69827-3 69827-3

Case No. 69827-3

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

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

Appellants/Cross-Respondents,

v.

CITY OF SEATTLE, a municipal corporation,

Respondent/Cross-Appellant.

APPELLANTS/CROSS RESPONDENTS SISLEY'S AMENDED OPENING BRIEF

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I. INTRODUCTION

This appeal examines the Respondent City of Seattle's deliberate disregard for Appellants Hugh and Martha Sisley's constitutional rights and the City's failure to follow its own protocol.

After years of dealing with the City's mistreatment, Mr. and Mrs. Sisley sued the City of Seattle. In particular, Mr. and Mrs. Sisley sued the City for breaching its agreement (as set forth in the Seattle Municipal Code) to bill the tenants of Mr. and Mrs. Sisley's rental properties rather than Mr. and Mrs. Sisley personally once it received notice regarding tenant occupancy. Mr. and Mrs. Sisley also sued the City because the City willfully failed to issue a "Certificate of Compliance" relating to two specific rental properties once Mr. and Mrs. Sisley corrected the violations listed in the City's initial "Notice of Violation" by completing repairs and/or closing the properties.

Unfortunately at trial, as a result of an adverse summary judgment ruling by the trial court, the jury was not presented with the additional evidence regarding Mr. and Mrs. Sisley's other constitutional and tort claims against the City nor evidence the "Certificate of Release" finally issued by the City as to one of the two rental properties discharged and extinguished all prior fines related to the corrections mandated by the City's initial "Notice of Violation."

This evidence should have been presented to the jury – Mr. and

Mrs. Sisley were entitled to show the jury that they were standing for their principles, for what they believed to be right, and refusing to be pushed around by the City. As it happened, the jury only received a snapshot of the overzealous inspections and mismanagement of their municipal service accounts by the City. On appeal this injustice should be corrected and, following *de novo* review, these claims should be reinstated for a full and impartial hearing by the trier of fact.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err by resolving material factual conflicts in the City's favor on summary judgment and dismissing Mr. and Mrs. Sisley's constitutional and tort claims, especially when the City subsequently testified as to disparate treatment of Mr. and Mrs. Sisley?
2. Did the trial court err by finding the Certificates of Release issued by the City did not release accrued civil penalties?

III. STATEMENT OF THE CASE

A. Introduction

This appeal involves litigation initiated by Appellants Hugh and Martha Sisley, which asserted that Respondent City of Seattle had

violated their constitutional rights and engaged in tortious conduct.[1] These assertions, in turn, were based on the City's improper and unlawful conduct in its dealings with Hugh and Martha Sisley.[2]

Mr. and Mrs. Sisley own multiple properties, including residential units, in the Roosevelt neighborhood of Seattle, many of them available for rent. Over the years, hundreds of people who otherwise could not afford to live in Seattle or in single family residences have lived in these homes. Not surprisingly, given the number of properties and residents, maintenance of the properties and strict compliance with the Housing and Building Sections of the Seattle Municipal Code (SMC) has presented a number of challenges over the years.

The gravamen of the claims against the City, however, is the City's conduct and the retaliatory actions the City has taken against Mr. and Mrs. Sisley. As outlined more fully in this Brief, for years the City has engaged in an escalating campaign of field investigations; a pattern of transferring, assessing, and imposing charges, penalties, and fees for City utility services consumed by others; and instigating

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[1] Respondent City of Seattle recently moved to dismiss its Cross Appeal. As a consequence, there is no need to address the claims asserted there.

[2] The evidentiary basis for the factual statements set forth in this Response is contained in the Declaration of Jeffrey Grant (Grant Decl.), and the accompanying 146 exhibits (CP 562-1177), and the Declaration of Hugh Sisley (CP 556-561).

litigation. Mr. and Mrs. Sisley have been subjected to a barrage of unwarranted transfer charges, notices that electrical power to their personal property would be terminated, and dunning letters and other forms of harassment from the City's outsourced, third-party debt collectors.

As earlier noted, some of the City's investigations have discovered violations of its Housing Code, a fact which is not particularly surprising given that the City has initiated hundreds of housing code enforcements or investigations concerning alleged violations of the Housing Code. It appears, however, that only one in every four investigations has uncovered a violation. The remaining cases, nearly three out of every four—in literally hundreds of its investigations, no violation was found to exist.

The two specific rental properties at issue in this case are 6515 16th Ave. N.E. and 6317 15th Ave. N.E., which were determined to have conditions in violation of the City's Housing Code. Mr. and Mrs. Sisley corrected the violations as mandated by the City's initial "Notice of Violation" by completing repairs and/or closing the properties. Nonetheless, the corrections proceeded to litigation, resulting in two judgments. The following is a brief history of the underlying judgments.

6317 15th Ave. N.E., Seattle, WA. On June 27, 2008, the City

issued a "Notice of Violation" regarding certain alleged violations of its Housing Code for the residential property located at 6317 15th Ave. N.E., Seattle, WA. Mr. and Mrs. Sisley timely responded by remedying the complaints and informed the City of their corrective actions by way of two sworn declarations confirming that the required repairs had been made.

On April 1, 2009, the City filed its Complaint for Civil Penalty. The non-jury trial occurred in August and September 2009. Judgment was entered in favor of the City on September 17, 2009, awarding $368,000 in civil penalties, continuing penalties of $1,000 per day, $246 in costs, and interest at 12% per annum.

At trial in this case, on the question of whether the City failed to issue the necessary "Certificate of Compliance" after Mr. and Mrs. Sisley completed all of the requirements of the initial "Notice of Violation," the jury concluded the City was not at fault for willfully failing to issue Certificates of Compliance once Mr. and Mrs. Sisley completed repairs on two specific rental properties as mandated by the City's initial "Notice of Violation."

However, the jury was not presented with the additional evidence regarding the "Certificate of Release" finally issued by the City as the property, which should have discharged and extinguished all prior fines related to the violations. This "Certificate of Release"

was issued on August 3, 2012 (roughly three months prior to trial) and specified that:

> The above described property [6317 15th Ave. N.E., Seattle, WA] is released from all requirements of the NOTICE OF VIOLATION of the Seattle Municipal Code 22.206 dated JUNE 27, 2008 for the following reasons:
>
> HOUSE WAS DEMOLISHED FOR REDEVELOPMENT.

As indicated in the "Certificate of Release," the structure on this property had been demolished earlier, as part of the greater development associated with the light rail construction in the area

6515 16th Ave. N.E., Seattle, WA. On March 31, 2008, the City issued a Notice of Violation regarding certain alleged violations of its Housing Code for the residential property located at 6515 16th Ave. N.E., Seattle, WA. Here again, Mr. and Mrs. Sisley timely responded by remedying the complaints and also closing the upper unit of the building, which had received the bulk of the complaints. Mr. and Mrs. Sisley informed the City of their corrective actions by written letter dated April 18, 2008, which included invoices from third-party vendors for the services rendered to correct the violations.

