No. 90032-9

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

HUGH and MARTHA SISLEY, both individually and on behalf of their marital community,

Petitioners,

vs.

CITY OF SEATTLE, a municipal corporation,

Respondent.

CITY OF SEATTLE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The petitioners, Hugh and Martha Sisley (the "Sisleys") have failed to demonstrate their petition meets the standards for review under RAP 13.4(b). Instead of identifying issues subject to review, the Sisleys reargued what they presented to the court of appeals and that is insufficient to raise an issue for review.

It is not a significant question of law or an issue of substantial public interest for this Court to determine if a tort claim exists for violating the state constitution. The court of appeals has repeatedly held that without augmentative legislation, a tort claim for violating the state constitution does not exist.

And it is not a significant question of law whether the civil penalties the Sisleys complain of are excessive when this Court previously determined in a different Sisley case where the penalties were first imposed that given the seriousness of the violations the penalties were not excessive and instead, were appropriate.

Nor does an issue of substantial public interest arise in determining that the City's zoning and housing codes enforcement is subject to the public duty doctrine when the law is settled that code enforcement actions are governmental functions.

Finally, an issue of substantial public interest does not arise when the plain language of the City's certificate of release did nothing to release the Sisleys from civil penalties imposed up to the date the house at issue was demolished.

The City will not address two claims not raised in the petition for review.[1]

II. IDENTITY OF RESPONDENT

The respondent is the City of Seattle ("City").

III. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals, Division I, issued an unpublished opinion in *Hugh K. Sisley and Martha E. Sisley v. City of Seattle*, Nos. 69827-3-I and 69828-1-I (consolidated cases) on February 3, 2014.

IV. COUNTER-STATEMENT OF THE ISSUES

Tort claims do not exist for state constitutional law violations when augmentative legislation has not been adopted. Have the Sisleys demonstrated a significant question of law or an issue of substantial public interest that a constitutional violation tort claim exits when augmentative legislation has not been adopted?

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[1] The two claims are the reinstallation of a water meter in an occupied Sisley house, and that the City tortuously interfered with their business expectations when the City enforced its code in response to tenant complaints about housing code violations.

The Sisleys, in a previous petition for review before this Court where the penalties they complain of were first imposed, argued the penalties violated the 8th Amendment. This Court denied review of that claim. Have the Sisleys demonstrated a significant question of law or an issue of substantial public interest through their second attempt to obtain review of the same issue?

Housing and zoning code enforcement are subject to the public duty doctrine. The City enforced its housing and zoning codes in response to tenant complaints about the unsafe conditions of Sisley rental houses. Have the Sisleys identified an issue of substantial public interest by claiming the City's enforcement of its housing and zoning codes are not subject to the public duty doctrine?

The effect of the certificate of release is determined by the language of the release. The release stated it released the Sisleys from notice of violation ("NOV") repair requirements and did not address releasing the Sisleys from civil penalties. Have the Sisleys identified an issue of substantial public interest arising from the release's plain language that did not release the Sisleys from civil penalties?

V. STATEMENT OF THE CASE

The history behind this petition is intertwined with a prior Sisley case that gave rise to the civil penalties that the Sisleys again claim are

excessive. The prior case started in municipal court where judgments were entered against the Sisleys, was heard by the court of appeals that ruled for the City, and went onto this Court where review was denied. The prior case will be briefly discussed before the case before this Court is discussed.

A. The City was awarded civil penalties in a prior case.

The 6515 house

In March 2008, after receiving a tenant complaint, the Department of Planning and Development ("Department") issued a NOV for housing violations at 6515 16th Avenue N.E. (the "6515 house").[2] The NOV required that the Sisleys correct 17 code violations,[3] and request an inspection when the repairs were made.[4] The Sisleys did not bring the house into compliance before the municipal court judgment was entered.[5]

The 6317 house

In June 2008, after receiving another tenant complaint, the Department issued a NOV to the Sisleys for housing violations at 6317 15th

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[2] CP 234-239, *City of Seattle v. Sisley*, Seattle Municipal Court Civil Case No. 08-100, City's Ex. 6.

