NO. 91527-0
COURT OF APPEALS NO. 42988-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF BONNEY LAKE,

Respondent,

v.

ROBERT KANANY,

Petitioner.

CITY'S ANSWER TO KANANY'S PETITION FOR REVIEW

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I. INTRODUCTION

Review of this case is not warranted under RAP 13.4(b). Division Two of the Court of Appeals issued a thorough, well-reasoned opinion which does not conflict with any precedent of this Court or the Court of Appeals. This case does not involve significant constitutional questions, nor any issue of substantial public interest.

The City of Bonney Lake (City) brought suit against Robert Kanany (Kanany) to collect unpaid fines for civil violations of the Bonney Lake Municipal Code (BLMC). Kanany appealed the trial court's denial of his motion for summary judgment and its grant of the summary judgment to the City. Kanany's main contention was that the procedural protections afforded by Title 14 of the BLMC were inadequate and deprived him of due process. In the published portion of its opinion, the Court of Appeals held that the City's municipal code "provided Kanany with a full opportunity to appeal the notices of violation and therefore did not deprive him of due process." *City of Bonney Lake v. Kanany*, ___ Wn. App. ___, 340 P.3d 965 (Wn. App. 2014); Appendix to Petition for Review (Appendix) at 1. Contrary to Kanany's assertions, this holding does not conflict with this Court's case law.

The Court of Appeals addressed Kanany's remaining contentions in the unpublished portion of its opinion. None of these remaining arguments involves issues of significance, and this Court should deny Kanany's motion for discretionary review.

II. ISSUE PRESENTED

Whether Kanany has failed to establish that review of the Court of Appeals decision is warranted under RAP 13.4(b).

III. STATEMENT OF THE CASE

In the summer of 2009, the City received a complaint of a violation of the municipal code on a residential rental property Kanany owned at 7513 191st Avenue East, Bonney Lake, Washington, 98391 (the Property). CP 271. The complaint alleged that Kanany was permitting the space above the detached garage on the Property to be occupied, and was therefore maintaining an impermissible accessory dwelling unit (ADU) on the same lot as a duplex. *Id.*[1] The municipal code prohibits an ADU in conjunction with a duplex or multi-family dwelling unit. BLMC 18.22.090(C)(1). The

[1] The City's municipal code defines an ADU as "a second dwelling unit either in or added to an existing single-family detached dwelling, or in a separate structure on the same lot as the primary dwelling for use as a complete, independent living facility with provision within the accessory unit for cooking, eating, sanitation, sleeping and entry separate from that of the main dwelling." BLMC 18.04.010; CP 271.

City investigated the complaint and determined Kanany was maintaining an illegal ADU. CP 271.

The City initially sought voluntary correction of the code violation pursuant to BLMC 14.130.060. CP 271-72. On August 5, 2009, the City's Code Enforcement Officer sent a letter to Kanany explaining the City's determination that the ADU violated the municipal code. CP 272; 275-76.

The letter offered Kanany 45 days to voluntarily correct the ADU violation and to arrange for a City inspection of the Property to confirm compliance. CP 275-76. Additionally, it explained the legal and financial repercussions if Kanany failed to voluntarily correct the code violation, including the issuance of a Notice of Civil Violation and the subsequent imposition of a $1,000 fine for each day of a continuing violation, pursuant to BLMC 14.130.030 and 14.130.070. CP 275.

Kanany refused to accept delivery of the letter by certified mail. CP 272. The City eventually served Kanany in person with the letter through a process server on or about September 29, 2009. CP 272; 279-80.

Kanany did not contact the City within 45 days of receipt of the letter, either to dispute the determination of a code violation or to arrange for an inspection of the Property to confirm voluntary compliance. CP 272. The City issued a Notice of Civil Violation pursuant to BLMC 14.130.070.

CP 272, 282-90. The Notice of Civil Violation informed Kanany of the City's determination that an illegal ADU was located on the Property. CP 272, 282-83. Additionally, the Notice of Civil Violation imposed a penalty of $1,000 fine for each day of continued violation under BLMC 14.130.030. CP 272, 282-83.