On October 16, 2008, the City filed its Complaint for Civil Penalty. The non-jury trial occurred in June and August 2009. Judgment was entered in favor of the City on September 3, 2009, awarding $247,400 in civil penalties, continuing penalties of $600 per

day, costs of $577.50, and interest at 12% per annum.

At trial in this case, the jury concluded the City was not at fault for willfully failing to issue Certificates of Compliance. But here again, the jury was not provided with the whole picture because the trial court erroneously granted summary judgment in the City's favor and dismissed Mr. and Mrs. Sisley's constitutional and tort claims.

Notwithstanding the City's efforts during this case to re-litigate past Housing Code violations related to the underlying judgments, this lawsuit represented Mr. and Mrs. Sisleys' effort to stop the City's campaign of harassment and to seek compensation for the damages they have suffered, in the form of legal expenses, serious aggravation, and frustrating attempts to deprive Mr. and Mrs. Sisley of important aspects of their constitutional freedoms.

As set forth in the Factual Summary below, the City improperly, repeatedly, and unlawfully (a) charged for City Light power Mr. and Mrs. Sisley did not use, (b) charged fees for monitoring buildings that stand empty, (c) imposed fines which are unconstitutionally excessive, (d) charged for "tenant relocation" costs that did not apply, and (e) charged for water services they did not request. The City's campaign has included spam-like billing practices, official warning notices, referrals to outsourced, third-party debt collectors, and threats to immediately terminate Mr. and Mrs.

Sisley's access to City services. Moreover, the City frequently denied or ignored Mr. and Mrs. Sisley's requests for information, documents, or answers. In many instances, the City acknowledged its errors, but only after significant delay and prodding. And, even when the City acknowledged its errors, it has been loath to provide accurate, written confirmation of its decisions.

B. Procedural History

Mr. and Mrs. Sisley filed their action in King County Superior Court on May 7, 2010.[3] Thereafter, the City removed the action to United States District Court, pursuant to 28 U.S.C. §§1441, 1446. After their federal law claims were voluntarily dismissed, the action was remanded back to King County Superior Court. Mr. and Mrs. Sisley filed their Amended Complaint on June 6, 2011, which was amended again on October 12, 2012, following the City's Motion for Summary Judgment. [4]

By way of written order dated September 18, 2012, the trial court granted, in part, the City's Motion for Summary Judgment.[5] Among other rulings, the trial court (1) dismissed Mr. and Mrs.

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[3] CP 105-111

[4] CP 1489-1484

[5] CP 1419-1422

Sisleys' state constitution based claims, (2) found that the public duty doctrine barred their claims relating to the City's housing and zoning enforcement actions, (3) dismissed their claim for tortious interference, (4) dismissed their claims based on excessive fines as precluded by the doctrine *res judicata*. The trial court's written order allowed Mr. and Mrs. Sisleys' claims for breach of contract and breach of the duty of good faith and fair dealing under the City's contract to provide power to proceed to trial.[6]

In the same written order dated September 18, 2012, the trial court denied Mr. and Mrs. Sisleys' Motion Seeking Enforcement of Defendant's Procedures for Confirming Compliance with Defendant's Housing Code, which related, in part, to whether a "Certificate of Release" is actually a release of the responsible party from all claims relevant to the initial "Notice of Violation". [7] The trial court found there were no genuine issues of material fact that the "Certificate of Release" issued by the City for 6317 15th Ave. NE did not release accrued civil penalties relating to the "Notice of Violation." [8] Therefore, the trial court concluded that the City did not release certain accrued civil penalties.

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[6] CP 1419-1422

[7] CP 1419-1422

[8] *Id.*

By way of written order, the trial court denied the City's Second Motion for Summary Judgment. [9]

The jury trial began on November 5, 2012, and concluded on November 9, 2012. The jury found the City did not breach its agreement with Mr. and Mrs. Sisley and the City was not at fault for failing to issue the Certificates of Compliance after the repairs had been completed. [10]

On January 8, 2012, the trial court denied Mr. and Mrs. Sisleys' Motion for New Trial. [11]

On January 2, 2012, Mr. and Mrs. Sisley sought review from this Court.

C. Factual Summary

Seattle City Light Charges Have Been Improperly Transferred

It appears that Seattle City Light (SCL) has the authority to transfer unpaid charges for its services used by a resident of

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[9] CP 1626-1627.

[10] CP 2153-2158.

[11] CP 2200.

residential property to the personal account of the property owner.[12] The property owner, however, may be protected from this practice if the property owner notifies SCL that the resident is responsible.

Mr. and Mrs. Sisley have consistently complied with this procedure. Nevertheless, the City has repeatedly transferred charges incurred on properties they own—even though the required notices were properly and timely provided.

Beginning in at least early 2005, Mr. and Mrs. Sisley have been under the siege of SCL's campaign to transfer charges for homes they own, but do not live in, to their personal account. For example, in February 2005, SCL transferred unpaid invoices for charges at seven separate properties, claiming that Mr. and Mrs. Sisley owed $15,486.43, an administrative action to which they promptly and properly objected. It appears that SCL has conceded that these transfers were done in error, although confirmation of this fact does not appear to exist.

In March 2009, SCL transferred $8,001.49 in charges for *different* properties Mr. and Mrs. Sisley owned to their individual

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[12] The factual basis for the discussion in this section is set forth in Grant Decl. Exhibits 1-65 (CP 577-766), the deposition testimony of Donna Morse (Grant Decl., Ex. 143) (CP 1095-1135), and the Declaration of Hugh Sisley (CP 556-561). The discussion involves properties located at 1321 NE 66th Street, 6511 16th Avenue NE, 6515 16th Avenue NE, 6321 15th Avenue NE, 1318 NE 65th Street, 6515 15 Avenue NE, 1408 NE 65th Street, and 6534 15th Avenue NE.

account. Objection was promptly and properly made. While waiting for a hearing on their appeal to be scheduled, Mr. and Mrs. Sisley were subjected to a "FINAL NOTICE" that referral to a collection agency would occur (regarding a transfer in the amount of $2,194.04), dunning letters from debt collection agencies hired by SCL, and a "Notice of Impending Shutoff" (that is, that the power to their personal residence would be shut off). During their efforts to correct this improper transfer, Mr. and Mrs. Sisley discovered that documents they had earlier given to SCL, identifying the responsible parties, were missing from the SCL's records. In June 2010, SCL notified Mr. and Mrs. Sisley that some, but not all, of the transfers and associated late fees had been had been removed from their individual account—and that they did not owe the disputed amounts. Unfortunately, the notification inaccurately understated the amount, in the City's favor, and a correction had to be issued. SCL failed to properly reflect the amount of its mistake on Mr. and Mrs. Sisleys' next bill, in July 2010, (the adjustment credit was listed as $7,474.41, when it should have been $7,628.82). This $154.41 error, in favor of SCL, was not corrected until September 2010.

