No. 96420-3

THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals: No. 34606-4-III

ALLAN and GINA MARGITAN, Petitioners,

vs.

SPOKANE REGIONAL HEALTH DISTRICT and SPOKANE REGIONAL HEALTH DISTRICT BOARD OF HEALTH, Respondents.

ANSWER TO AMENDED PETITION FOR DISCRETIONARY REVIEW BY RESPONDENTS SPOKANE REGIONAL HEALTH DISTRICT AND SPOKANE REGIONAL HEALTH DISTRICT BOARD OF HEALTH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
Table of Cases

Statutes

Regulations

Rules

I. INTRODUCTION

Allan and Gina Margitan's ["Margitans"] Petition should not be accepted for discretionary review because the opinion issued by the Court of Appeals for Division III ["Opinion"] is not in conflict with prior decisions of the Supreme Court. The Court of Appeals properly affirmed the trial court's grant of summary judgment dismissing Margitans' claims against Spokane Regional Health District ["SRHD"].

II. STATEMENT OF THE CASE

A. RELEVANT FACTS.

This matter involves Short Plat 1227-00, which was approved by Spokane County on March 19, 2002 and contains three parcels with an easement serving parcels 2 and 3. CP 13. Mark and Jennifer Hanna ["Hannas"] purchased Parcel 2, and in June of 2002 they submitted Application for On-Site Sewage System No. 02-4270 to SRHD. CP 72, 76. The proposed septic tank and drain field drawing submitted to SRHD indicated there was a 20-foot easement running along the southern side of the Hannas' property. CP 73, 78. Based on SRHD's review of the design plan submitted, SRHD issued Permit No. 02-4270 on January 10, 2003. CP 73, 80. In March of 2003, Hannas submitted an As-Built drawing for the septic tank and drain field which, also indicated that there was a 20-foot

easement running along the southern side of Hannas' property. No. 02-4270. CP 73, 82.

Approximately ten years later, Margitans submitted a complaint to SRHD alleging that Hannas' drain field was improperly located partially within the easement. CP 73. As of February 2010, Margitans owned parcels 1 and 3 on either side of Hannas' property. CP 73. SRHD investigated Margitans' complaint and discovered that Hannas' property was actually subject to a 40-foot easement. CP 73. Based on the depiction of the location of the drain field on the As-Built drawing, the existing drain field appeared to be located partially within the 40-foot easement. CP 73, 82. WAC 246-272A-0210 requires a five-foot separation between a drain field and an easement.

Margitans also notified SRHD that litigation was pending between Hannas and Margitans. CP 73. This litigation concerned, in part, the existence and location of easements located on Short Plat 1227-00. CP 73. On August 7, 2013, Margitans provided SRHD with a copy of Spokane County Superior Court Judge Linda G. Tompkins' *Order on Reconsideration and Injunction*, dated August 6, 2013. CP 73, 84-87, 439. Judge Tompkins' Order stated, in relevant part:

> [T]his court vacates its July 19, 2013 oral ruling and determines that there is sufficient cause shown to alter the court's May 24, 2013 Summary Judgment Order in this case as follows:
>
> Ruling 6. Delete second sentence and add: ***Questions of material fact exist as to any private and public grants of easements by the parties and the county processes available to validate easements over property subject to Short Plat 1227-00.***
>
> . . . .
>
> ***IT IS FURTHER ORDERED THAT the parties are to honor the 40-foot wide easement depicted in Short Plat 1227-00 without inhibiting access thereon by any party. Further, as of the date of this order, the status quo shall be preserved regarding all other party and third-party access pending further court order.***

CP 85-86 (Emphasis added).

On October 18, 2013, SRHD and Hannas entered into a written agreement in which Hannas were required to relocate the drain field or otherwise bring the system into compliance at the conclusion of the pending litigation between Hannas and Margitans ["Agreement"]. CP 74, 89-91. SRHD determined that there was no imminent public health risk presented as a result of the encroachment of the drain field into the easement but reserved the right to require Hannas to take immediate corrective action if

it appeared to SRHD that the drain field posed a public health risk in the future. CP 91.

On December 4, 2013, more than a month *after* the SRHD/Hannas Agreement, Margitans notified SRHD for the first time that Hannas' drain field may also be within ten feet of the water line serving Parcel 3. CP 737, 746-47, 744. The Margitans' letter does not mention an issue with the Certificate of Occupancy for the property. CP 746-47. Nonetheless, SRHD's counsel sent a letter to Hannas' counsel requesting documentation of the location of the water line by January 20, 2014. CP 942. Unfortunately, due in part to the lack of records and the fact that the pipe was plastic, the location of the water line was not able to be established until years later. CP 955.