The City explained Kanany's appeal rights pursuant to BLMC 14.130.080 and 14.120.020. CP 284-90. Kanany had the right to appeal the City's determination of a code violation as well as the City's imposition of $1,000 fine per day penalty within 15 days of receipt of the Notice of Civil Violation. BLMC 14.130.080(A); BLMC 14.120.020. Absent an appeal, the code provides that the City's determination of a violation and imposition of penalty is final. BLMC 14.130.020; BLMC 14.130.030; BLMC 14.120.020(A). Copies of BLMC 14.130 and 14.120.020 were attached to the Notice of Civil Violation. CP 284-90.

The City heard nothing from Kanany in response to the Notice of Civil Violation and the imposition of the penalty. CP 273. Therefore, under the Code, City's determination of a violation and imposition of penalty were final.

The City filed a lawsuit in Pierce County Superior Court on January 8, 2010 to collect the penalty owed for the code violation. CP 1. Due

to a scrivener's error, the original complaint misidentified the Property's address. CP 1-6. The City filed a motion to amend the complaint to correct the address. CP 1-6. Kanany objected, contending that the City had failed to join the co-owner of the Property, Navid Kanani,[2] as a necessary party under CR 19 and the BLMC. CP 76-92.

After reviewing the motion to amend the complaint, the court requested additional briefing from the parties to address whether or not a recent Supreme Court case, *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), applied to the City's lawsuit. CP 93-174. Following supplemental briefing and argument, the trial court concluded that the City's civil enforcement system, Title 14 BLMC, was constitutional under *Post* and granted the City's motion to amend its complaint. CP 176. The court also rejected Mr. Kanany's argument that Navid was a necessary party under either CR 19 or the BLMC. CP 176.

The parties filed cross-motions for summary judgment. CP 177-269. The trial court denied Kanany's motion for summary judgment and entered judgment on behalf of the City. CP 349-50.

[2] To avoid confusion with Kanany's surname, and intending no disrespect, the City's Answer refers to Navid Kanani as "Navid."

Kanany appealed the trial court's orders granting the City's motion to amend the complaint and the order on cross-motions for summary judgment. CP 351. On appeal, Kanany argued that the City's civil enforcement system violated his procedural due process rights under *Post v. City of Tacoma*, that the City's failure to join a necessary party deprived the court of subject matter jurisdiction, that equitable estoppel precluded the City from asserting that the space over the garage was an ADU, and that the code provision Kanany violated was unenforceable because it conflicted with another code provision and the City's comprehensive plan. The Court of Appeals rejected all of Kanany's contentions in a thorough, well-reasoned, part-published opinion. *Kanany*, 340 P.3d 965.

Kanany filed a motion for reconsideration. Mot. Reconsideration (Jan. 14, 2015). After considering a response from the City, the Court of Appeals denied the motion for reconsideration. Order (March 12, 2015).[3]

[3] The Court of Appeals requested the City respond to the motion with respect to two issues: whether the court lacked subject matter jurisdiction due to the absence of an indispensable party, and whether, in his appeal, Kanany properly raised a challenge that the fines charged by the City were excessive. Order (Feb. 5, 2015). The City responded to those two issues. The City argued that while Kanany's briefing on the necessary party issue was insufficient, under well-established precedent, failure to join a necessary party does not deprive a superior court of jurisdiction. Response to Mot. for Reconsideration at 3-6 (Feb. 23, 2015). With respect to the excessive fines issue, the City argued that Kanany failed to identify the excessive fines issue in his brief, and that his brief's passing references to the fines as "excessive" was insufficient to warrant judicial consideration. Response to Mot. for Reconsideration at 8-10 (Feb. 23, 2015).

IV. ARGUMENT

The Court of Appeals' decision correctly applied the law and provides no basis for review by this Court. Under RAP 13.4(b), a petition for review may only be accepted by this Court if:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Review is not warranted under any of these four criteria. Accordingly, this Court should deny the petition for review.

A. The Court of Appeals' Decision does not Conflict with *Post v. City of Tacoma*

Kanany contends the relevant provisions of Title 14 of the BLMC deprived him of due process.[4] The Court of Appeals correctly concluded that the City's code did not deprive Kanany of due process, stating "Kanany was given the full opportunity to appeal all aspects of the notice of civil violation." *Kanany*, 340 P.3d at 970; Appendix at 10.