There were other improper transfers in June 2009, when SCL transferred unpaid charges of $2,194.04. Mr. and Mrs. Sisley objected to these charges. The administrative SCL appeal hearing did

not occur for two years. While waiting for the hearing to be scheduled, Mr. and Mrs. Sisley were again subjected to additional dunning letters from SCL's debt collection agencies. After the hearing on August 23, 2011, Mr. and Mrs. Sisley were notified verbally that the transferred charges were removed from their individual account. While waiting for the written confirmation, an additional "FINAL NOTICE", threatening referral to a collection agency, was received. Despite repeated requests for written confirmation, SCL failed to do so until June 2012, nearly a year after issuing its verbal decision.

There is one additional transfer still pending which Mr. and Mrs. Sisley have protested. Although the amount transferred is reasonably modest, $234.32, it is unclear when SCL will address this transfer. In the interim, Mr. and Mrs. Sisley dread the next "FINAL NOTICE", dunning letter, or "Notice of Impending Shutoff" of power for their own residence.

SCL claims to have a process which allows its customers to appeal billing practices or decisions. It is a process, however, without apparent structure or effectiveness. There are no schedules or deadlines. Documents which are received by SCL are either lost, mis-filed, or thrown away. Customers who appeal are supposed to be protected from interim enforcement action—notices, debt collectors,

threats to turn off power—while their appeal is pending. These protections have been repeatedly ignored by SCL in its dealings with Mr. and Mrs. Sisley.

In this case, the abuses are particularly jarring as SCL has acknowledged in every circumstance that its transfers were done in error. Unfortunately, this has all occurred without compensation, apology, or reassurance that this campaign will end.

The City Has Improperly Charged Fees for Its Vacant Building Monitoring Program

The Seattle Municipal Code provides that fees may be charged when the Department of Planning and Development (DPD) monitors buildings which have been vacated and closed (Vacant Building Monitoring, or VBM, fees).[13]

Over the years, the City has repeatedly charged Mr. and Mrs. Sisley VBM fees for several different properties. They have timely and properly objected to these charges—as the properties should not have been subject to monitoring or to VBM fees.

[13] The factual basis for the discussion in this section is set forth in Grant Decl. Exhibits 66-90 (CP 767-842), the deposition testimony of Jill Vanneman (both as the City's CR 30(b)(6) designee and individually) (Grant Decl., Exs. 145 and 146) (CP 1148-1177), and the Declaration of Hugh Sisley (CP 556-561). The discussion involves properties located at 1509 NE 66th Street, 6418 Brooklyn Avenue NE, and 1322 NE 65th Street.

Despite their protests, the City continued to send statements and, at least at one point, referred the statements to a debt collection agency which, in turn, sent them dunning notices.

The City's attempts to charge VBM fees were in error. In fact, it has since been learned that the City's lawyer responsible for administering the VBM program concluded that there was no authority to charge these fees. In this case, the City now claims that this conclusion, reached in November 2007, was in error—that the fees were owed. It appears, however, that the City has no intention of pursuing the charges it claims are, or were, owed.

Later, the City again billed Mr. and Mrs. Sisley for additional VBM fees. Finally, in March 2010, in a dispute involving different charges, the City agreed that these charges should be "cleared" and issued "credit memos" which accomplished this task. Confirmation of this fact, however, occurred only after, and in response to, communications sent on behalf of Mr. and Mrs. Sisley.

The City Has Charged Unconstitutionally Excessive Fines

The most egregious examples of the City's unconstitutionally excessive fines concern two properties, 6317 15th Avenue NE and 6515 16th Avenue NE, which were found to have housing code

violations.[14] After receiving Notices of Violation, the required repairs were made at 6317 15th Avenue NE and 6515 16th Avenue NE was vacated and closed. Fines, at $1,600 per day, have continued to accrue, even while Mr. and Mrs. Sisley have continued to appeal the charges, because the City refuses to act on the evidence of compliance which Mr. and Mrs. Sisley have submitted.

Today, the total fines presently exceed two million dollars – more than $2,500,000, and the fines grow by $1,600 a day. These fines (including the underlying judgments of $247,400 and $368,000, which are largely fine-based) are grossly disproportionate to the nature of the violations and the costs of compliance.

The City Has Improperly Charged for "Tenant Relocation Expense"

The City has adopted a program to provide financial assistance to residents who are compelled to move immediately due to circumstances beyond their control (*e.g.*, demolition of their residence or certain housing code violations).[15] Under certain circumstances,

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[14] The factual basis for the discussion in this section is set forth in Grant Decl. Exhibits 105-120 (CP 879-951), the deposition testimony of Carol Anderson (Grant Decl., Ex. 138) (CP 1003-1022), and the Declaration of Hugh Sisley (CP 556-561). The discussion involves properties located at 6317 15th Avenue NE and 6515 16th Avenue NE.

[15] The factual basis for the discussion in this section is set forth in Grant Decl. Exhibits 121-136 (CP 952-999), the deposition testimony of James Metz (both as the City's CR 30(b)(6) designee and individually) (Grant Decl., Exs. 141 and 142) (CP 1050-1094), and the Declaration of Hugh Sisley (CP 556-561). The discussion involves property located at 6526 15th Avenue NE.

the City holds the property owner responsible for some or all of the expense. Laudable though the program may be, the City has, at times, improperly enforced this program against Mr. and Mrs. Sisley.

In particular, the City has demanded that Mr. and Mrs. Sisley pay "tenant relocation expense" for an individual who did not reside at the property and incurred no expense in re-locating. That the City's demand is improper is not particularly surprising, given that the program is administered without adequate procedural safeguards, deficiencies which allowed the City to gain the strategic advantage in its enforcement action.

The City Improperly Installed Water Services

In November 2006, after determining that one of their properties was vacant, Mr. and Mrs. Sisley cancelled the water service and requested that the meter be removed.[16] The City removed the water meter, as requested, on November 27, 2006, only to re-install a new water meter after concluding, incorrectly, that people were living at the property. Despite Mr. and Mrs. Sisleys' repeated demands, the City refused to remove the water meter and claimed that Mr. and Mrs. Sisley were responsible for the charges.

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[16] The factual basis for the discussion in this section is set forth in Grant Decl. Exhibits 91-104 (CP 843-878), the deposition testimony of Marcus Jackson (Grant Decl., Ex. 140) (CP 1040-1049), and the Declaration of Hugh Sisley (CP 556-561). The discussion involves property located at 6544 16th Avenue NE.

III. ARGUMENT

A. The trial court erred by resolving material factual conflicts in the City's favor on summary judgment and dismissing Mr. and Mrs. Sisley's constitutional and tort claims, especially when the City subsequently testified as to disparate treatment of Mr. and Mrs. Sisley.

The City applies two standards of practice when enforcing compliance with the Housing Code: the standard for most citizens and the standard for Hugh and Martha Sisley. Although the language of the Housing Code is reasonably static, the City has adopted a pattern or policy of fluid interpretation, application, and enforcement. Like Sisyphus in ancient Greek legend, Mr. and Mrs. Sisley have been, and continue to be, confronted with newer, more imaginative punishments by the City with compliance always placed just slightly out of their reach.

