 foot easement been depicted on the drawing, it would show that the closest corner of the drain field extends 9 feet into the easement.

In 2010, the Margitans purchased Parcel 3, including the existing home. The following year, the Margitans began to remodel the home so they could lease it out as a high-end rental.

In 2012, the Hannas filed a quiet title action in Spokane County Superior Court against the Margitans to reduce the 40 foot easement to a 20 foot easement. About one

year into that litigation, the Margitans learned that the Hannas' drain field was built 9 feet into their easement. The Margitans notified SRHD of this. The litigation was later amended to a quiet title action that sought to determine the rights of all Parcel 2 easement holders of record.

In July 2013, the Margitans filed a complaint with SRHD. The complaint alleged that the Hannas' drain field was within their 40 foot easement.

The Margitans told Steven Holderby, SRHD's Liquid Waste Program Manager, that they were remodeling the old house on Parcel 3 and they planned on leasing it for income. Mr. Holderby confirmed to the Margitans that if his investigation determined that the Hannas' drain field was in the easement, SRHD would have the drain field relocated promptly.

In October 2013, SRHD and the Hannas entered into an agreement concerning their on-site sewage system. The Margitans were not party to this agreement and neither SRHD nor the Hannas consulted the Margitans about the agreement. The agreement required the Hannas to promptly relocate their drain field after completion of their quiet title litigation. Notwithstanding that requirement, the agreement required the Hannas to immediately take corrective action if it appeared to SRHD that the drain field posed a public health risk.

In early December 2013, SRHD received a letter from the Margitans. In the letter, the Margitans expressed concern that the Hannas' drain field might contaminate their water. Soon after, the Margitans asked Dr. Joel McCullough, the health officer for SRHD, to make an expedited decision concerning the legality of the Hannas' drain field.

In his January 27, 2014 letter decision, Dr. McCullough concluded:

> [T]here is insufficient documentation to definitely determine whether or not your water line is within 10 feet of the drain field [as prohibited by WAC 246-272A-0210]. Therefore, it is unknown if there is non-compliance of the [Hannas's drain field] as it relates to the . . . pressurized water line . . . .

CP at 61. Dr. McCullough directed Mr. Hanna to provide documentation to establish the exact location of the water line and its relationship to the drain field. Dr. McCullough also directed the Hannas to propose how they would bring their drain field into compliance if it was within 10 feet of the Margitans' water line.

The Margitans appealed Dr. McCullough's determination to the SRHD Board of Health (Board). After an adjudicatory hearing, the Board found there was insufficient evidence to establish the location of the water line and, for that reason, insufficient evidence that the drain field violated the 10 foot separation requirement. The Board also determined, *if* the drain field was within 10 feet of the water line, the health risk was minimal. Specifically, the Board found that no water contamination could occur unless the water line broke near the drain field. The Board noted that a break in the line would

be obvious to the Margitans because it would cause a noticeable reduction in water pressure.

In the summer of 2014, the Margitans completed their remodel work. They requested a final building inspection so they could obtain a certificate of occupancy. When the building inspector arrived, the Margitans' water was off. Mr. Margitan explained his concern that the proximity of the water line to the drain field might cause the water to be unsafe.

In early September 2014, the building inspector issued a brief report denying the Margitans a certificate of occupancy. The report notes:

> You have notified us of encroachment of a septic drain field into the restricted zone of your water supply line which you claim endangers your potable water supply. You have also provided us corroboration of the issue through copies of SRHD documentation. A Certificate of Occupancy can be issued upon receipt of documentation (SRHD and/or water puveyor [sic]) accepting the waterline and it's [sic] adequacy for residential use.

CP at 1271.

The Margitans filed suit against SRHD and the Hannas. This appeal concerns only the Margitans' claims against SRHD. Those claims center around SRHD's failure to promptly require the Hannas to relocate their drain field outside the 40 foot easement. The Margitans claimed that SRHD's failure caused the certificate of occupancy not to be issued, leading to their loss of rental income.

The parties conducted discovery. The Hannas retained Shawn Rushing to use a tracer wire to locate the water line and determine if it was within 10 feet of the drain field. Mr. Rushing determined that the closest the water line came to the drain field was 14 feet.

SRHD filed a motion for summary judgment requesting that the trial court dismiss the Margitans' claims. During the briefing process, SRHD deposed the building inspector.