[3] *Id.*

[4] *Id.*

[5] CP 234-239, *City of Seattle v. Sisley*, Seattle Municipal Court Civil Case No. 08-100, Judgment 3:8-9.

Avenue N.E. (the "6317 house").[6] The NOV required that the Sisleys correct 26 code violations,[7] and request an inspection when the repairs were made.[8] Like the 6515 house NOV, this NOV required the violations be corrected by an established date and explained that a failure to correct the violations may result in civil penalties.[9] Again, like the 6515 house, the Sisleys did not bring the property into compliance before the municipal court judgment was entered.[10]

B. An appeal of civil penalties in the prior case was denied by this Court.

After municipal court judgments were entered for the 6515 and 6317 housing code violations, the judgments were appealed to superior court and consolidated for review. During the appeal, the Sisleys moved for an order requesting that Certificates of Compliance be issued for both houses based on Anthony Narancic's declarations filed for the first time during the appeal that stated repairs were made before the municipal court judgments were entered.[11] The superior court declined to order the certificates be issued and

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[6] CP 240-245, *City of Seattle v. Sisley*, Seattle Municipal Court Civil Case No. 09-024, City's Ex. 6.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] CP 242, *City of Seattle v. Sisley*, Seattle Municipal Court Civil Case No. 09-024, Judgment 3:1-2.
[11] CP 4.

remanded the cases to the municipal court to reinstate judgments up to $75,000.[12]

The City appealed the decision to the court of appeals that affirmed the decision for the City except for reversing the $75,000 penalty limitation and directing reinstatement of the full judgments.[13] After the court of appeals decision, this Court denied the Sisleys petition for review and rejected the Sisleys' claim that the penalties imposed for their refusal to bring the houses into compliance were excessive.[14]

Turning from the prior case, what follows is the factual and procedural posture of the current case.

C. The current case's factual summary.

The City enforced its housing code by seeking vacant building monitoring fees when Sisley rental houses were vacant and unsecured.

In October 2006, the City issued a NOV that stated the house at 6418 Brooklyn Avenue N.E. (the "Brooklyn house") was unfit for habitation.[15] The City also determined the vacant house was open to entry and sent the Sisleys a letter that stated the house was being placed on vacant building monitoring status and they would be charged vacant building monitoring

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[12] CP 514.

[13] CP 511-523, *City of Seattle v. Sisley*, Court of Appeals No. 65226-5-1 Order on Petitions for Discretionary Review (2010).

[14] CP at 528.

[15] CP 261.

fees as the code provides.[16] The City then filed a municipal court case to abate the house when the Sisleys failed to repair it. Nearly a year later, the Sisleys entered into a stipulated judgment where the Sisleys would repair or demolish the Brooklyn house and the judgment was a "*final resolution of the unfit building case*"—including their counterclaim that a Director's order directing that the house be closed to entry should have been issued.[17]

In a separate enforcement matter, in March 2008, the City issued a NOV that stated the house at 1322 Northeast 65th Street (the "1322 house") was unfit for habitation.[18] The Sisleys stipulated to repairing or demolishing the house in the same judgment entered in the Brooklyn house case. Eventually, the Sisleys demolished the Brooklyn and 1322 houses.[19]

In November 2011, Jill Vanneman, a Department employee,[20] erroneously determined that City code required a NOV be issued before vacant building monitoring fees could be sought.[21] Based on this, the City wrote the

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[16] CP 276.

[17] CP 254-257 (emphasis added).

[18] CP 258.

[19] CP 206-207, Declaration of Patrick Downs at 2:3-3:15. There are two properties in the record, 6418 Brooklyn Avenue N.E. and 1322 N.E. 65th Street that were subject to vacant building monitoring fees. CP 250-318; CP 818-842.

[20] The Sisleys describe Jill Vanneman as "the City's lawyer responsible for administering the VBM program." Petition for Review at 6. Ms. Vanneman is not employed by the Law Department and is not responsible for administering the VBM program. She is a Code Compliance Coordinator for the Department. CP 1151.

[21] CP 159-160, Declaration of Jill Vanneman.