The constitutional and tort claims asserted by Mr. and Mrs. Sisley demonstrated the City's shifting interpretations and *ad hoc* method of implementing the Housing Code as it specifically related to them and their rental properties. Nonetheless, the trial court found Mr. and Mrs. Sisley's constitution-based claims were precluded based on the City's augmentative legislation and *res judicata* arguments and the tort-based claims were precluded by the public nuisance doctrine. These findings were erroneous under the CR 56 standard for summary

judgment. Therefore, following *de novo* review, the trial court should be reversed and these claims should be reinstated.

The Limitations of CR 56 Summary Judgment Motions

The procedural context concerning Motions for Summary Judgment is well known. Motions for Summary Judgment are not appropriate where a genuine issue of material fact exists or the moving party cannot demonstrate that she or he is entitled to judgment as a matter of law. The motion may not be used as a substitute for trial on disputed issues of fact. *Tran v. State Farm Fire & Cas. Co*., 136 Wn.2d 214, 961 P.2d 358 (1998). An order granting summary judgment is reviewed de novo, with the Court of Appeals engaging "in the same inquiry as the trial court." *Beaupre v. Pierce County,* 161 Wn.2d 568, 571, 166 P.3d 712 (2007).

Summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Beaupre,* 161 Wn. 2d at 571 (*citing* CR 56(c)). The City, as the moving party, should bear the burden of demonstrating both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Knox v. Microsoft Corp.,* 92 Wn.App. 204, 962 P.2d 839 (1998). If reasonable minds could reach two, or more, different conclusions from the evidence concerning whether the claimant should prevail on the claim, then

summary judgment is inappropriate. *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 959 P.2d 1104 (1998).

There Are Disputed Issues of Material Fact Regarding the Constitutional-Based Tort Claims

Privileges and Immunities Clause. Mr. and Mrs. Sisley are entitled to protection under the privileges and immunities clause of the Washington Constitution Article I, section 12, which provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."[17] The privileges and immunities clause is frequently broken into two categories: substantive due process and procedural due process. Mr. and Mrs. Sisley have been denied both and have raised factual questions regarding the same.

Mr. and Mrs. Sisley are entitled to protection against official government intrusion in the form of overzealous inspections and mismanagement of their municipal service accounts by government employees. In *Robinson, supra,* landowners filed a class action against the City of Seattle and its officials, alleging civil rights

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[17] Mr. and Mrs. Sisley need not be members of a protected class in order to recover on their claims. A class of one qualifies for equal protection. *Washington Public Employees Ass'n v. State*, 127 Wn.App. 254, 264, 110 P.3d 1154 (2005). *See also Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (*per curium*) (Equal protection claims based on a "class of one" were recognized by the United States Supreme Court).

violations under § 1983 and seeking refunds for payments made pursuant to invalid ordinance requiring landowners to pay a fee for or replace rental units before removing or demolishing them and imposing tenant relocation assistance obligations. *Robinson v. City of Seattle*, 119 Wn.2d 34, 63. On appeal, the landowners assigned error to the trial court's ruling dismissing their Section 1983 claims on summary judgment and argued they were entitled to prevail on the basis of substantive due process violations committed by the City.

The Supreme Court agreed, and held that:

> ...the Robinsons properly stated a cause of action under 42 U.S.C. § 1983, having alleged their constitutional rights (to substantive due process) were violated by "persons" (the City of Seattle and its officials) acting under color of law (the Housing Preservation Ordinance). Their claim is based in an impairment of constitutional property rights caused by the City of Seattle's unreasonable, continued enforcement of a land use regulation previously invalidated by a trial court. As genuine issues of material fact remain to be decided, the trial court erred in dismissing the Robinsons' civil rights action against the City on summary judgment. The liability of the City to the Robinsons under Section 1983, and to what degree possible civil rights damages are available, are matters to be determined in trial court.

Id. at 63.

As set forth above, it is a fact the City routinely deprives Mr. and Mrs. Sisley of their constitutionally afforded property rights by unreasonable, *ad hoc* enforcement of the SMC—frequently sending overzealous government inspectors to Mr. and Mrs. Sisley's rental

properties and continuously mismanaging their bills. Therefore, like the Robinsons, Mr. and Mrs. Sisley have properly stated a cause of action and should be allowed to present their case.

Procedural Due Process. Procedural due process issues arise when the law stipulates a particular course of action to follow. An individual's claim a right to a fair process in connection with his or her suffering a deprivation of life, liberty, or property can be broken down into three basic questions: has there been a deprivation of life, liberty, or property without due process of law? Chemerinksy, E., *Constitutional Law: Principals and Policies*, 3rd ed. (2006).

In this case, the violation of Mr. and Mrs. Sisleys' procedural due process rights by the City is illustrated by the numerous transfers of the unpaid SCL charges. The City has created a process, designed to protect the property owner and, if necessary, to allow the property owner to contest a transfer or other charge. No one has disputed that Mr. and Mrs. Sisley complied with the City's process. Although the City eventually acknowledged this compliance and reversed most of the charges, it delayed doing so for years—and even then failed to do the math accurately, further short-changing Mr. and Mrs. Sisley.[18] Moreover, notwithstanding Mr. and Mrs. Sisley's compliance, the

[18] The notion that there must administrative timely action is well established. For example, RCW 64.40.020 gives property owners a cause of action for damages when a governmental agency unreasonably delays issuing a permit.

City's procedure is defective because it has no timeline, no standard of proof, and no process to contest the outcome. The inadequate process created by the City allows it to delay resolving disputes. Finally, the City violated its own procedures when it failed to suspend collection efforts during the appeal process.

As a consequence of (a) the City's failure to timely acknowledge Mr. and Mrs. Sisley's compliance with the procedure, (b) the inherent defects in the procedure, and (c) the City's failure to follow its own procedure, the City's conduct constitutes a denial of procedural due process.

Equal Protection Clause. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr. Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). An equal protection claim requires proof that (1) the defendant intentionally treated the plaintiff differently, (2) from others similarly situated, and (3) without a rational basis for treating the plaintiff differently. *Gerhart v. Lake County*, 637 F.3d 1013 (9th Cir. 2011) *cert. denied*, 132 S. Ct. 249, 181 L. Ed. 2d 143 (U.S. 2011).

In *Gerhart*, the Ninth Circuit held the court erred when it held no genuine issues of material fact existed and the plaintiff's (Gerhart's) "class of one" claim failed as a matter of law. *Id*. at 1022.

The dispute arose as a result of the County's denial of Gerhart's application for a permit to construct an access road from his property to a county road. The Ninth Circuit found that:

> Gerhart presented considerable evidence that he was treated differently than other similarly situated property owners throughout the permit application process. Specifically, Gerhart's uncontradicted testimony was that at least ten other property owners on his block have built approaches to Juniper Shores Lane of which the Commissioners are aware, but for which the Commissioners have not required approach permits. This evidence strongly suggests that Gerhart was singled out when he was told to apply for an approach permit.
>
> The evidence also suggests that Gerhart was treated differently than other permit applicants after his application was submitted. The usual practice for dealing with concerns about an approach was for [the Road Superintendent] to work with the applicant to address the problem. With Gerhart's application, however, the Commissioners did not follow this usual procedure; instead Gerhart's application was put "on hold." The eventual denial of Gerhart's permit application was also an outlying occurrence, as described above.