Spokane County Building and Planning first declined to issue a Certificate of Occupancy to Margitans on September 3, 2014 – more than a year after the SRHD/Hanna Agreement. CP 737, 749. Specifically, the Comments section of the Inspection Results document prepared by Spokane County Building and Planning on September 3, 2014 states

> 1) You have notified us of the 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 purveyor) accepting the water line and it's [sic] adequacy for residential use.

CP 737, 749. The Spokane Building and Planning Inspector, Tim Utley, testified that the first time he spoke to Allan Margitan regarding the water to the property was between June and August of 2014. CP 1265, 1269-71. During his deposition, Mr. Utley testified that he would have issued the Certificate of Occupancy for Margitans' property if the water to the home had been running and the Short Plat indicated it was potable. CP 1516, 1521, p. 41. The Short Plat for the property indicates on its face that public water was required, and private wells and water systems were prohibited. CP 13. The only remaining reason that the Certificate of Occupancy was not issued is because Margitans hadn't turned on the water within the home.

On June 15, 2016, Shawn Rushing, Hannas' expert, testified that he used a tracer wire to locate the water line and determined there was a fourteen-foot separation between the water line and the drain field at the closest point. CP 1273-74. Only a ten-foot separation is required by the regulations.

Prior to Utley's inspection and Rushing's location of the water line, Margitans asked the SRHD Health Officer to review the issues related to

Hannas' drain field. On January 27, 2014, Dr. Joel McCullough, Health Officer for Spokane Regional Health District, issued his determination. CP 58, 61-62. Due to a lack of evidence as to the location of the water line, Dr. McCullough was unable to conclude that Hannas' drain field failed to comply with the WAC regulations requiring a ten-foot horizontal separation between the drain field and the water line. CP 58, 61-62.

Margitans appealed Dr. McCullough's decision to the SRHD Board of Health. After an adjudicatory hearing, the SRHD Board of Health found that there was insufficient evidence presented to establish the location of the pressurized water line, and that the public health risk presented by the alleged location of the drain field within ten feet of the pressurized water line was minimal. CP 59, 66-67. Specifically, a breach of the water line would have to occur near the drain field, the water line would have to lose pressure, and there would have to be contamination of the water line which included pathogens. CP 59, 66-67. The Board of Health for SRHD found that a loss of water pressure would be observable in Margitans' house, allowing for mitigation of any risk of harm. CP 59, 66-67. The Board also upheld the Health Officer's request that Hannas provide additional information as to the precise location of the water line. CP 59, 66-67.

On May 22, 2014, Margitans filed a Petition for Review of the SRHD Board of Health's decision with the Spokane County Superior Court. On September 15, 2014, Judge John Cooney ruled that Margitans lacked standing and dismissed the petition for review. CP 70-71. On October 28, 2014, Margitans appealed Judge Cooney's decision to the Court of Appeals for Division III. On January 21, 2016, the Court of Appeals affirmed the trial court's decision. *Margitan v. Spokane Regional Health District,* 192 Wn.App. 1024 (2016) (unpublished).

There was also an appeal filed with respect to the action originally filed by Hannas against Margitans. The Court of Appeals' decision in that matter was issued on April 28, 2016 and the mandate issued on July 22, 2016. *Hanna v. Margitan,* 193 Wn.App. 596, 373 P.3d 300 (2016). Since that time, Hannas have abandoned the noncompliant system in the manner required by the regulations and installed a system that complies with the on-site regulations.

B. RESPONSE TO MARGITANS' STATEMENT OF THE CASE.

Margitans' Statement of the Case contains alleged factual statements that are not supported by the record as follows:

1. SRHD did not require that the parcels be serviced with public water through the utility easements. Rather, SRHD required that "appropriate utility easements be indicated on copies of the preliminary plat", that water service would be through a public water supply and that adequate and potable water supply is available. CP 1201.

2. The lawsuit between Hannas and Margitans filed in October 2012 involved issues of the existence and location of other easements that may exist on the property in addition to the width of the utility easement. CP 85-86.

3. Margitans did not inform SRHD of their speculation that the water line was too close to the drain field until a month after the SRHD/Hanna Agreement. CP 737, 746-47, 744. Further, the only evidence developed was that the horizontal separation between the water line and the drain field is fourteen feet, which exceeds the requirements of the applicable WAC provision. CP 1266, 1274, pp. 15-16.

