NO. 90032-9

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

NO. 69827-3

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

HUGH AND MARTHA SISLEY, both individually and
on behalf of their marital community,

Petitioners,

v.

CITY OF SEATTLE, a municipal corporation,

Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

I. IDENTITY OF PETITIONERS

This Petition is filed by Hugh and Martha Sisley, the Plaintiffs in the Trial Court and the Appellants in the Court of Appeals.

II. COURT OF APPEALS DECISION

The issue presented to the Court of Appeals was whether Respondent City of Seattle (the City) could be liable for violating Mr. and Mrs. Sisley's constitutional rights. In addition, the Court of Appeals was confronted with the issue of whether it was error for the Trial Court to find that the Certificate of Release issued by the City did not release accrued civil penalties.

Mr. and Mrs. Sisley now seek review of the February 3, 2014, decision of Division I of the Court of Appeals, which affirmed the Trial Court's summary judgment dismissal of Mr. and Mrs. Sisley's constitutional, tort, and certificate of release claims. A copy of the Court of Appeals decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether a civil cause of action exists where a municipality violates a citizen's rights under the Washington Constitution.
2. Whether the public duty doctrine bars relief where a municipality unlawfully imposes vacant building

monitoring fees without due process, unlawfully imposes tenant relocation assistance fees without due process, and tortuously interferes with a citizen's business relationships.

3. Whether the imposition of over $3,000,000 in fines as punishment for housing code violations violates the constitutional prohibition against excessive fines.

4. Whether a Certificate of Release issued by the City releases the recipient of all requirements of a Notice of Violation, including accrued civil penalties.

IV. STATEMENT OF THE CASE

A. Procedural Summary

Mr. and Mrs. Sisley filed the underlying cause of action in King County Superior Court on May 7, 2010. The City of Seattle removed the case to the United States District Court for the Western District of Washington on June 25, 2010, pursuant to 28 U.S.C. §§ 1441, 1446. Mr. and Mrs. Sisley voluntarily dismissed their federal claims, and the case was remanded to King County Superior Court. Mr. and Mrs. Sisley filed an Amended Complaint on June 6, 2011.

On August 24, 2012, the Honorable Carol A. Schapira heard oral argument on the City's Motion for Summary Judgment. Judge Schapira granted the City's motion in part, and dismissed the majority of Mr. and

Mrs. Sisley's claims. The remaining claims were heard by a jury which, not surprisingly given the Trial Court's earlier rulings, found in favor of the City on November 9, 2012.

Mr. and Mrs. Sisley appealed the Trial Court's partial summary judgment order to Division I of the Court of Appeals.[1] The Court of Appeals affirmed the Trial Court on February 3, 2014.

B. Factual Background

Mr. and Mrs. Sisley are the owners of numerous residential properties in the City of Seattle, many of which they use as rental properties. In their capacity as landlords and property owners, Mr. and Mrs. Sisley have faced years of mistreatment from the City of Seattle. Finally, in 2010, Mr. and Mrs. Sisley sued the City, and were prepared to present to a jury the aggressive and negligent manner in which the City dealt with them.

Unfortunately, as a result of an adverse summary judgment ruling by the trial court, the jury was not presented with all of the evidence regarding Mr. and Mrs. Sisley's constitutional and tort claims against the City. 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 that they refused to be

[1] Mr. and Mrs. Sisley did not appeal the jury's findings.

pushed around by the City.

The City Improperly Transferred Seattle City Light Charges to Mr. and Mrs. Sisley

It appears that Seattle City Light ("SCL") has the authority to transfer unpaid charges for its services used by a resident of rental property to the personal account of the property owner.[2] 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, notifying the City in writing that certain charges were attributable to residents of their rental properties. Nevertheless, the City has repeatedly transferred charges incurred on rental properties—even though the required notices were properly and timely provided.

SCL has 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

[2] 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.

action—e.g., notices, debt collectors, and threats to turn off power—while their appeal is pending. Yet these protections were repeatedly ignored by SCL in its dealings with Mr. and Mrs. Sisley, requiring the Sisleys to spend considerable time and expense in resolving their issues with SCL.

The City Improperly Charged Fees to Mr. and Mrs. Sisley 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 that have been vacated and closed ("Vacant Building Monitoring" or "VBM" fees).[3]

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

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

[3] 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 6418 Brooklyn Avenue NE and 1322 NE 65th Street, which have been demolished.