[4] Title 14 of the BLMC has been revised since the 2009 events underlying this lawsuit. Copies of the former municipal code provisions, BLMC 14.120 and BLMC 14.130, are in the record at CP 59-66.

Kanany contends that the Court of Appeals' decision in this case conflicts with this Court's decision in *Post*, 167 Wn.2d 300, warranting review under RAP 13.4(b)(1). The Court of Appeals discussed *Post* at length and concluded it was distinguishable, correctly applying this Court's precedent.

In *Post*, Tacoma found code violations on many of Paul Post's properties and assessed hundreds of thousands of dollars in civil penalties. 167 Wn.2d at 303. Tacoma's code provided that property owners were subject to civil penalties if they did not respond to an initial notice of civil violation, or if the violation was not corrected. The code called for a series of four successive, mandatory fines, which imposed between $125 and $250 each. *Id.* at 304-05. But under Tacoma's code, only the first of these four fines was subject to any appeal or review. *Id.* at 305. Further, after the first four fines were imposed, the code permitted city officials to assess fines every calendar day, and gave city officials discretion to impose these successive daily fines. The code afforded no procedure for review of these discretionary, daily fines. *Id.*

Post argued Tacoma's code violated his due process rights by providing no mechanism to challenge the subsequent fines. The Court agreed, concluding, "Where a local jurisdiction assesses civil penalties for

noncriminal violations of law but provides no opportunity for civil defendants to be heard, the fundamental due process right to an opportunity to be heard at a meaningful time is violated." *Id.* at 314 (emphasis added).

The Court reasoned that Tacoma's code only provided Post an opportunity to be heard on the first finding of violation and penalty, but Post had "no opportunity to bring potential errors to Tacoma's attention with regard to any subsequent findings or penalties." *Id.* at 313–14. The Court held, "[W]here local jurisdictions issue infractions (finding violations and assessing penalties), there must be some express procedure available by which citizens may bring errors to the attention of their government and thereby guard against the erroneous deprivation of their interests." *Id.* at 315.

Here, the City provided an express procedure for Kanany to appeal the Notice of Civil Violation and the daily fine imposed for continuing violation of the code. BLMC 14.130.080; BLMC 14.120.020. In the Notice of Civil Violation, the City informed Kanany that his Property was in violation of the code, that he had not responded during the 45 day voluntary compliance period the City afforded him, that a daily fine would be imposed for each continuing day of violation, and that he had 15 days to appeal. CP 57. As the Court of Appeals concluded,

> Kanany was given the full opportunity to appeal all aspects of the notice of civil violation, including the ongoing daily fine. That opportunity to appeal the entire assessment of fines was the step that was absent in *Post*. The absence of that opportunity, the absence of that safeguard against erroneous deprivation of property, was the flaw that led the court in *Post* to find a due process violation under *Mathews*. Here, that safeguard is fully present.

Kanany, 340 P.3d at 970.

Further, unlike *Post*, the daily fines were imposed here as part of a continuing violation, and were automatically imposed until the violation was remedied. As the Court of Appeals explained, unlike *Post*, here "there was nothing discretionary about the daily fines at issue. They were automatic, and Kanany had the full opportunity to appeal the continuing fines for his specific violation." *Kanany*, 340 P.3d at 970; Appendix at 9.

Kanany also contends that the Court of Appeals' decision wrongly limited the application of *Post* to actions brought under the Land Use Petition Act, Chapter 36.70C RCW. This is incorrect. The Court of Appeals merely noted that some of Kanany's citations to *Post* came from a portion of the opinion discussing a statutory argument involving LUPA, not the portion of the case addressing procedural due process. The Court of Appeals properly noted that portion of *Post* did not support Kanany's argument. *Kanany*, 340 P.3d at 970 n.4. While Kanany argues the hearing

examiner system is "incomplete," because a hearing examiner would not have jurisdiction to hear constitutional and equitable arguments against the fines imposed, Petition at 10–14, constitutional and equitable arguments can still be raised through appeals to state courts. BLMC 14.120.020(G); *Kanany*, 340 P.3d at 970 n.4; Appendix at 11 n.4.