4. Counsel for SRHD did not email a copy of Margitans' second complaint directly to Hannas' attorney. Rather, SRHD's counsel sent a letter to counsel for Hannas advising them that SRHD had become aware that there may be an insufficient horizontal separation between the

water line and the drain field and requested documentation of the location of the drain field. CP 517. Margitans' name was not mentioned. CP 517.

5. The SRHD/Hanna Agreement was not an easy way to resolve the complaint, but rather a way to avoid the possibility of a homeowner having to relocate their on-site system only to find out that additional easements have been declared to exist in the Hanna/Margitan litigation and then be forced to move the system a second time.

III. ARGUMENT

A. STANDARD FOR GRANTING DISCRETIONARY REVIEW.

The conditions under which the Supreme Court will grant a petition for discretionary review are set forth in RAP 13.4(b). Margitans are relying on subparagraph (1) which requires that the decision of the Court of Appeals conflict with a decision of the Supreme Court.

B. THE OPINION OF THE COURT OF APPEALS FINDING NO UNCONSTITUTIONAL TAKING DOES NOT CONFLICT WITH A DECISION OF THE SUPREME COURT.

The decision of the Court of Appeals affirming the trial court's dismissal of Margitans' claim of an unconstitutional taking does not conflict with a decision of this Court. None of the three Supreme Court cases cited by Margitans support their contention that a conflict exists.

Margitans first rely on *State v. Superior Court of King Cty.*, 26 Wash. 278, 287, 66 P. 385 (1901), but fail to articulate how the decision of the Court of Appeals is in conflict. In fact, the decision does not conflict, but rather follows the well-established and more recent law established in *Presbytery of Seattle v. King Cty.*, 114 Wn.2d 320, 335, 787 P.2d 907 (1990) and *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 17, 829 P.2d 765 (1992), which hold that a governmental regulation is only a taking if it is found to be excessive.

Superior Court of King Cty. is also factually distinguishable. In that case, a corporation planned to build an elevated railroad that would cut off access to another's property and interfere with the landowner's air and light. *Presbytery of Seattle v. King Cty.*, 114 Wn.2d 320, 335, 787 P.2d 907 (1990). The court stated that a when a person is deprived of the right to *use and possess* his or her own property "he is to that extent deprived of his property, and hence that his property may be taken." 26 Wash. 278, 287, 66 P. 385 (1901). Here, Margitans did not have the right to exclusive use of the easement, the existence of the drain field in the easement did not deprive Margitans of the ability to use the easement, and the water line met the minimum horizontal separation from the drain field. Therefore, the

Opinion does not conflict with this Court's decision in *Superior Court of King Cty.*

Next, Margitans contend that the Opinion conflicts with *Miotke v. City of Spokane*, 101 Wn.2d 307, 347, 678 P.2d 803 (1984), abrogated on other grounds by *Blue Sky Advocates v. State*, 107 Wn.2d 112, 727 P.2d 644 (1986). Margitans argue that *Miotke* held that an unconstitutional taking need not be permanent. Margitans fail to advise the Court that they are relying on language from the dissenting opinion in *Miotke*, and that the majority opinion succinctly stated that "[a] constitutional taking is a permanent (or recurring) invasion of a property right." *Miotke v. City of Spokane*, 101 Wn.2d at 334. The decision of the Court of Appeals in this matter is wholly consistent with the majority opinion in *Miotke*.

Margitans also cite to a decision of the United States Supreme Court titled *Kaiser Aetna v. U.S.*, 444 U.S. 164, 180, 100 S. Ct. 383, 393, 62 L. Ed. 2d 332 (1979), for the proposition that governments must pay just compensation for invading an easement. However, *Kaiser* is distinguishable from this case. In *Kaiser*, the government effectively transformed a privately-owned pond into a public aquatic park. The government also required the property owner to allow public access to the pond/aquatic park without charging a fee, where the landowner had

previously charged customers for access. *Id.* The easement was created by the government for the public, invading the property rights of the landowner. *Id.* Here, SRHD did not take the easement for the benefit of the public, but merely maintained the status quo pending judicial determination of other easements that may have existed on Hannas' property before requiring the on-site system to be brought into compliance.