Sisleys telling them the monitoring fees for the Brooklyn house would be reversed.[22] Then the City told the Sisleys the monitoring fees for the Brooklyn and the 1322 houses would be waived,[23] and issued invoices to the Sisleys indicating the fees had been reversed.[24] The Sisleys never paid vacant building monitoring fees.[25]

The City enforced its housing code by seeking tenant relocation assistance when Sisley rental houses were unsafe for habitation.

Turning to other Sisley code violations, the Sisleys have entered into agreements with various individuals they call "tenants" who act as managers for their rental houses.[26] These "tenants" include Anthony Narancic who lives in his West Seattle home,[27] who failed to pay thousands of dollars in power bills owing on Sisley rental houses,[28] and who signed declarations filed in the prior case stating he repaired the 6515 and 6317 houses—an

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[22] CP 313.

[23] CP 318.

[24] CP 207-208, Declaration of Patrick Downs at 3:15-4:9.

[25] CP 476, Declaration of Patrick Downs, Exhibit 42, Deposition of Hugh Sisley at 91:3-6.

[26] CP 467, Deposition of Hugh Sisley (Keith Gilbert a "tenant" in 10 houses); CP 467-468 (Sisleys' daughter is a "tenant" in 10 houses); CP 469 (Anthony Narancic a "tenant" in 10 houses).

[27] Verbatim Transcript of Proceedings, November 2, 2012 at 66:14-17.

[28] CP 475, Deposition of Hugh Sisley (Keith Gilbert responsible for power bills for seven Sisley houses); CP 482-488, Deposition of Hugh Sisley (unpaid power bills from seven Gilbert-managed houses totaling $15,486.43); and CP 489-491, Deposition of Hugh Sisley (Narancic responsible for $12,625.94 in unpaid power bills).

assertion the jury rejected in the current case. After power was disconnected to Sisley rental houses for lack of payment, the City issued orders requiring the Sisleys reconnect the power as required by state and City code.[29]

Besides houses without power, Sisley houses had no heat or water, defective plumbing and wiring, broken windows, missing smoke detectors, holes in the floors and walls, and ants and cockroaches.[30] Because of the lack of power and other housing defects, the City ordered the Sisleys pay to their tenants—"guests" as the Sisleys call the people who pay rent monthly and live in the houses[31]—tenant relocation assistance that allows tenants to vacate the unsafe Sisley rental houses and relocate.[32] In response, the Sisleys argued Mr. Narancic was the "tenant" and the Sisleys had no control over the housing code violations that led to the orders.[33]

Although the City filed four cases against the Sisleys in municipal court for failing to pay tenant relocation assistance, the City exercised prosecutorial discretion and dismissed three of the cases. The City carried one case forward

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[29] CP 1419-1420. *See also,* RCW 59.18.060(10); SMC 22.206.160.A; SMC 22.206.050.F.

[30] CP 208, Declaration of Patrick Downs at 4:10-4:16

[31] CP 497, Declaration of Patrick Downs, Exhibit 44, Deposition of Anthony Narancic at 25:17-24.

[32] Seattle Municipal Code (SMC) Chapter 22.210.

[33] CP 209, Declaration of Patrick Downs at 5:2-5:4.

that has been upheld by the municipal and superior courts, with review denied by the court of appeals.[34] The Sisleys never paid tenant relocation assistance fees.[35]

The City issued a certificate of release after the Sisley house was demolished.

In August 2012, the City issued a certificate of release after the Sisleys demolished the 6317 house. The certificate of release stated that it released the Sisleys from the "requirements of the NOV."[36] The requirements of the NOV were to correct housing code violations at the property.[37] The certificate of release did not release the Sisleys from penalties imposed by the judgment when it was the judgment that imposed the penalties.

City staff also confirmed the certificate of release only released the requirement to correct the violations identified in the NOV. Diane Davis stated a certificate of release is used to clear title so property can be transferred,[38] and further explained that after a certificate of release has

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[34] CP 435-440, Declaration of Patrick Downs, *Sisley v. Seattle*, Court of Appeals No. 67870-1-1 Order Denying Discretionary Review.

