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Uselmann v. Clark County, No. 27949-5-II, 2002 Wash. App. LEXIS 2930 (Wash. Ct. App. Nov. 22, 2002)

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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.

Heather Chamberlain

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 Miekle ("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.

On appeal the landowners maintained that the charge in question was a tax rather than a regulatory fee. The court of appeals applied three factors to determine whether the fee in question was regulatory or a tax. First, it reviewed whether the County's primary purpose to raise revenue with a tax, or to regulate with a regulatory fee. Second, it considered whether the County allocated the money collected only to the authorized regulatory purpose of regulating storm water quality. And third, it assessed whether there was a direct relationship between the fee charged by the County and the service received by those who paid the fee, or between the fee charged and the burden produced by the fee payer. Applying these factors to the charge in question, the court of appeals determined the fee was regulatory and not a tax.

The court of appeals found the language of the ordinance clear. The fee imposed would specifically fund activities related to the *regulation* of issues impacting storm water quality; any additional funds would be used *only* for the acquisition and construction of new storm water facilities. All the funds collected would be utilized solely in the unincorporated areas of Clark County. Because the charge met the criteria for a regulatory fee the court held it was not an impermissible tax, and affirmed the County's cross-motion for summary judgment.

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Lesaffre Yeast Corp. v. Milwaukee Metro. Sewerage Dist., Appeal No. 02-1685, 2003 Wisc. App. LEXIS 219 (Wis. Ct. App. Mar. 4, 2003) (holding summary judgment improper when issues of material fact remain regarding the source of well contamination, frequency of contamination, and knowledge that operation of a tunnel would result in ground water contamination).

Lesaffre Yeast Corporation ("Lesaffre") filed suit against the Milwaukee Metropolitan Sewerage District ("MMSD") in the Milwaukee County Court alleging inverse condemnation and nuisance. The court granted summary judgment in favor of MMSD because Lesaffre failed to satisfactorily plead all the elements necessary to constitute a taking in an inverse condemnation action. The court also found MMSD was entitled to governmental immunity on the nuisance cause of action. The Court of Appeals of Wisconsin, District One, reversed the judgment and remanded the case because disputed issues of material fact existed.

Lesaffre's Red Star Yeast and Products plant installed a 1700-foot deep, high-capacity production water supply well, in 1948, to draw water from two aquifers. MMSD constructed a tunnel within 660 feet of the Red Star well to relieve peak flow demand on an existing sewer system by collecting and storing storm water overflow and excess