It appears that the Court of Appeals made a scrivener's error when it amended its decision. SRHD agrees that the record is clear that SRHD was aware that the drain field was within the easement when entering into the Agreement with Hannas, but SRHD was not aware of Margtians' allegation that the water line was too close to the drain field. It is clear that the Court of Appeals was aware of the correct facts, as the Opinion states that "[a]t the time when SRHD entered into the agreement with the Hannas, Margitans had not alerted SRHD that their water line might be within 10 feet of the drain field."[1] Further, the Opinion states that "SRHD entered into an agreement with the Hannas to allow them to delay relating their drain field until the easement rights of third persons could be determined." This statement immediately precedes the erroneous statement and it appears that

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[1] *Margitan v. Spokane Regional Health District, 4 Wn.App.2d 1058 (2018)(Unpublished)*

the appellate court meant to say that SRHD was not aware of potential issues with Margitans' water line. The error is harmless however, because it does not lead to a different result. SRHD's Agreement with Hannas would still reasonably allow for Hannas to bring the drain field into compliance after completion of the litigation between Hannas and Margitans.

Margitans' remaining arguments relate to the reasonableness of the Agreement between SRHD and Hannas, the alleged economic impact on Margitans, and whether actual interference is required. These arguments appear to address the merits, and not whether discretionary review should be granted. Nonetheless, SRHD entered into the Agreement with the Hannas primarily for two reasons: (1) there was ongoing litigation involving allegations of additional easements on Hannas' property, which would directly impact the possible location of a replacement system; and (2) Judge Linda Tomkins had issued an order requiring maintenance of the status quo. The *Order on Reconsideration and Injunction* in Hannas quiet title action stated that "[q]uestions of material fact exist as to the existence and nature of any related significant property interest of unjoined parties" including "any private and public grants of easements by the parties," and that "the status quo shall be preserved regarding all other party and third-party access pending further court order." CP 85-86. The Agreement properly allowed

for the completion of the Hanna/Margitan litigation before commencing an application process to relocate the drain field or otherwise bring it into compliance, thus serving a legitimate government interest. CP 74, 89-91.

There was no economic impact on Margitans as a result of the drain field being in the easement, and there was no evidence presented that there was an insufficient horizontal separation between the drain field and the water line. The Opinion cites three factors to consider when determining if a regulation is excessive, and thus constitutes a taking.[2] The second factor is extent of the regulation's interference with investment-backed expectations. *Id.* The Opinion states that SRHD's decision not to breach the agreement did not interfere with Margitans' water line. The Opinion does not distinguish between actual and any other type of interference, but instead finds that SRHD did not interfere at all.

SRHD respectfully requests that the Court decline to accept review of the claim for an unconstitutional taking.

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[2] Order Denying Motion to Publish and Amend Opinion, No. 34606-4-III, September 13, 2018, p. 2.

C. THE OPINION OF THE COURT OF APPEALS FINDING NO EXCEPTION TO THE PUBLIC DUTY DOCTRINE APPLICABLE DOES NOT CONFLICT WITH A DECISION OF THE SUPREME COURT.

The Court of Appeals properly applied Supreme Court precedent when it determined that SRHD did not owe a duty to Margitans because none of the exceptions to the public duty doctrine were applicable. Where the defendant is a governmental entity, the public duty doctrine provides that a governmental entity is not liable for negligence unless the entity owes a duty to the plaintiff as an individual rather than to the public in general. *West Coast, Inc. v. Snohomish County,* 112 Wn.App. 200, 207, 48 P.3d 997 (2002).

1. The Legislative Intent Exception Did Not Apply Because RCW 43.20.050 and WAC 246-272A-0210 Establish that SRHD's Duty is to the Public in General.

In order for the legislative intent exception to the public duty doctrine to apply, there must exist a clear intent by the legislature to identify and protect a particular class of persons rather than the general public. *Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.,* 102 Wn.App. 599, 607-08, 9 P.3d 879 (2000). The intent to identify and protect a particular class of persons must be clearly expressed within the legislation, it may not be implied. *Ravenscroft v. Washington Water Power Co.,* 136 Wn.2d 911, 930,

969 P.2d 75 (1998). The enabling statute, RCW 43.20.050, and WAC 246-272A-0001 refer to the "public health," and not a particular class of persons. The Opinion is consistent with this Court's decisions regarding the applicability of the legislative intent exception to the public duty doctrine.

2. The Duty to Enforce Exception Did Not Apply Because SRHD Took Enforcement Action Related to the Drain Field Within the Easement and no Violation Related to the Water Line Was Established.

The Opinion states that, absent "any statute, regulation, or decisional authority that required SRHD to immediately take enforcement action absent a public health risk," SRHD's Agreement with Hannas does not constitute a failure to enforce WAC 246-272A-0001. Margitans fail to point to any authority to show that the Opinion conflicts with Supreme Court precedent. Further, absent proof of a violation of the minimum horizontal separation between the water line and the drain field, there is nothing for SRHD to enforce related to the water line.

3. The Special Relationship Exception Did Not Apply Because there were Insufficient Communications Between Margitans and SHRD.