Id. at 1022.

Similarly, in *Willowbrook, supra,* the Supreme Court ruled an equal protection violation occurred when the government intentionally and arbitrarily singled out one homeowner for more exacting requirements relating to the construction of their home. 528 U.S. at 564. In particular, the Village in that case refused to connect the homeowners, the Olechs, to the municipal water supply unless the Olechs granted the Village a 33-foot easement to widen the road on

which their house was located. Customarily, the Village only required a 15-foot easement. The Village deprived the Olechs of water for three months until the Village finally relented, acceded to the smaller easement, and hooked up the water. The Olechs brought suit claiming the Village had insisted on the large, nonstandard easement in retaliation for an earlier successful unrelated suit by the Olechs against it. The Olechs sought damages for the period of time they were without water. The Court granted a motion by the Village to dismiss the equal protection claim because the Olech's complaint did not allege an "orchestrated campaign of official harassment" motivated by "sheer malice." The Seventh Circuit rejected this "ill-will" requirement, reversed, and remanded for trial, holding that even a temporary deprivation is actionable. The Supreme Court affirmed.

The circumstances in *Turner v. Hallberg*, 04-276-KI, 2005 WL 2104999 (D. Or. Aug. 30, 2005) present a helpful analogy to this case. In *Turne*r, a homeowner complained the City of Portland targeted her home for numerous inspections for nonexistent or insignificant code violations. The homeowner claimed that when she could no longer withstand the City's harassment, she allowed her mortgage company to foreclose. A housing inspector purchased the home and resold it, reaping a 300 percent profit. Denying summary judgment to the City, the Court, in recognizing the validity of her claims, held that Ms.

Turner had asserted sufficient facts to demonstrate the inspector selectively enforced the housing code. The Court found the validity of the code violations was irrelevant:

> In this "class of one" claim, Turner [the homeowner] is entitled to the inference that she complained about a neighbor's home and it was never inspected. Although I agree that the evidence is minimal, it is enough to create a factual issue on whether her property was treated differently from other similarly situated properties. Moreover, the fact that Hallberg [inspector] told Turner that one way to resolve the violations without investing money to correct them was to sell the home, and then immediately purchased Turner's home after the foreclosure, raises a factual issue that his motive for citing her home was pretextual. This is the case even though there is no evidence that the citations were invalid.

Id. at 6. *See also Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004) (finding triable issue of fact as to whether board's executive officer was more strict in enforcing water quality laws against ski resort because of personal animosity precluded summary judgment); *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996) *overruled on other grounds by Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir.2007) (finding triable issue of fact as to whether the City targeted them for over-enforcement of the housing code because the City wanted to deflate the value of the plaintiffs' properties so they could be replaced with commercial development).

Finally, the Washington Supreme Court has held that an equal

protection claim was sufficiently stated by a plaintiff asserting his permit application was unfairly denied by a government agency when he stated the agency had granted permits to another association. *Postema v. Pollution Control Hearings Bd.,* 142 Wn.2d 68, 121-123, 11 P.3d 726 (2000).

In this case, when viewing all evidence in the light most favorable to Mr. and Mrs. Sisley, as required by CR 56, there are questions of fact sufficient to create a triable issue as to whether the City has treated Mr. and Mrs. Sisley differently from other property owners. Therefore, the trial court erred when it granted the City summary judgment on this issue and resolved material factual conflicts in the City's favor.

During its briefing and during the trial, the City has admitted that it subjects Mr. and Mrs. Sisley to more oversight and enforcement action than anyone else in the City. Specifically, Jill Vanneman testified that:

> THE COURT: Can a guest request a DPD inspection and therefore DPD legally be allowed to inspect the property?
>
> THE WITNESS: In the context of the Sisley properties, we do not recognize the term "guest." They are tenants. And when a tenant calls, we do inspections as long as they are giving use permission to enter their premises.[19]

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[19] Transcript of Record at p.81, ll: 18-23, Sisley v. City of Seattle

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This testimony further demonstrates the City applies the SMC differently to Mr. and Mrs. Sisley—a slap in the face to "equal justice under the law."

Privacy Clause. Property owners and landlords have an expectation and right to privacy. Washington courts have upheld the right to privacy in the face of intrusive administrative inspections:

> The Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. An *owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable*. This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes.

Seymour v. State, 152 Wn.App. 156, 165, 216 P.3d 1039 (2009) (*citing New York v. Burger,* 482 U.S. 691, 699-700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987)) (emphasis added).

Mr. and Mrs. Sisley have a privacy interest in the rental properties they own is further buttressed by the federal and state constitutions. It is well-established that warrantless searches and seizures are *per se* unreasonable. *State v. Houser,* 95 Wn. 2d 143, 149, 622 P.2d 1218, 1222 (1980) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). This rule of law applies to administrative searches. *See v. City of Seattle*, 387 U.S.

541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *Seattle v. See*, 67 Wn.2d 475, 408 P.2d 262 (1965). *See also Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (observing that administrative searches conducted by municipal building inspectors are significant intrusions on individual's Fourth Amendment interests, and such searches must be conducted with a warrant).

Therefore, one of the only ways for the City to lawfully inspect Mr. and Mrs. Sisleys' properties without a warrant is through consent. *See City of Seattle v. McCready,* 124 Wn.2d 300, 304, 877 P.2d 686 (1994) (holding that, in the absence of consent, a warrant is necessary to authorize an inspection of rented premises). A tenant's ability to consent to a search may somewhat circumscribe an owner's privacy interest, but it does not abolish the owner's privacy interest. The City has offered no authority to the contrary.

The basic function of the Fourth Amendment is to protect personal privacy. Moreover, it is "well established" that the protections of Article I, Section 7 of the Washington Constitution afford greater protection for the right to privacy than even the Fourth Amendment. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn. 2d 297, 306, 178 P.3d 995, 1001 (2008) (*citing State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002)); *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984*); City of Pasco v. Shaw*, 161 Wn.2d 450, 464, 166

P.3d 1157 (2007) (J. Chambers Concurrence ("[W]e should always be skeptical when any government seeks to invade any person's home, no matter how well meaning the exercise of police power may be.")). In this case, the trier of fact must determine whether, when taken as a whole, the inspections by the City were unreasonable and violated Mr. and Mrs. Sisleys' constitutional right to privacy.

The Augmentative Legislation Argument Presented By The City Does Not Excuse The City From Its Constitutional Violations

The trial court found that Mr. and Mrs. Sisley's "state-constitution based claims fail because augmentative legislation does not exist to support these claims." However, the constitutional claims asserted by Mr. and Mrs. Sisley should be recognized and remunerated.

