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O'Hagan v. Kelley, No. 26227-4-II, 2002 Wash. App. LEXIS 3192 (Wash. Ct. App. Dec. 31, 2002)

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line from the cistern. No breach of the easement terms occurred because Mr. McNally undertook such action to ensure continued use of the shared water system, a right he enjoyed under the easement agreement. Accordingly, Zadra was not entitled to damages for breach of the easement agreement and thus could not mitigate by drilling a separate well.

Still in effect, the easement agreement required forfeiture of interest in the water system if the users “secure or obtain a working well.” The court noted Zadra’s separately drilled well satisfied her use requirements of the water system; therefore, her duty to forfeit rights in the shared system was not excused.

Thus, the court affirmed the superior court’s holding in favor of the McNallys.

J. Reid Bumgarner

O’Hagan v. Kelley, No. 26227-4-II, 2002 Wash App. LEXIS 3192 (Wash. Ct. App. Dec. 31, 2002) (holding that to establish an injury from decreased water level due to an excavation project, plaintiff must establish the excavation project caused the decreased water level and not merely that the water level fell after they completed excavating).

The O’Hagans, the Kelleys, and the Hulberts jointly used water from Deer Creek in Pacific County. In 1993, Pacific County authorized the Pacific County Drainage District (“PCDD”) to excavate a drainage ditch from Deer Creek. During the excavation project, Brian Hulbert, the PCDD commissioner, selected the excavation site. After PCDD completed the excavation project, the water level fell below the O’Hagan’s culvert. Consequently, the O’Hagans sued Pacific County, PCDD, and the Hulberts for diverting water, negligently or intentionally, from the O’Hagans’ property. Additionally, the O’Hagans sued the Kelleys for moving their diversion point, which the O’Hagans claimed also diverted water from their property. The Pacific County Superior Court found the Kelleys had moved their diversion point and diverted water from the O’Hagan’s property. However, the superior court granted summary judgment to Pacific County and PCDD on the negligence claim, finding they did not owe the O’Hagans a special duty. The superior court also dismissed the remaining claims against Pacific County, PCDD, and the Hulberts, finding the O’Hagans did not establish the excavation altered the flow of Deer Creek. The O’Hagans appealed to the Washington Court of Appeals, challenging the superior court’s grant of summary judgment and dismissal.

The appellate court first addressed whether the superior court correctly concluded the excavation project did not cause the water level to fall. The superior court found the Deer Creek water level fell below the culvert after PCDD completed the excavation project. However, the superior court concluded that the Kelleys caused the

water level to fall by moving their diversion point, rather than finding the excavation project caused the lower water level. After evaluating this issue, the court found the superior court's conclusion consistent with the facts because the O'Hagans only established the water level fell after the excavation, not whether the excavation caused the water level to fall.

Next, the court determined whether the superior court correctly concluded the public duty doctrine applied and hence Pacific County and PCDD did not owe the O'Hagans a duty. Under the public duty doctrine, public officials are only liable for negligence if the plaintiff establishes an official breached a specific duty owed to them, rather than the public generally. However, there are three exceptions to this doctrine: (1) if the plaintiff establishes a special relationship; (2) if the public official fails to enforce a statute; or (3) if the government acts in a proprietary function. First, the court found the O'Hagans failed to establish a special relationship because they did not prove they relied on Pacific County's or PCDD's assurances. Secondly, although the O'Hagans asserted a violation of a takings and nuisance statute, the O'Hagans failed to establish the failure to enforce exception because they did not establish the legislature specifically charged Pacific County or PCDD with enforcing these statutes. Finally, the court concluded the O'Hagans failed to establish the excavation project was too small to benefit the public as a whole and hence, the proprietary function exception did not apply.

Accordingly, the court affirmed the superior court's finding because the O'Hagans did not establish the excavation project caused the lower water level and because the O'Hagans failed to establish an exception to the public duty doctrine.

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Uselmann v. Clark County, No. 27949-5-II, 2002 Wash. App. LEXIS 2930 (Wash. Ct. App. Nov. 22, 2002) (holding that so long as a fee is for the purpose of regulating storm water quality, is directly related to that regulation, and is allocated only to the regulation of storm water quality, the fee is regulatory in nature and not an unlawful tax).

Edwin Uselmann and Tom Mickle ("landowners") filed a complaint in the Superior Court of Clark County against Clark County ("County") challenging the validity of a County ordinance that assessed a fee on property with improvements valued over \$10,000 located in the unincorporated areas of the County. The County used the fee to regulate storm water quality, in compliance with its obligations under the federal Clean Water Act. The landowners sought a declaratory judgment that the fee was an unconstitutional tax. The trial court granted the County's cross-motion for summary judgment. The landowners appealed to the Washington Court of Appeals for Division Two.