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 Punished Mr. and Mrs. Sisley with 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.[4] After receiving Notices of Violation, the required repairs were made at 6317 15th Avenue NE and 6515 16th Avenue NE was vacated and closed.

[4] 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.

In spite of this, punitive fines have continued to accrue at a rate of $1,600 per day, even while Mr. and Mrs. Sisley have continued to appeal the charges. The City refuses to act on the evidence of compliance that Mr. and Mrs. Sisley have submitted.

As of this writing, it is estimated that the fines now total over three million dollars. The underlying judgments were in the amounts of $247,400 (Seattle Municipal Court case number 08-100) and $368,000 (Seattle Municipal Court case number 09-024). Each judgment called for continuing civil penalties of $600 and $1,000 per day, respectively. These penalties have continued to accrue for 419 days (SMC 08-100) and 375 days (SMC 09-024). Additionally, post-judgment interest in the amount of 12% per annum has been accruing. These punitive fines, including the underlying judgments (which themselves are largely fine-based), are grossly disproportionate to the nature of the violations and the costs of compliance.

The City Improperly Charged Mr. and Mrs. Sisley for "Tenant Relocation Expenses," Without Providing Due Process of Law

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).[5] Under certain circumstances, 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 expenses" for an individual who was not a tenant, 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, thus violating due process. Notably, a City official testified in the trial below that the City treats Mr. and Mrs. Sisley differently when it comes to enforcing certain code provisions relating to tenant relocation expenses, stating that "[i]n the context of the Sisley properties, we do not recognize the term guest." RP 877:23-24. These deficiencies allowed the City to gain the strategic advantage in its enforcement actions.

The City Improperly Installed Water Services at one of Mr. and Mrs. Sisley's Properties

In November 2006, after determining that one of their properties

[5] 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, which has been demolished.

was vacant, Mr. and Mrs. Sisley cancelled the water service and requested that the meter be removed.[6] 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.

Mr. and Mrs. Sisley's claims should be reinstated for a full and impartial hearing by the trier of fact.

V. ARGUMENT FOR REVIEW

A. Standard for Acceptance of Review

RAP 13.4(b) provides that petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

[6] 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, which has been demolished.

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

At least two considerations apply here – *first*, this Petition presents a significant question of law, and *second*, this Petition involves issues of substantial public interest under the Washington constitution.

B. Whether a Civil Cause of Action Exists Under the Washington State Constitution is a Significant Question of Law and an Issue of Substantial Public Interest

In its opinion, the Court of Appeals stated that "Washington courts have 'consistently rejected invitations to establish a cause of action based upon constitutional violations "without the aid of augmentative legislation."'" Slip Op. at 4 (quoting *Blinka v. Wash. State Bar Ass'n*, 109 Wn. App. 575, 591 (2001)). Yet the Washington Supreme Court has never considered this issue. In the one Washington Supreme Court case cited by the Court of Appeals, *Reid v. Pierce County*, 136 Wn.2d 195, 213–14 (1998), the Court expressly declined to decide whether "a private right of action for damages 'should be created for a violation of the Washington State Constitutional right to privacy, Art. I § 7.'" *Id.* at 213.

Whether a cause of action for damages exists under the Washington Constitution is a significant question of law, given the myriad ways in which the Washington Constitution provides Washington citizens with rights more extensive than those secured by the United States Constitution. Moreover, to the extent that an action under the Washington

Constitution might provide more extensive relief than an action brought under 42 U.S.C. § 1983, this is an issue of substantial public interest to Washington citizens. Although the Court of Appeals has rejected such a cause of action, the highest court of the state has not yet weighed in on this significant issue.

C. Whether the Imposition of Over Three Million Dollars in Fines for Civil Housing Code Violations Violates the Excessive Fines Clause is a Significant Question of Law

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."[7] 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)

[7] The state counterpart to the Eighth Amendment is Article I, §14 of the Washington Constitution, which mandates that "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." The state constitution provides greater protection than its federal counterpart, *see State v. Witherspoon*, 171 Wn. App. 271, 301 (2012), *review granted* 177 Wn.2d 1007 (2013), and thus a violation of the Eighth Amendment is necessarily a violation of Article I, §14.

(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 $3,000,000, 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 which are neither grave offenses 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.