State constitutional rights are the supreme law of the land. *See* Wn. Constitution, Article I, Section 2. The availability of a remedy for the violation of these rights cannot be overstated as it fundamental to the rule of law. Constitutional rights are only meaningful if they can be enforced. Sound public policy demands, and this Court should recognize, a state constitutional tort when the government violates an individual's constitutional rights. The factual circumstances in this case are illustrative, and support, this fundamental concept.

Moreover, Washington courts look to the federal constitution as they have concurrent jurisdiction in actions brought under 42 U.S.C. §

1983. *See Robinson v. City of Seattle*, 119 Wn.2d 34, 47, 830 P.2d 318 (1992) ("The gravamen of such a claim is that a person acting under the color of state law has deprived a person of a federal right."). Section 1983 was designed to afford plaintiffs a cause of action for constitutional violations by local government bodies and other state officials. In this case, Section 1983 allows an avenue of redress to Mr. and Mrs. Sisley who have been injured by the unconstitutional action of the City. Mr. and Mrs. Sisley have made the requisite showing for a Section 1983 action and it is for the trier of fact to resolve the factual questions.

Finally, it must be observed that the judiciary's responsibility to provide a remedy for the violation of constitutional rights reaches to the deepest roots of American jurisprudence.

Mr. and Mrs. Sisley have lost thousands of hours of time, incurred litigation costs, and suffered from the City's intimidating conduct as they have stood up for their rights.

The City Has Charged Unconstitutionally Excessive Fines

The Eighth Amendment of the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines

imposed, nor cruel and unusual punishments inflicted."[20] A fine is excessive if it is grossly disproportional to the gravity of the defendant's offense. *U.S. v. Bajakajian*, 524 U.S. 321 (1998); *State v. WWJ Corp.*, 138 Wn. 2d 595 (1999). Courts look at four factors in weighing the gravity of the defendant's offense: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused. *U.S. v. $100,348.00 in U.S. Currency*, 354 F. 3d 1110 (9th Cir. 2004) (analyzing the excessive fines discussion in *Bajakajian*).

Considering each of these factors in turn, it is clear that the City's fines, presently in excess of $2,500,000, are excessive. The nature and the extent of the "crime" are housing code violations (*e.g.*, an ant infestation, as found at one property) is not a grave offense nor connected to other illegal activities. Certainly, the amount of the fines, and their *per diem* increase, are grossly disproportionate to the revenue the properties could generate, as rentals, or their fair market value.

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[20] Although Article I, §14 of the Washington Constitution has an excessive fines clause, this memo analyzes the applicability of only the Eighth Amendment of the U.S. Constitution. Const. Art. I, §14. The Washington Court of Appeals suggests that state claims will not be considered unless a *Gunwall* analysis is included showing why the Washington and not federal provision should be used. *Tellevik v. 6717 100th Street S.W.*, 83 Wn.App. 366 (1996) (referring to *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 which requires a 6 factor test).

The Doctrine of Res Judicata Does Not Apply

As discussed above, it cannot be said, as a matter of law, that the fines at issue here are not constitutionally excessive. Nonetheless, the trial court found the constitutionally excessive fines could not be reviewed because final judgments on the merits had been reached in the underlying municipal cases regarding the fines (see brief history of the underlying judgments above).

The excessive penalty claim is not barred by the doctrines of claim preclusion because the issues and claims presented by this case are different from prior litigation concerning the rental properties.

Once entered, a judgment operates as a resolution of the issues in the case, and the parties are precluded from re-litigating issues resolved by the court. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 726 P.2d 1 (1986). That is, *res judicata* applies only when one seeks a retrial of the same cause of action. The notion is that "[i]nsofar as possible, there shall be one trial on merits with all issues fully and fairly presented to trial court at that time so court may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials." *Haslund,* 86 Wn. 2d at 614. Moreover, *res judicata* requires a final judgment on the merits. *Schoeman,* 106 Wn.2d at 859. Finally, the burden of proving claim preclusion rests on the City. *Meder v. CCME Corp.*, 7 Wn. App. 801, 807, 502 P.2d

1252 (1972) (citing *Rufener v. Scott*, 46 Wn.2d 240, 280 P.2d 253 (1955)); *Luisi Truck Lines v. Washington Utils. & Transp. Comm'n*, 72 Wn. 2d 887, 894, 435 P.2d 654, 659 (1967).

In *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818, 821 (2011), the Supreme Court held neither *res judicata* nor collateral estoppel barred the plaintiff's claims because an Idaho decision, which was used by the defendant to bolster its arguments, was not final. *See also Rufener v. Scott*, 46 Wn.2d 240, 280 P.2d 253 (1955) (holding the judgment was not *res judicata* because it was not determined in the prior case).

Similarly, in *Mellor v. Chamberlin*, 100 Wn. 2d 643, 673 P.2d 610, 612 (1983) the Supreme Court was asked to determine whether an action for breach of covenant of title is barred under the doctrine of *res judicata* by a prior lawsuit for misrepresentation, which was settled between the same parties and concerned the same sale of real property. The Court concluded *res judicata* did not apply:

> Although both lawsuits arose out of the same transaction (sale of property), their subject matter differed. The first lawsuit disputed whether the Chamberlins misrepresented the parking lot as part of the sale. The second questioned whether Buckman's claim of encroachment breached the covenant of title. Moreover, the two causes of action were distinct...Here, the "primary right" not to misrepresent a sale is distinguishable from the right to enforce a breach of a covenant of title. Moreover, evidence to show who owned the parking lot was not directly pertinent in deciding whether the building encroached a few inches.

Id. at 646 (citations omitted). *See also, St. Luke's Evangelical Lutheran Church v. Hales*, 13 Wn. App. 483, 534 P.2d 1379 (1975) (accord); *Harsin v. Oman*, 68 Wn. 281, 123 P. 1 (1912) (accord).

Finally, in *Luisi Truck Lines v. Washington Utilities and Transportation Commission*, 72 Wn. 2d 887, 435 P.2d 654 (1967) the Supreme Court considered whether an action for violation of a common carrier permit was *res judicata* in later litigation regarding the property rights created by the permit. The Court concluded the violation of the permit litigation could not decide – and was not material to – the property rights question:

> The only issue necessary for the commission to determine in 1961 was whether Luisi was innocent or guilty of the charge of hauling canned goods without a permit. The record establishes that neither the complaint filed against him in 1961 nor the notice of hearing given to him upon that complaint stated any other issue for determination and the decretal portion of the order entered did not indicate that any other adjudication had been made at the hearing.

Id. at 893-894. Noting the purpose of *res judicata* is not to deny a litigant his day in court, the Court approved the rule that "issues which are to material to the controversy, although determined, do not become res judicata." *Id.*

In this case, unlike the litigation over the propriety of the individual Housing Code violations, Mr. and Mrs. Sisley are challenging the City's aggressive, targeted enforcement of the

Housing Code as well as the mismanagement of Mr. and Mrs. Sisleys' municipal accounts and efforts to charge fees and fines *as a whole*. Therefore, although there are factual similarities with underlying judgments, the doctrine of *res judicata* should not apply. Like the challenged evidence in *Mellor,* the underlying judgments relating to Code violations are not directly pertinent to whether the City's ongoing actions violated their constitutional rights and/or breached duties in tort. Mr. and Mrs. Sisley could have accepted, rather than challenged, the Housing Code violations and this lawsuit would still be valid because the propriety of the violations is immaterial; it is only the existence of repetitive, overzealous inspections by the City matters. Just as the Supreme Court concluded in *Luisi,* the violation itself bears little on the substantive rights at issue.