> Q. Did [Mr. Margitan] tell you why he was not comfortable with the potability of the water to Parcel 3?
> A. . . . [H]e said he felt that the [water line] was close to a . . . drain field . . . in the easement of Parcel 2.
> And I said, "Well, then, just get something that—from your purveyor that says it's potable. You know, somebody, tell me it's good water. I don't care who it is."
> . . . .
> Q. . . . So if you had gone out there [to re-inspect] and the water is running and the short plat says it's potable, would [it] have been sufficient for you?
> A. Yes, ma'am.

CP at 1521.

The trial court granted SRHD's motion, and the Margitans timely appeal.[1]

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[1] After the parties filed their appellate briefs, the Margitans filed a motion asking this court to take judicial notice of the permit that SRHD issued to the Hannas in conjunction with the Hannas relocating their drain field. The permit, issued during the pendency of this appeal, shows that SRHD did not require the Hannas to dig up their former drain field.

ANALYSIS

The Margitans claim that the trial court erred by granting SRHD's summary judgment motion.

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). When reasonable minds can only reach one conclusion, questions of fact may be determined as a matter of law. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).

The party opposing summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value . . . ." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d

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Facts that a court may judicially notice are those "'facts capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy and verifiable certainty." *CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996) (quoting *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963)). Because a permit does not qualify under this standard, we deny the Margitans' motion.

1, 13, 721 P.2d 1 (1986). Instead, it must put forth evidence showing the existence of a triable issue. *Id.* at 12-13. The evidence must be admissible. CR 56(e) (affidavits "shall set forth such facts as would be admissible in evidence").

"In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact." *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

> If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion.

Id. (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

A. UNCONSTITUTIONAL TAKING

The Margitans assert that SRHD violated their property rights by executing the October 2013 agreement with the Hannas. They argue that the agreement allowed the encroachment to continue and was thus an unconstitutional taking.

Article I, section 16 of the Washington Constitution states that "'[n]o private property shall be taken or damaged for public or private use without just compensation

having been first made.'" *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 38-39, 352 P.3d 807 (2015) (alteration in original).

> Under existing Washington and federal law, a police power measure can violate article I, section 16 of the Washington State Constitution or the Fifth Amendment to the United States Constitution and thus be subject to a takings challenge when (1) a regulation affects a total taking of all economically viable use of one's property, (2) the regulation has resulted in an actual physical invasion on one's property, (3) a regulation destroys one or more of the fundamental attributes of ownership (the rights to possess, exclude others from, and dispose of property), or (4) the regulations were employed to enhance the value of publicly held property.

Id. at 39 (citations omitted). A constitutional taking is a permanent or recurring invasion of private property. *Miotke v. City of Spokane*, 101 Wn.2d 307, 334, 678 P.2d 803 (1984) (quoting *N. Pac. Ry. v. Sunnyside Valley Irrig. Dist.*, 85 Wn.2d 920, 924, 540 P.2d 1387 (1975)). In order to constitute a taking, a governmental intrusion must be "'chronic and unreasonable,'" and not simply a temporary interference that is unlikely to recur. *Lambier v. City of Kennewick*, 56 Wn. App. 275, 283, 783 P.2d 596 (1989) (quoting *Orion Corp. v. State*, 109 Wn.2d 621, 671, 747 P.2d 1062 (1987)).

Here, the agreement allows the drain field to exist in the easement only temporarily. The agreement requires the Hannas to relocate their drain field soon after

the rights of all easement holders are adjudicated. The encroachment, therefore, is only temporary, not permanent.[2]

The Margitans argue that *Miotke* supports their position by recognizing that a taking may be temporary. Their argument is supported only by the dissent in *Miotke*. The dissenting opinion is not binding and is contradicted by a majority of the justices on the issue.

B. NEGLIGENCE AND PUBLIC DUTY DOCTRINE

The Margitans next contend the trial court erred by dismissing their claim that SRHD was negligent in not requiring the Hannas to promptly relocate their drain field outside the easement. The Margitans argue that SRHD owed them a duty. We disagree.