[35] CP 477, Declaration of Patrick Downs, Exhibit 42, Deposition of Hugh Sisley at 96:18-21.

[36] CP 1190-1191, Plaintiff's Motion Seeking Enforcement of City's Procedures, Ex. A.

[37] CP 1454-1458, Housing Code Notice of Violation 1016356; 6317 – 15th Ave. NE.

[38] CP 1034, Deposition of Diane Davis at 37:12-23.

been issued the fines accrued "up to the point of the release" would still be in effect.[39]

D. The current case's procedural summary.

In May 2010, the Sisleys filed their complaint in King County Superior Court.[40] In August 2012, the Sisleys filed a motion "seeking enforcement of defendant's procedures for confirming compliance with the defendant's housing code."[41] The purpose of the motion was to obtain a determination that the Sisleys repaired the 6515 and 6317 houses and tolled civil penalties, and that the City released civil penalties when it issued a certificate of release after the 6317 house was demolished.[42]

In September 2012, the trial court dismissed five Sisley claims: the state Constitution tort claims, the tenant relocation assistance and vacant building monitoring housing-code-enforcement tort claims, the tortious interference with business expectations claim, the excessive penalty claim, and the improper water-supply tort claim.[43] The court determined that the certificate of release did not release accrued civil penalties associated with the 6317 house, but it ended future penalties accruing after the house was

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[39] CP 1034, Deposition of Diane Davis at 40:9-10.
[40] CP 105-111.
[41] CP 1178-1188
[42] *Id.*
[43] CP 1419-1420.

demolished.[44] The court also determined that the issues of whether the Sisleys brought the houses into compliance after the municipal court judgments were entered, and whether a breach of contract occurred when the City sought payment for the unpaid Sisley rental house power bills by transferring the bills to the Sisleys, should be heard by the jury.[45]

In October 2012, the Sisleys filed a second amended complaint that included breach of contract and breach of the implied duty of good faith and fair dealing claims.[46] These claims served as the basis for the jury determining if the City improperly sought to collect unpaid rental house power bills from the Sisleys.[47]

In November 2012, the jury determined the Sisleys never brought the 6515 house into compliance,[48] and did not bring the 6317 house into compliance before August 2012 when the Department issued the certificate of release after the house was demolished.[49] The jury also determined that the City did not breach its contract with the Sisleys when it sought to collect unpaid power bills by transferring the bills to the Sisleys' account.[50]

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[44] *Id.*
[45] *Id.*
[46] CP 1489-1494.
[47] CP 2143; CP 2146; CP 2147.
[48] CP 2142; CP 2157.
[49] CP 2142; CP 2157
[50] CP 2187.

The Sisleys did not appeal the verdict to the court of appeals. Instead, they appealed the claims that were dismissed on summary judgment.

VI. ARGUMENT

A. The Sisleys' constitutional violation tort claims do not raise a significant question of law or an issue of substantial public interest.

The court of appeals has repeatedly held that a tort cause of action for constitutional violations only exists if augmentative legislation has been adopted.[51] The decision in the current case reached the same result: "Because the Sisleys identified no augmentative legislation supporting their claims for money damages, this claim fails."[52]

The law addressing this claim is settled and a significant question of law does not arise. And in order for an issue on appeal to meet the "substantial public interest" test, the petitioner "should point any evidence in the record or information capable of judicial notice which demonstrates that the issue is reoccurring in nature or impacts a large number of persons."[53] The Sisleys

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[51] *Reid v. Pierce County*, 136 Wn.2d 195, 213-14, 961 P.2d 333 (1998); *Blinka v. WSBA*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001), *review denied*, 146 Wn.2d 1021 (2002); *Hannum v. Dept. of Licensing*, 144 Wn. App. 354, 362, 181 P.3d 915 (2008).

[52] *Hugh K. Sisley and Martha E. Sisley v. City of Seattle*, Nos. 69827-3-I and 69828-1-I (consolidated cases) (February 3, 2014), p. 4.

