69827-3

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Case No. 69827-3

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

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.

REPLY BRIEF OF APPELLANTS

Jeffrey C. Grant
SKELLENGER BENDER, P.S.
1301 Fifth Avenue, Suite 3401
Seattle, Washington 98101-2605
(206) 623-6501

Attorneys for Appellants
Hugh and Martha Sisley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other Cases

Constitutional Provisions

Secondary Sources

Although the City of Seattle's (the City's) Response Brief raises a variety of arguments, objections, and contentions, Mr. and Mrs. Sisley have limited their Reply Brief to three issues which are central to this appeal.[1] *First*, the City released its claim for penalties which had been imposed against the property located at 6317 15th Avenue NE, Seattle, WA and the Judgment entered in corresponding litigation should be vacated. *Second*, the City's refusal to issue "Certificates of Compliance" with respect to Notices of Violation it had issued against properties located at 6515 16th Avenue NE, Seattle, WA and 6317 15th Avenue NE, Seattle, WA was contrary to the City's established practices with respect to Housing Code violations, but part of the City's campaign of unequal treatment levied at Mr. and Mrs. Sisley. *Third*, the penalties in question, in the millions of dollars, are, and continue to be, unconstitutionally excessive.

ARGUMENT

The Trial Court Improperly Granted Summary Judgment

The prism though which this appeal must decided is that of *de novo* review, as the trial court either decided the issues, either directly or indirectly, on summary judgment. Moreover, it must also be recognized

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[1] This silence is not the same as agreement, however. Rather, Mr. and Mrs. Sisley are prepared to allow the content of their Opening Brief serve as their rebuttal.

that the trial court's summary judgment orders unfairly and improperly altered the outcome of the trial, as the jury was precluded from considering certain evidence and claims.

The City's "Certificate of Release" Should Be Enforced

One of the City's Judgments at issue in the trial below (in the amount of $368,000), was based on Housing Code violations set forth in a Notice of Violation (NOV) issued by the City, following its inspection of the property located at 6317 15th Avenue NE. Trial Ex. Nos. 167, 112. The structure at this address was later demolished, as part of an ongoing neighborhood development. Following the demolition, the City issued a "Certificate of Release", and "released" Mr. and Mrs. Sisley "...from all requirements of the NOTICE OF VIOLATION of the Seattle Municipal Code 22.206 dated JUNE 27, 2008." Trial Ex. No. 149.

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 City's "Certificate of Release" should be determined and construed in the same manner as other contractual documents. *See* 16 Wash. Prac., Tort Law And Practice § 10.1 (3d ed.) ("In general, releases are contracts, and are governed by general contract principles."). This process is achieved by adhering to the well established

principles of contract interpretation.

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)).

The language of a release is to be given its ordinary, plain meaning. *Corbray v. Stevenson*, 98 Wn.2d 410, 656 P.2d 473 (1982). 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, the effect of a general release is to release 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.).

Not surprisingly, 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 (1982) *aff'd*, 100 Wn.2d 221, 667 P.2d 1104 (1983) (citing *Bakamus v. Albert*, 1 Wn.2d 241, 95 P.2d 767 (1939). *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).

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 were 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." Trial Ex. No. 149. The underlying Judgment in the amount of $368,000, which also provided for continuing

daily civil penalties in the amount of $1,000, was based on the Notice of Violation released in the "Certificate of Release." Trial Ex. Nos. 112, 149.

By the plain meaning of the document drafted by the City, the release, the existing judgment and all of the accumulated fines have been discharged and extinguished.

The failure of the trial court to so hold was in error.

The City Has Selectively Enforced Its Code Against Mr. and Mrs. Sisley

As noted in the Parties' briefing, the City's Housing Code inspection and compliance regime has both a compliance *procedure* and more informal set of *practices*. Provided that the procedures and practices are implemented fairly and equally, both sets of approaches allow the City the flexibility to enforce its Housing Code effectively and in a balanced way. As demonstrated below, however, the City's enforcement of its Housing Code against Mr. and Mrs. Sisley has not been implemented fairly and equally.

For example, the City's interaction with Anthony Narancic, a tenant of several properties owned by Mr. and Mrs. Sisley, is illustrative of the City's attitude of enforcement involving their properties. Contrary to the testimony of Mr. and Mrs. Sisley and Mr. Narancic, the City continues to contend that Mr. Narancic is their "property manager".

Respondent's Brief, at 2, 10. Although the significance of Mr. Narancic's legal status may be disputed, it is the fact of the City's refusal to accept the accurate nature of this relationship that is relevant to the issue of the City's uneven treatment.

Even more alarming is the fact that the City refuses to apply at least some of the express terms of its Housing Code as part of its campaign of enforcement actions against Mr. and Mrs. Sisley. The most concrete illustration of this conduct is the City's acknowledgment that, when it comes to Mr. and Mrs. Sisley, the City refuses to recognize the term "guest", one defined by its own Housing Code and adopted by Mr. and Mrs. Sisley.[2] This practice is of no small consequence, as "guests" and "tenants" have differing rights with respect to allowing third parties to enter the properties Mr. and Mrs. Sisley own. Not surprisingly, by unilaterally determining that there are only "tenants", and not "guests", the City is able to more broadly justify its unannounced and warrantless searches of these properties—an issue which has been central to many of the disputes between these Parties.

Moreover, the City has displayed an uneven, and unequal, use of the practice of issuing "Compliance in Lieu of Correction" or "Certificates of Compliance", practices which allow a property owner to avoid

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[2] *See* Testimony of Jill Vanneman. RP (11/8/2012) at 89: 17-25.

imposition of or accumulation of fines and penalties. In this case, the City refused to issue either document with respect to the properties located at 6515 16th Avenue NE, Seattle, WA and 6317 15th Avenue NE, Seattle, WA, despite the fact that the properties had been vacated and boarded (the procedures required by the City before issuing either).

The Fines At Issue Are Excessive

As noted, two of the properties at issue, 6515 16th Avenue NE, Seattle, WA and 6317 15th Avenue NE, Seattle, WA, were found to have conditions which were in violation of the City's Housing Code. After receiving Notices of Violation, the required repairs were made to the structure at 6317 15th Avenue NE and the structure at 6515 16th Avenue NE was vacated and closed.

Fines, at $1,600 per day for both properties, have continued to accrue. The total fines presently are more than $2,500,000. 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 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."[3] 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), and these are 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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[3] 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. This Court has suggested 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 Wn.2d 54, 720 P.2d 808 which requires a 6 factor test).

CONCLUSION

It is respectfully requested, therefore, that this Court reverse the trial court, vacate the Judgment, and remand the case for further proceedings in accordance with this Court's ruling.

DATED this 3rd day of September, 2013.

SKELLENGER BENDER, P.S.

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

CERTIFICATE OF SERVICE

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 September 3, 2013, I arranged for the filing of the Reply Brief of Appellants and this Certificate of Service with the Clerk of the Court of Appeals, Division One; and served Respondent City of Seattle by sending copies of the Reply Brief of Appellants and this Certificate of Service to its attorney Patrick Downs via email to Patrick.Downs@seattle.gov.

Jule Sprenger _____

Date and Place of Execution 9·3·2013 at Seattle, WA