In any negligence action against a governmental entity, the threshold determination is whether a duty of care was owed to the injured plaintiff individually rather than to the public in general; this is known as the public duty doctrine. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001). This doctrine is a "focusing tool" designed to determine whether the governmental entity owed a duty to the general

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[2] A constitutional taking does not occur unless the property owner suffers a loss because of governmental interference with the owner's property. *See Tapio Inv. Co. I v. Dep't of Transp.*, 196 Wn. App. 528, 541, 384 P.3d 600 (2016), *review denied*, 187 Wn.2d 1024, 390 P.3d 331 (2017). We question whether the Margitans have sustained any loss, given that the drain field is more than 10 feet from the water line.

public or to a particular plaintiff. *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012).

There are four exceptions to the public duty doctrine that enable a plaintiff to establish that he or she was owed a duty of care by the governmental entity: (1) legislative intent, (2) failure to enforce, (3) rescue, and (4) special relationship. *Id.* at 879. The Margitans assert that three of the four exceptions apply.

1. Exception 1: legislative intent

The legislative intent exception applies where legislation or regulation, by its terms, evidences a clear intent to identify and protect a particular class of persons rather than the general public. *1515-1519 Lakeview Boulevard Condo. Ass'n v. Apt. Sales Corp.*, 102 Wn. App. 599, 607-08, 9 P.3d 879 (2000), *rev'd in part and remanded*, 146 Wn.2d 194, 43 P.3d 1233 (2002). The legislation or regulation must clearly express the intent to identify and protect a particular class of persons; it may not be implied. *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 930, 969 P.2d 75 (1998). Where the purpose of a statute or regulation is to protect the health, safety, and welfare of the general public, and not a particular person or class, the exception is not applicable. *Id.*

RCW 43.20.050 is the statutory authority for WAC 246-272A-0210. The statute expressly states the purpose of adopting water system rules is to "protect public health." RCW 43.20.050(2). Similarly, the rules identify the purpose for chapter 246-272A WAC:

> (1) The purpose of this chapter is to protect the public health by minimizing:
> (a) The potential for public exposure to sewage from on-site sewage systems; and
> (b) Adverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters.

WAC 246-272A-0001. The Margitans do not point us to any language in the statutes or regulations that contain an express intent to protect a particular class of persons.

The Margitans rely on two cases to support their argument that the legislative intent exception applies. The first case is *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978). There, the plaintiff, an occupant of a building, was injured because the city of Seattle was negligent in not enforcing its housing code. *Id.* at 675. The *Halvorson* court analyzed the housing code's declaration of purpose and found express language evidencing a legislative intent to protect a particular class of persons. *Id.* at 676-77. The declaration of purpose provided: "'Such conditions and circumstances are dangerous and a menace to the health, safety, morals or welfare of *the occupants of such buildings* and of the public . . . ." *Id.* at 677 n.1 (emphasis added) (quoting *Seattle Housing Code*

§ 27.04.020). No such express language appears in the enabling statute or the regulations at issue in this case.

The Margitans also cite *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975). There, a person was electrocuted because the city of Bellevue's electrical inspector failed to sever faulty electrical equipment from the power source. *Id.* at 3-6. Bellevue Municipal Code § 16.32.090 in effect at the time stated:

> "*In order to safeguard persons and property from the danger incident to unsafe or improperly installed electrical equipment*, the building official shall immediately sever any unlawfully made connection of electrical equipment to the electrical current if he finds that such severing is essential to the maintenance of safety and the elimination of hazards."

Id. at 5 (emphasis added). The *Campbell* court held that the city was liable because its ordinance explicitly safeguarded people from the danger of unsafe electrical equipment and required the inspector to sever the dangerous electrical connection. *Id.* at 13. *Campbell* is distinguishable because there is nothing in the enabling statute or regulations at issue in this case that explicitly safeguards people from the possibility of contaminated water.

2. Exception 2: failure to enforce

This exception applies when all four elements are shown where: (1) governmental agents are responsible for enforcing statutory requirements, (2) governmental agents

possess actual knowledge of a statutory violation, (3) governmental agents fail to take corrective action despite a statutory duty to do so, and (4) the plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987); *Woods View II*, 188 Wn. App. at 26. This exception is construed narrowly to avoid dissuading governmental officials from carrying out public duties. *Woods View II*, 188 Wn. App. at 26-27.

Here, the Margitans complain that SRHD failed to enforce WAC 246-272A-0210's five foot separation requirement between a drain field and an easement. We disagree. SRHD enforced the separation requirement by requiring the Hannas to relocate their drain field immediately if it appeared to SRHD that there was a public health risk, or, if no such risk appeared to SRHD, after the Hannas completed their quiet title litigation. The Margitans fail to point to any statute, regulation, or decisional authority that required SRHD to take immediate enforcement action absent a public health risk.

