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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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44543-3-II

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

TOWN OF STEILACOOM,

Respondent,

v.

DOUGLAS MCLEAN,

Appellant.

REPLY BRIEF OF APPELLANT

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COMES now, the Appellant in Reply to The Brief of Respondent.

A. FACTUAL PREFACE

On October 4, 2012, the Town of Steilacoom brought its summary judgment motion contending that Appellant's actions were barred under a number of theories. CP 142 – 150. Steilacoom argued inter alia that the public duty doctrine barred Appellant's negligence actions, but mainly claimed that the contract claim was based upon an oral contract and therefore barred under a two year statute of limitations. Appellant provided affirmative proof of the written nature of the contract, as required under the Steilacoom Municipal Code, which went unchallenged in the underlying motion. CP 82 – 103. Additionally, the provision of the municipal code declaring the utilities service as a contract was provided to the trial court. CP 104 – 141.

On November 2, 2012, Steilacoom was granted judgment on the negligence claims, but not on the contract claim. CP 161-163.

At oral argument, the trial court succinctly set out

Appellant's claims as follows:

“Mr. McLean's allegation are that the Town of Steilacoom failed to maintain the water drainage system and not that the Town of Steilacoom was to basically prevent all the storm water or, for that matter, the rain from entering his property. He's not making that allegation. His allegation is pretty simple, and Mr. Thorsrud made it pretty clear, that the allegation is that the storm drain backed up and that storm

drain, as a result of not being maintained, backed up into Mr. McLean's property, and that's – that's the breach. The failure to maintain. So that's where the plaintiff is coming from in relation to the breach of contract claim.

As for the actual Public Duty Doctrine, it wasn't address because it seems inapplicable in this instance in that the plaintiff is not asking for the enforcement of any particular statute, only that the contract under which or the duties that are established under the statutory scheme here be adhered to under the contract claims.”

Verbatim Report of Proceedings, November 2, 2012, page 13, lines 5 – 24.

B. ARGUMENT

I. Steilacoom is estopped from challenging the existence of a contract between it and Appellant.

Respondent, the Town of Steilacoom, continues to challenge claim that no contract was created between Steilacoom and Appellants. Based upon the facts, assertions and admissions, the trial found differently.

“Basically, the timeframe in terms of – in terms of what's being discussed here is relatively correct. When Mr. McLean moved into his home at 21st and Westshore in Steilacoom, he went to the Town of Steilacoom, and that occurred in the January timeframe of 2007. He basically established his utility account which, in fact, according to their municipal code under 13.24.050 was a – was based upon a writing, and that writing was executed and thereafter the utilities were established.

Where we get the contract aspect is based upon the language contained within the municipal code, 13.24.050, and it appears that it has been conceded that it is a contract, but pointing to the actual language contained within the code, it is based upon a writing, and specifically at 13.24.030 Sub A, “Any person desiring to receive utility services from the

Town shall make application, therefore, upon a printed form to be furnished for that purpose.” And then later on the – in Sub C, “The contract shall take effect at the time the provision of utility services is initiated.”

So I think it’s pretty clear that we have a written contract, however it is characterized, whether it is – whether there was a negotiation that went back and forth, and according to the reply brief, it is an adhesion contract irrespective of the characterizations based upon a writing.

...

So I think it is pretty clear, just simply based upon what’s been submitted, especially through the municipal code and what isn’t in dispute at this juncture and this is, in terms of the contract, (1) it is a contract, whether it’s simply claimed for the establishment of an account and it’s based upon a writing.

Secondarily, when we look at the rest of the representations that are made by the Town of Steilacoom, the Town of Steilacoom maintains – which I think they are estopped at this point – or claims to maintain, and I think that’s the operative word in this case based upon the breach of contract.”

Verbatim Report of Proceedings, pgs. 11, line 3 – 13, line 4.

Appellant supplied sufficient proof, not just to establish a material dispute, but proved the existence of a written contract between himself and the Town of Steilacoom. Despite the trial court’s ruling and findings, Respondent attempts to call into question whether a contract exists in this case. There was no challenge that Appellant established an account for utilities with Steilacoom. There was no challenge that Appellant paid for services. Most importantly, there was no challenge, by Respondent, that it

made affirmative representations that it “maintains” its own utilities including drainage systems.

II. The Public Duty Doctrine is not applicable to contracts.

Appellant asserted in his opening brief that the Public Duty Doctrine does not apply to contracts in which municipalities enter into with its citizens. The argument is maintained in this Reply. To hold otherwise would fly in the face of established law regarding contracts to include promissory estoppel.

To obtain recovery in promissory estoppel, plaintiff must establish: "(1) a promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wash.2d 255, 259 n. 2, 616 P.2d 644 (1980) (quoting Corbit v. J.I. Case Co., 70 Wash.2d 522, 539, 424 P.2d 290 (1967)); see Restatement (Second) of Contracts § 90 (1981). Promissory estoppel requires the existence of a promise. Klinke, 94 Wash.2d at 259, 616 P.2d 644; Restatement (Second) of Contracts § 90. A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in

understanding that a commitment has been made." Restatement (Second) of Contracts § 2(1); see § 90 cmt. a (referring to promise definition in § 2).

All the elements of an express written contract have been established in this case. Additionally, the elements of promissory estoppel have also been established. As is clear from the case law cited in Appellant's opening brief, the Public Duty Doctrine does not bar contract claims.

C. CONCLUSION

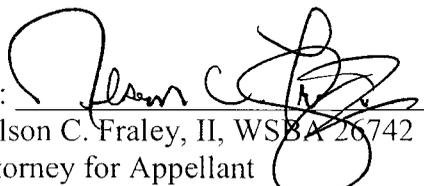
Based upon Appellant's submissions to this Court, it should be concluded that the Public Duty Doctrine does not work to bar contract claims. Respondents contracted with Appellant to maintain its storm water drainage system. Respondent breached that contract and Appellant was damaged.

For these reasons, this case should be remanded back to the trial court for a trial on the merits of the case.

Dated this 18th day of October, 2013.

Respectfully submitted,

FAUBION, REEDER, FRALEY
& COOK, PS

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DECLARATION OF SERVICE

I certify under penalty of perjury that on the 18th day of October 2013, I served a copy of this BRIEF OF APPELLANT to the individuals and via the method(s) designated below:

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