The Supreme Court in *Mellor*, and its antecedents, also stressed that, if a claim has not fully ripened so that complete recovery was not possible in the first action, a second action permissible. Mr. and Mrs. Sisley have not earlier asserted claims raised in this case.

On a final note, it is critical to remember that *res judicata* is a judicially created doctrine. As a consequence, application of *res judicata* can be adjusted to accommodate the considerations necessary to achieve the final objective—administering justice. Courts have strongly cautioned that *res judicata* is not intended to deny an

individual his or her day in court. *Luisis,* 72 Wn. 2d at 896.

There Are Disputed Issues of Material Fact Regarding the Negligence-Based Tort Claims

The City negligently managed Mr. and Mrs. Sisleys' personal municipal account. "Negligence consists in the doing of an act which a reasonable man would not have done, or in the failure to do an act which a reasonable man would have done under similar circumstances." *Sys. Tank Lines v. Dixon*, 47 Wn. 2d 147, 151, 286 P.2d 704, 706 (1955).

A municipality has a duty to exercise reasonable care in the course of enforcing the Housing Code and operating the electrical utility and water services. As set forth above, the City has breached this duty. The City has been hounding Mr. and Mrs. Sisley for years and even assuming *arguendo* the more recent mismanagement of their municipal accounts is simply bureaucratic obstinacy or incompetence, Mr. and Mrs. Sisley have stated a cause of action for negligence because this perverse course of conduct is unreasonable and economically harmful to their business and livelihood.

The Public Duty Doctrine Does Not Apply or A Special Exception Exists Under These Circumstances

The work of local inspectors in administering building regulations, such as examining structures and issuing permits, helps prevent urban blight and improves the quality of life for all citizens.

However, negligence in performing these tasks may cause great harm to individual community members. In this case, Mr. and Mrs. Sisley have been injured by the City's negligence and tortious interference with their livelihood as property owners. The injury has been compounded by the mismanagement of their municipal accounts and assessments of other charges.

The public duty doctrine applies to governmental functions, but not to proprietary functions. *Borden v. City of Olympia,* 113 Wn. App. 359, 53 P.3d 1020 (2002) (trial court erred in granting summary judgment in favor of municipality on public duty theory; municipality was operating in a proprietary function while aiding and cooperating with private land developers).

Washington recognizes that the administration of electrical utilities and water services as proprietary functions. *See, e.g., Okeson v. City of Seattle,* 150 Wn.2d 540, 550, 78 P.3d 1279 (2003) (holding a city's electric utility serves a proprietary function of the government; the electric utility operates for the benefit of its customers, not the general public); *Russell v. City of Grandview*, 39 Wn.2d 551, 236 P.2d 1061 (1951) (holding city was liable for its negligence in operation of water system). .

The public duty doctrine cannot excuse the City's conduct in this case because while Building Code *inspections* may be a

governmental function,[21] Mr. and Mrs. Sisley have asserted negligence in the administration of the Housing Code, negligent mismanagement of their municipal accounts, and tortious interference with their livelihood.[22] The other methods employed by the City in its campaign against Mr. and Mrs. Sisley (such as the unilateral and improper imposition of VBM fees) are also propriety functions.

Moreover, there are several exceptions to the public duty doctrine. *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992). At least one exception is relevant here—the so-called special relationship exception.

A special relationship is created when (1) there is privity or direct contact between a public official and an injured plaintiff, (2) the public official gives express assurances, and (3) the plaintiff justifiably relies on those assurances. *Taylor v. Stevens County*, 111

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[21] County's building code inspections remained governmental, rather than proprietary, function and, thus, remained subject to public duty doctrine. *Moore v. Wayman*, 85 Wn. App. 710, 934 P.2d 707 (1997)

[22] The public duty doctrine does not apply to intentional tort claims. A person has a right to enjoy valid contractual agreements and to pursue business expectancies unmolested by wrongful and officious intermeddling. *Calbom v. Knudtzon*, 65 Wn. 2d 157, 162, 396 P.2d 148, 151 (1964). In this case, the City knew of Mr. and Mrs. Sisleys' business relationships involving their properties and has intentionally and wrongfully interfered with these relationships by engaging in repeated and protracted investigations that interrupted their business and scared away clients. Although the Court appeared to reject this claim by finding the City's enforcement of the SMC outweighed Mr. and Mrs. Sisley's "rental interest," no explanation was given for the apparent (and improper) balancing of governmental and personal interests.

Wn.2d 159, 166, 759 P.2d 447 (1988); *Moore v. Wayman,* 85 Wn.App. 710, 718, 934 P.2d 707, review denied, 133 Wn.2d 1019, 948 P.2d 387 (1997) (special relationship exception requires evidence of plaintiff's inquiries and County's specific assurances).

In *Sundberg v. Evans*, 78 Wn.App. 616, 897 P.2d 1285 (1995), for example, the trial court grant of summary judgment was reversed when the appellate court found a fact issue as to whether a county employee was in special relationship with the plaintiff, a purchaser of real property. Specifically, the Court held that "[b]ecause the parties disagree over what representations were made, we cannot decide as a matter of law whether a special relationship arose or not." *Id.* at 624. The plaintiff alleged the Secretary of the county Planning Department erroneously told him certain lots were zoned 'commercial, no restrictions.' *Id.* The Secretary, in contrast, said she would have told him the underlying zoning was recreational, but the plat designation was commercial. *Id.* Noting that a municipality may be liable under the special duty exception when a building inspector makes a negligent representation of zoning classification to the purchaser of property, the Court of Appeals reversed and remanded the case. *Id., citing Rogers v. City of Toppenish*, 23 Wn. App. 554, 596 P.2d 1096 (1979).

In this case, the City has made numerous promises to Mr. and

Mrs. Sisley over the years, but has retracted and delayed when asked to provide written confirmation. Despite the City's intransigence, Mr. and Mrs. Sisley presented declarations in opposition to summary judgment that should have been considered under the CR 56 standard and created a factual issue as to whether the City was in special relationship with Mr. and Mrs. Sisley.

B. The trial court erred by finding the Certificates of Release issued by the City did not release accrued civil penalties.

As discussed above, an interesting twist occurred during the course of litigation when the City issued a "Certificate of Release" as to one of two rental properties at issue, 6317 15th Ave. N.E, which was demolished as part of the ongoing neighborhood development.[23]

The City's creation and use of the "Certificate of Release" is significant because it is a "release". A "release" of course, is a valid and binding instrument, with particular meaning and legal ramifications. The meaning of the "Certificate of Release" may be determined and construed in the same manner as other release documents. *See* 16 Wash. Prac., Tort Law And Practice § 10.1 (3d ed.) ("In general, releases are contracts, and are governed by general

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[23] The "Certificate of Release" provides in full: "The above described property [6317 15th Ave. N.E., Seattle, WA] is released from all requirements of the NOTICE OF VIOLATION of the Seattle Municipal Code 22.206 dated JUNE 27, 2008 for the following reasons: HOUSE WAS DEMOLISHED FOR REDEVELOPMENT."

contract principles.").