3. Exception 4: special relationship

"A special relationship arises where (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise

to justifiable reliance on the part of the plaintiff." *Taylor v. Stevens County*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988).

Here, Mr. Holderby assured the Margitans that if the Hannas' drain field was within the easement, SRHD would promptly require the Hannas to relocate their drain field. However, the Margitans did not rely on this assurance. The record is undisputed that the Margitans purchased Parcel 3 and began remodeling the old house long before Mr. Holderby gave the Margitans any assurances.

C. INTENTIONAL FAILURE TO ENFORCE WAC 246-272A-0210

The Margitans claim the trial court erred by determining there is no cause of action for intentional failure to enforce chapter 246-272A WAC.

They first contend that RCW 4.96.010 creates a cause of action. We disagree. The purpose of RCW 4.96.010 is to abolish sovereign immunity. *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988). By adopting RCW 4.96.010, the legislature declared that municipal corporations "shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their . . . officers . . . to the same extent as if they were a private person or corporation." RCW 4.96.010 does not create any new causes of action, imposes no new duties, and brings into being no new liability; it merely removes the defense of

sovereign immunity. *Garnett v. City of Bellevue*, 59 Wn. App. 281, 285, 796 P.2d 782 (1990). This statute does not support the Margitans' claim of a cause of action here.

But even if such a cause of action existed, SRHD did enforce the separation requirements of WAC 246-272A-0210. SRHD took corrective action, including obtaining a commitment from the Hannas that they would immediately relocate their drain field if it appeared to SRHD that the drain field posed a public health risk.

D. INTENTIONAL INTERFERENCE WITH BUSINESS EXPECTANCY

The Margitans next contend the trial court erred by dismissing their claim for intentional interference with business expectancy. We disagree.

"Washington has adopted the tort of interference with a business or economic expectancy, which consists of five elements: (1) existence of a valid contractual relationship or business expectancy, (2) defendants had knowledge of that relationship, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) defendants interfered for an improper purpose or used improper means, and (5) resultant damage." *In re Estate of Lowe*, 191 Wn. App. 216, 237, 361 P.3d 789 (2015) (internal quotation marks omitted).

The parties present argument on several elements, but we focus only on whether SRHD interfered for an improper purpose or used improper means. In their briefing, the

Margitans do not argue that SRHD acted for an improper purpose. They instead focus on improper means, contending that the agreement with the Hannas was an improper means because SRHD should have ordered the Hannas to immediately remove the noncomplying system. We disagree.

"[A] plaintiff in Washington may establish an improper means by . . . establishing a set of facts that raises an inference that the defendant was motivated by considerations outside the scope of the party's obligations, such as greed, retaliation, ill will, a desire to gain favor with others, [or] failing to act fairly and reasonably in its dealings with the plaintiff, or acting arbitrarily and capriciously." 16A DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE: § 23:7 Prospective Advantage—Overview at 256 (4th ed. 2013).

The Margitans contend that SRHD's agreement with the Hannas was an improper means of bringing the Hannas' drain field into compliance with WAC 246-272A-0210. We disagree. At the time when SRHD entered into the agreement with the Hannas, the Margitans had not alerted SRHD that their water line might be within 10 feet of the drain field. But even so, the agreement required the Hannas to immediately take corrective action if it appeared to SRHD that the drain field posed a public health risk. The

Margitans have presented no evidence that SRHD was motivated by considerations outside of its obligations or failed to act fairly and reasonably.

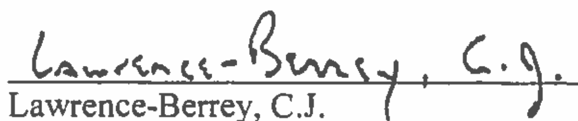
E. SRHD'S REQUEST FOR ATTORNEY FEES

SRHD argues that it is entitled to reasonable attorney fees and costs pursuant to RCW 4.84.370. That statute authorizes an award of reasonable attorney fees and costs if a party substantially prevails in a land use decision made by a county, city, or town, and is the prevailing party before such agency and in all judicial proceedings.