B. Because Kanany Failed to Properly Raise an Argument Regarding Excessive Fines, That Issue Provides No Basis for This Court's Review

Kanany contends, as he did in his motion for reconsideration of the appellate decision in this case, that the Court of Appeals wrongly ignored his argument regarding excessive fines. But Kanany failed to adequately address the issue in his briefing.

Kanany did not clearly present an excessive fines violation as separate basis for reversal, distinct from his procedural due process argument. *See* Br. of Appellant at 23. In his formulation of the issues on appeal, Kanany did not identify a violation of Article 1, Section 14 of the Washington State Constitution. Br. of Appellant at 3; RAP 10.3(a)(4) (requiring appellants to identify assignments of error and issues pertaining to those errors). Instead, Kanany's briefing on appeal only discussed the amount of the fines in the context of arguing his procedural due process violation: he contended that given the interest at stake, the procedural

protections afforded by the City were insufficient. Br. of Appellant at 3 (identifying procedures as error in Issue No. 1), 22-25. Further, while Kanany's briefing mentioned Article 1, Section 14, the authority he cited regarding excessive fines was contained in a single footnote which merely states blackletter law and provides no analysis. *Id.* at 24 n.50.

Kanany insufficiently briefed this claimed constitutional violation, and failed to set it forth as a separate issue warranting reversal in his briefs. *See State v. Ladson*, 86 Wn. App. 822, 829, 939 P.2d 223 (1997) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)) ("Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'"); City's Response to Mot. for Reconsideration at 8-10 (Feb. 13, 2015). The Court of Appeals properly did not reach this issue. Appendix at 9 n.3 ("No issue is raised whether the total amount of the fines assessed is excessive as a remedial measure."). Kanany's belated attempts to more fully brief this issue, both in his motion for reconsideration and his petition for review, are an attempt to circumvent the rules of appellate procedure.

C. The Court of Appeals' Conclusion Regarding Subject Matter Jurisdiction Does Not Conflict With Other Appellate Decisions

Kanany contends that the superior court should have dismissed the City's suit because the City did not name Navid, the co-owner of the Property, as a co-defendant. Kanany contends this failure deprived the superior court of subject matter jurisdiction. Kanany's argument is contrary to this Court's decisions.

Preliminarily, the Court of Appeals concluded that Kanany's briefing on this issue was insufficient, and did not require judicial consideration. Appendix at 16 (Kanany "failed to provide sufficient argument or provide relevant authority sufficient to merit further judicial review."). This Court should agree, and need go no further in its inquiry.

Nonetheless, the Court of Appeals noted in a footnote that Kanany's argument misunderstood the nature of subject matter jurisdiction. Appendix at 16 n.7. The Court of Appeals stated, "a court's jurisdiction does not depend on the presence or absence of a party." Appendix at 16 n.7 (citing *Wimberly v. Caravello*, 136 Wn. App. 327, 333, 149 P.3d 402 (2006)). A superior court's subject matter jurisdiction is defined by the state constitution, and not, as Kanany contends, by statute, municipal code, or CR 19.

Superior courts have broad subject matter jurisdiction, encompassing all cases in which jurisdiction has not been vested exclusively in some other court. Appendix at 16 n. 7 (citing CONST. ART. IV, § 6)). The type of controversy determines whether a court has subject matter jurisdiction. "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011) (citation and quotation omitted). It is undisputed that jurisdiction over this type of controversy is not vested elsewhere.

This Court has stated that "[t]he indispensable party doctrine is not jurisdictional, but founded on equitable considerations." *Lindberg v. County of Kitsap*, 133 Wn.2d 729, 744-56, 948 P.2d 805 (1997). "[A] court's jurisdiction does not turn on the presence or absence of a party. Instead, failure to join [a party] affects only the court's authority over the absent party." *Saunders v. Meyers*, 175 Wn. App. 427, 306 P.3d 978 (2013). *See also Wimberly*, 136 Wn. App. at 334.