The scope of a release is a question of law—the court (1) should consider the intent of the parties, (2) must ascertain the intent from reading the document as a whole, and (3) will not read an ambiguity into a document that is otherwise unambiguous. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn.App. 416, 420, 909 P.2d 1323 (1995) (*citing Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965)). Words must be given their ordinary, plain meaning. *Corbray v. Stevenson*, 98 Wn. 2d 410, 656 P.2d 473 (1982). Moreover, releases are strictly construed against the releaser—here, the City—and against the party who drafted the release—again, the City. 66 Am. Jur. 2d Release § 29. Finally, a general release releases all present claims:

> A general or unconditional release is the broadest form of release. Typically, by its terms it releases all claims, actions, and damages arising from or relating to a particular incident or event or relationship between the parties. The effect of a general release is to release any and all claims. Thus, where a contract provides that acceptance of the last payment shall operate as a release, the creditor cannot accept a check for the final payment and thereafter assert a right to recover additional costs, even though it states, in indorsing the check, that such rights are not waived.

29 Williston on Contracts § 73:4 (4th ed.).

Washington courts have held that a release generally extends to all matters within the parties' contemplation at the time it is executed.

Chadwick v. Nw. Airlines, Inc., 33 Wn. App. 297, 302, 654 P.2d 1215, 1217 (1982) *aff'd,* 100 Wash. 2d 221, 667 P.2d 1104 (1983) (citing *Bakamus v. Albert*, 1 Wn.2d 241, 95 P.2d 767 (1939) 0. *See also, e.g., Blide v. Rainier Mountaineering, Inc.,* 30 Wn. App. 571, 636 P.2d 492 (1981) (holding although wording of release did not specifically refer to "negligence," where hazard experienced in mountain climbing was within contemplation of release, failure to use word "negligence" did not render release ineffective).

Thus, in *Roberts v. Bechtel*, 74 Wn.App. 685, 875 P.2d 14 (1994) the Court of Appeals held that the release and stipulation in settlement of the claims precluded a claim for attorney fees. The instrument in that case stipulated the matter should be dismissed without costs. *Id.* at 687. Since attorney fees are considered costs of litigation, the court concluded that attorney fees were not allowed. *Id.*

In this case, the "Certificate of Release" simply and clearly states that Mr. and Mrs. Sisley, as the property owners, are "...released from all requirements of the NOTICE OF VIOLATION of the Seattle Municipal Code 22.206 dated JUNE 27, 2008." By the plain meaning of the document drafted by the City, the existing judgment and all of the accumulated fines have been discharged and extinguished. Therefore, the trial court erred as a matter of law when it found there was no genuine issue of material fact that accrued civil

penalties were not released by the "Certificate of Release."

IV. CONCLUSION

The trial court erred in granting summary judgment in favor of the City and dismissing Mr. and Mrs. Sisley's constitutional and tort claims and further erred in finding the "Certificate of Release" did not discharge and extinguished all prior fines. Therefore, as both a matter of law and public policy, Mr. and Mrs. Sisley ask this Court reverse the trial court and remand the case for further proceedings in accordance with this Court's ruling.

DATED this 28th day of June, 2013.

SKELLENGER BENDER, P.S.

s/ Jeffrey C. Grant
Jeffrey C. Grant, WSBA #11046
Attorneys for Appellants/Cross-Respondents
Hugh and Martha Sisley

Case No. 69827-3

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

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

Appellants,

v.

CITY OF SEATTLE, a municipal corporation,

Respondent.

ERRATA TO APPELLANTS' OPENING BRIEF

Jeffrey C. Grant
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1301 Fifth Avenue, Suite 3401
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Attorneys for Appellants
Hugh and Martha Sisley

On June 28, 2013, Appellants Mr. and Mrs. Sisley filed their Opening Brief. Footnote no. 21, contained on page 33, was inadvertently included. Mr. and Mrs. Sisley filed an Amended Opening Brief on July 15, 2013. The only change in the Amended Opening Brief was the removal of the inadvertently included footnote.

DATED this 22nd day of July, 2013.

SKELLENGER BENDER, P.S.

s/ Jeffrey C. Grant
Jeffrey C. Grant, WSBA #11046
Attorneys for Appellants
Hugh and Martha Sisley

Case No. 69827-3

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v.

CITY OF SEATTLE, a municipal corporation,

Respondent.

PROOF OF SERVICE OF APPELLANTS SISLEY'S ERRATA TO OPENING BRIEF

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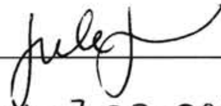
Hugh and Martha Sisley

2013 JUL 22 PM 4:20
COURT OF APPEALS DIV I
STATE OF WASHINGTON

Jule Sprenger declares, under penalty of perjury under the laws of the State of Washington, that the following is true.

1. I am employed by Skellenger Bender, P.S., counsel of record for Appellants Hugh and Martha Sisley in this action; a resident of the State of Washington; over the age of 18 years; and not a party to this action.

2. On July 22, 2013, I arranged for the filing of the Errata to Appellants Sisley's Opening Brief and this Proof of Service with the Clerk of the Court of Appeals, Division One; served Respondent City of Seattle by sending copies of the Errata to Appellants Sisley's Opening Brief and this Proof of Service to its attorney Patrick Downs via email to Patrick.Downs@seattle.gov.

Jule Sprenger 

Date and Place of Execution 7·22·2013 at Seattle, WA

Case No. 69827-3

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

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

Appellants/Cross-Respondents,

v.

CITY OF SEATTLE, a municipal corporation,

Respondent/Cross-Appellant.

PROOF OF SERVICE OF APPELLANTS/CROSS-RESPONDENTS SISLEY'S AMENDED OPENING BRIEF

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Hugh and Martha Sisley

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUL 15 PM 4:39

Kelli Huerta declares, under penalty of perjury under the laws of the State of Washington, that the following is true.

1. I am employed by Skellenger Bender, P.S., counsel of record for Appellants/Cross-Respondents Hugh and Martha Sisley in this action; a resident of the State of Washington; over the age of 18 years; and not a party to this action.

2. On July 15, 2013, I arranged for the filing of Appellants/Cross-Respondents Sisley's Opening Brief and this Proof of Service with the Clerk of the Court of Appeals, Division One; served Respondent/Cross-Appellant City of Seattle by sending copies of Appellants/Cross-Respondents Sisley's Amended Opening Brief and this Proof of Service to its attorney Patrick Downs via email to Patrick.Downs@seattle.gov.

Kelli Huerta

Date and Place of Execution 7/15/13 at Seattle, WA.

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