RCW 4.84.370 does not apply to this action. The decision on appeal was not made by a county, city, or town. Nor did the Margitans appeal from a land use decision. Rather, the Margitans appealed from a summary dismissal of their negligence and intentional tort claims.

Affirmed.

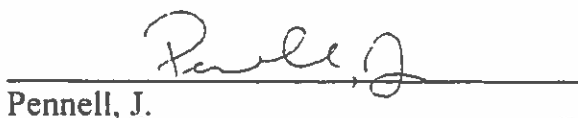
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Lawrence-Berrey, C.J.

WE CONCUR:

Korsmo, J.



Pennell, J.

Appendix 2

FILED
SEPTEMBER 13, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ALLAN MARGITAN and GINA MARGITAN, husband and wife, Appellants, v. SPOKANE REGIONAL HEALTH DISTRICT, a municipal corporation and SPOKANE REGIONAL HEALTH DISTRICT BOARD OF HEALTH, a municipal corporation, MARK HANNA and JENNIFER HANNA, husband and wife, Respondents.	)	No. 34606-4-III ORDER DENYING MOTION TO PUBLISH AND AMENDING OPINION

THE COURT has considered appellants' motion to publish the court's opinion of July 24, 2018, and the record and file herein, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion to publish is denied.

IT IS FURTHER ORDERED that the opinion shall be amended as follows:

The section entitled "A. Unconstitutional Taking" shall be deleted and the following shall be inserted in its place:

A. UNCONSTITUTIONAL TAKING

The Margitans assert that SRHD's failure to require the Hannas to immediately move their drain field from the easement constitutes an unconstitutional taking.

Article I, section 16 of the Washington Constitution states that "'[n]o private property shall be taken or damaged for public or private use without just compensation having been first made.'" *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 38-39, 352 P.3d 807 (2015) (alteration in original).

A governmental regulation can amount to an unconstitutional taking of private property. Such a taking is considered an "inverse condemnation" because the parties are aligned inversely, with the private property owner instead of the governmental entity suing as the plaintiff. 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 9.31 (2d ed. 2004).

In *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 16-17, 829 P.2d 765 (1992), the court described what type of a regulation amounts to an unconstitutional taking:

> A regulation effects a taking of private property if "it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'" [*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).]
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> . . . .
>
> . . . To determine if the regulation's economic impact is excessive, and thus constitutes a taking, we have suggested three factors to consider. The court should consider: "(1) the economic impact of the regulation on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action." [*Presbytery of Seattle v. King County*, 114 Wn.2d 320, 335-36, 787 P.2d 907 (1990).]

Here, SRHD entered into an agreement with the Hannas to allow them to delay relocating their drain field until the easement rights of third persons could be determined. When SRHD entered into this agreement, it did not know that the Hannas' drain field encroached into the Margitans' easement. When the Margitans alerted SRHD of this, SRHD was placed in the position of upholding or breaching its agreement with the Hannas. SRHD decided not to breach its agreement. Not breaching an agreement substantially advances a legitimate governmental interest of avoiding lawsuits.[2]

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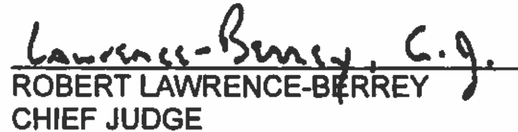
[2] Neither SRHD's agreement with the Hannas nor its decision to not breach its agreement is a regulation. Neither party addresses the issue of whether an agreement with one

Also, SRHD's decision to not breach its agreement did not have an excessive economic impact on the Margitans. The decision did not interfere with the Margitans' water line or cause them any cognizable harm. As noted in SRHD's decision, the Margitans' water could become contaminated only if their water line broke, and the Margitans would know immediately if there was a break because they would lose water pressure.

Finally, the character of SRHD's decision was reasonable. SRHD's decision allowed the Hannas to delay moving their drain field so that the relocated drain field would not encroach into any third person's easement. There is nothing nefarious about SRHD's decision, especially given the Margitans' failure to establish any cognizable harm.

PANEL: Judges Lawrence-Berrey, Korsmo, and Pennell

FOR THE COURT:



ROBERT LAWRENCE-BERREY
CHIEF JUDGE

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private party or a decision that impacts only two private parties can be a regulatory taking. We express no opinion on this issue.

THE LAW OFFICE OF JULIE C. WATTS, PLLC

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Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96420-3
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Superior Court Case Number:	15-2-00545-1

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