The case that Kanany relies on, *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 942, 206 P.3d 364 (2009), is no longer good law. *Spokane Airports* held that failure to join a party required by statute deprived the court of subject matter jurisdiction, relying on *Laffranchie v. Lim*, 146 Wn.

App. 376, 190 P.3d 97 (2008). But since issuing the *Laffranchie* decision, Division One has called the case "incorrectly reasoned," stating "it is incorrect to say that the court acquires subject matter jurisdiction from an action taken by a party or that it loses subject matter jurisdiction as a result of a party's failure to act." *MHM & F LLC v. Pryor*, 168 Wn. App. 451, 459–60, 277 P.3d 62 (2012). *See also ZDI Gaming, Inc. v. State ex re. Washington State Gambling Comm'n*, 173 Wn.2d 608, 616–18, 268 P.3d 929 (2012); *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 734, 250 P.3d 818 (2011)); *MHM & F*, 168 Wn. App. at 459 (citing *State v. Posey*, 174 Wn.2d 131, 272 P.3d 840, 842–45 (2012)).[5]

[5] Kanany's arguments that Navid is a necessary party under CR 19 and the BLMC likewise fail. While Kanany relies on BLMC 14.130.070 and .080, nothing in either of these provisions requires that the City issue a Notice of Civil Violation against all co-owners of a property. In fact, BLMC 14.130.020(B) explicitly permits enforcement of code violations against persons other than the owners. BLMC 14.130.020(B) (City may enforce code violation against owner or "any other responsible person."). Here, the City determined Kanany was the party responsible for the code violation. *See* Br. of Respondent at 17–18.

Further, CR 19(a)(2)(A) did not require the superior court to join Navid or dismiss the action. CR 19(a)(2)(A) provides that a person shall be joined if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may [] as a practical matter impair or impede his ability to protect that interest[.]" CR 19(a)(2)(A). Here, Navid's interest in the property was not impaired by the City's collection of fines from Kanany. The action did not concern title to jointly-owned property. BLMC 14.130.100 clearly states that a monetary penalty resulting from a code violation "constitutes a personal obligation of the person to whom the notice of civil violation is directed." BLMC 14.130.100. And under RCW 4.56.190, any judgment lien on the property would only affect Kanany's interest, not Navid's. RCW 4.56.190 ("If a judgment debtor owns real estate, subject to execution, jointly or in common with any other person, the judgment shall be a lien on the interest of the defendant only.").

D. The City's Municipal Code is Neither Inconsistent with State Law, Nor Provides a Basis for Granting Review Under RAP 13.4(b).

Kanany contends that the City's municipal code provision prohibiting accessory dwelling units on his property, BLMC 18.22.090(C)(1), is in direct conflict with other provisions of the code, the City's comprehensive plan, and the Growth Management Act, Chapter 36.70A RCW.

The Court of Appeals squarely addressed and rejected these contentions in the unpublished portion of its opinion. Appendix at 14–16. Former BLMC 18.16.020 is not in conflict with BLMC 18.22.090(C)(1): the former code provision provides that ADUs are permitted in the R-2 zone, but expressly states that this rule is subject to other provisions of the code. Former BLMC 18.16.020 (stating ADUs are permitted in the R-2 zone "subject to . . .other provisions and exceptions set forth in this code"). BLMC 18.22.090(C)(1) is just such a provision, stating that ADUs are not permitted on the same lot as a duplex. Likewise, Kanany establishes no inconsistency between the comprehensive plan and the municipal code, nor the Growth Management Act and the municipal code. Appendix at 15–16.

Further, these claimed errors do not involve issues of significant constitutional importance or public interest. Their significance is limited to this case.

V. CONCLUSION

This Court should deny Kanany's petition for review. The Court of Appeals' well-reasoned decision is not in conflict with any decision of this Court or the Court of Appeals. The various arguments addressed in the unpublished portion of the Court of Appeals' decision involve no significant constitutional issues, nor issues of substantial public interest. For these reasons, the City respectfully requests the Court deny the petition for review.

RESPECTFULLY SUBMITTED this 4th day of May, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent the City's Answer to Kanany's Petition for Review, to the following:

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Attached for filing is the **City's Answer to Kanany's Petition for Review**.

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