[53] WA App. Prac. Desk Book, Vol.II, § 27.11 at p. 27-11 (3rd ed. 2005).

failed to point to evidence in the record that demonstrates the issues are reoccurring in nature or impact a large number of persons.

Nor is the Sisleys' argument that a review may determine that a claim under the Washington Constitution may provide more extensive relief than a 42 U.S.C § 1983 action relevant,[54] when the Sisleys dismissed their § 1983 claim after the City removed the matter to the federal court.

B. The Sisleys' claim that the penalties imposed in the prior case are excessive does not raise a significant question of law or an issue of substantial public interest.

The prior case established the civil penalties that the Sisleys complain are excessive,[55] was previously litigated to a final judgment.[56] And this Court previously rejected the Sisleys' claim that the penalties imposed for their refusal to bring the rental houses into compliance constitute excessive penalties when it rejected the Sisleys' petition for review in the prior case:

> And the evidence showed multiple serious and uncorrected violations, some of which endangered tenants' lives. The Court of Appeals did not commit obvious or probable error in denying review of whether the fines here were excessive.[57]

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[54] Petition for Review at 11.

[55] CP 234-239, *City of Seattle v. Sisley*, Seattle Municipal Court Civil Case No. 08-100; CP 240-245, *City of Seattle v. Sisley*, Seattle Municipal Court Civil Case No. 09-024.

[56] CP at 511-529. Petitioners order for discretionary review and Supreme Court denying review.

[57] CP at 528.

Nothing but the Sisleys' continuing refusal to correct the violations has occurred since this Court previously rejected the same argument in the prior case. Had the Sisleys repaired the houses and requested City inspections they could have stopped the penalties they claim are excessive.

C. The Sisleys' claim that the public duty doctrine does not apply to City zoning and housing enforcement does not raise an issue of substantial public interest.

It is also settled law that inspecting and enforcing zoning, and housing and building maintenance codes, are governmental functions.[58] Mr. Sisleys' recounting of facts where the City sought then waived vacant building monitoring fees does not turn the City's enforcement actions into a nongovernmental activity subject to the public duty doctrine or create an issue of substantial public interest.[59] Nor does Mr. Sisley's unsupported statement that "the City made numerous promises to Mr. and Mrs. Sisley over the years" create to an issue of substantial public importance. Especially when Mr. Sisley's declaration is silent on what promises the City made to them.[60]

An issue of substantial public interest does not arise when the City's enforcement of its zoning and housing codes is subject to the public

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[58] *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1998); *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 482, 513 P.2d 80 (1973).
[59] Petition for Review at 16.
[60] CP 556-561.

duty doctrine, and the Sisleys have failed to demonstrate that the issue is reoccurring in nature or impacts a large number of persons."[61]

D. The determination that the certificate of release did not release the Sisleys from civil penalty liability is not an issue of substantial public interest.

The plain language of the release did not release the Sisleys from civil penalty liability that accrued up to the date the 6317 house was demolished; and the testimony of Diane Davis confirmed that the release did not release the accrued civil penalties.[62]

And the fact that the City issued a NOV for the housing code violations associated with the 6317 house then issued a certificate of release when the house was demolished does not raise an issue of substantial public interest when the Sisleys have again failed to demonstrate that the issue is reoccurring in nature or impacts a large number of persons."[63] Moreover, the fact that the Department issued the release at the Sisleys' request does not create an issue of substantial public interest.

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[61] WA App. Prac. Desk Book, Vol.II, § 27.11 at p. 27-11 (3rd ed. 2005).
[62] CP 1034, Deposition of Diane Davis at 37:12-23; 40:9-10.
[63] WA App. Prac. Desk Book, Vol.II, § 27.11 at p. 27-11 (3rd ed. 2005).

VII. CONCLUSION

The Sisleys failed to raise an issue that is subject to review under RAP 13.4(b) and the City respectfully requests that the petition for review be denied.

DATED this 4th day of April, 2014.

PETER S. HOLMES
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CERTIFICATE OF SERVICE

I certify that on this date, I sent a copy of the City's Answer to Petition for Review via messenger to the following party:

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Dated this 4th day of April, 2014.

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Thank you.

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