"The special relationship exception is a 'focusing tool' used to determine whether a local government is under a duty to the nebulous public or whether that duty has focused on the claimant." *Babcock v. Mason County*

Fire Dist. No. 6, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). The special relationship exception requires (1) privity; (2) express assurances in response to a specific inquiry; and (3) justifiable reliance. *Id.*

With respect to privity, ordinarily a permit applicant is responsible for ensuring his or her own compliance with codes, regulations and ordinances. *Taylor v. Stevens County,* 111 Wn.2d 159, 168, 759 P.2d 447 (1988). Recognized policy reasons exist for refusing to transfer liability to a local government. For example, the regulatory codes are designed to protect the general public, and not individuals such as Margitans from economic loss caused by public officials. Budgetary and personnel constraints make it unreasonable to place the burden of ensuring compliance upon the local government. Further, a developer has a legal obligation to comply with the statutes regardless of approval of plans. Finally, it is imprudent to shift the risk of erroneous permit issuance and inspections to local governments. *Mull v. City of Bellevue,* 64 Wn.App. 245, 255, 823 P.2d 1152 (1992). Each of these policy considerations weighed against the shifting of liability to SRHD.

To establish the second element requiring express assurances, there must be "a direct inquiry . . . by an individual and incorrect information is clearly set forth by the government." *Woods View II, LLC v. Kitsap County,* 188 Wn.App. 1, 352 P.3d 807 (2015). To be express, an assurance must be

unequivocal and promise that a government official will act in a specific way. *Id.*

In this case, SRHD did not make an unequivocal, specific assurance that it would act in a certain way in response to a specific inquiry from Margitans. In fact, as of August 30, 2013, SRHD was still gathering information regarding the complaint. The letter to Hannas on August 30, 2013 requests information confirming the location of the system and that a five-foot separation exists. CP 491. Margitans do not contend he had any communication with SRHD after August 30, 2013. Estimates of a possible time frame are, at most, implied assurances, which are not sufficient to give rise to a governmental duty. *Cummins v. Lewis County,* 156 Wn.2d 844, 856, 133 P.3d 458 (2006).

Munich v. Skagit Emergency Communications Ctr., 175 Wn.2d 871, 288 P.3d 328 (2012) is distinguishable. In *Munich,* the Court held that the Skagit County 911 dispatcher's failure to properly code an emergency call as priority one, resulting in the ultimate murder of the caller, satisfied the special relationship exception. The court pointed out the important differences between building code cases and 911 cases. "In 911 cases, the plaintiff relies not only on the information contained in the assurance, but also on the fulfillment of the action promised in the assurance." *Munich v.*

Skagit Emergency Communications Ctr., 175 Wn.2d 871, 882, 288 P.3d 328 (2012). The present case is more like a building code case, where the courts have continued to require proof of incorrect information at the time the alleged assurance was made. *Woods View II, LLC v. Kitsap County*, 188 Wn.App. 1, 352 P.3d 807 (2015).

Nor did Margitans justifiably rely on the alleged assurances by SRHD. First, the Certificate of Occupancy had not yet been denied. CP 737, 749. Second, when the system was not removed within the estimated time frame, and Margitans were aware of the terms of the Agreement between Hannas and SRHD, there could be no justifiable reliance.

D. THE OPINION OF THE COURT OF APPEALS FINDING NO INTERFERENCE WITH A BUSINESS EXPECTANCY DOES NOT CONFLICT WITH DECISIONS OF THE SUPREME COURT.

Margitans allege that the three factual observations made in the Opinion are inaccurate concerning the appellate court's analysis of whether SRHD entered into the Agreement with Hannas as an improper means of bringing Hannas' drain field into compliance under WAC 246-272A-0210. First, SRHD was not aware of potential issues with the water line when it entered into an Agreement with Hannas.

Second, the fact that the Agreement requires Hannas to immediately

take corrective action if it appeared to SRHD that the drain field posed a public health risk shows that SRHD's means of enforcing health regulations was proper.

Third, Margitans failed to provide evidence that SRHD was motivated by improper means. Margitans argue that "ill will, spite, defamation, fraud, force, or coercion, on the part of the interferor [sic], are not essential ingredients" to establish improper means. This argument is immaterial as the Opinion states that "Margitans have presented no evidence that SRHD was motivated by considerations outside of its obligations or failed to act fairly and reasonably".

V. CONCLUSION

For the reasons set forth above, SRHD requests that the Petition for Discretionary Review be rejected.

Dated this 5th day of December, 2018.

Respectfully Submitted,

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