The fines that Mr. and Mrs. Sisley face are 50 times greater than they could be ordered to pay if they committed a Class A Felony. *See* RCW 9A.20.021(1)(a) (setting maximum fine for a class A felony at $50,000). Whether the imposition of such exorbitant fines as a punishment for housing code violations is constitutionally permissible under the excessive fines clause – and whether a private cause of action exists if it is not – presents a significant question of law and an issue of substantial public interest.

D. The Proper Application of the Public Duty Doctrine is of Substantial Public Interest and Should be Determined by this Court

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 (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 (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 (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,[8] 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.[9] 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 (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 Wn.2d 159, 166 (1988); *Moore v. Wayman*, 85 Wn. App. 710, 718, review denied, 133 Wn.2d

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[8] 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 (1997).

[9] 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 (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 trial 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.

1019 (1997) (special relationship exception requires evidence of plaintiff's inquiries and County's specific assurances).

In *Sundberg v. Evans*, 78 Wn. App. 616 (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 (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. The Court of Appeals found that the public duty

doctrine operated to bar any negligence claims against the City. Slip Op. at 5–11. Yet the Court failed to acknowledge, for example, the Declaration of Hugh Sisley, in which he discussed the history of his communications with the City and the City's representations with regard to the VBM fees. *See* CP 556–61, ¶¶ 16–20. Whether and to what extent the public duty doctrine applies where a citizen has had numerous, ongoing communications with city officials is of substantial public interest. This issue is relevant not only to residential property owners, but to anyone who has ever attempted to navigate the often labyrinthine bureaucracy of a municipal agency, and has relied on the assurances of public officials.

E. Whether A Certificate of Release Issued by a City Agency Releases a Person from All Civil Penalties is of Substantial Public Interest

The scope of a release is a question of law—a 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 (1995) (*citing Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797 (1965)).

The language of a release is to be given its ordinary, plain meaning. *Corbray v. Stevenson*, 98 Wn.2d 410 (1982). Releases are

strictly construed against the releaser and against the party who drafted the release. 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 (1982) *aff'd*, 100 Wn.2d 221 (1983) (citing *Bakamus v. Albert*, 1 Wn.2d 241 (1939)). *See also, e.g., Blide v. Rainier Mountaineering, Inc.*, 30 Wn. App. 571 (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 (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.*

Here, one of the City's Judgments at issue in the trial court 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. CP 908-912. 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." CP 1190-1191. The Release also encouraged Mr. and Mrs. Sisley to record the Certificate of Release with the County "to ensure clear title" to that property.

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.").

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." CP 1190-1191 (emphasis added). 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." CP 1190-1191. Therefore, the Certificate of Release issued to Mr. and Mrs. Sisley – which was drafted by the City, who, as a party in the underlying litigation, was aware that a judgment related to that property existed – arguably extinguished and discharged the existing judgment and all of the accumulated fines.

Given the City's dual role in bringing housing code enforcement actions and in issuing these types of releases, the proper construction of a city-issued "Certificate of Release" is of substantial public interest.

VI. CONCLUSION

It is respectfully requested, therefore, that this Court accept this Petition for Review.

DATED this 5th day of March, 2014.

SKELLENGER BENDER, P.S.

s/Jeffrey Grant
Jeffrey C. Grant, WSBA No. 11046
Erin Newton, WSBA 38029
Attorneys for Petitioners
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 Petitioners 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 March 5, 2014, I arranged for the filing of the Petition for Review (with Appendix A) with the Clerk of the Court of Appeals, Division One; served Respondent City of Seattle by sending a copy of the Petition for Review (with Appendix A) to its attorney Patrick Downs via email (Patrick.Downs@Seattle.Gov).

Jule Sprenger _____

Date and Place of Execution 3/5/2014 at Seattle, WA

APPENDIX A

IN THE COURT OF APPEALS 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.	NOS. 69827-3-I 69828-1-I (Consolidated Cases) DIVISION ONE UNPUBLISHED OPINION FILED: February 3, 2014

LAU, J. — In this multi-decade long dispute over the City of Seattle's housing code enforcement actions involving numerous residential rental properties owned by Hugh and Martha Sisley, the Sisleys appeal the trial court's partial summary judgment order dismissing their state constitutional, tort, and certificate of release claims. They do not appeal the judgment entered after the jury's adverse verdict on their contract claims or the denial of their new trial motion. Finding no error, we affirm the partial summary judgment order of dismissal.

FACTS

Hugh and Martha Sisley own numerous Seattle residential properties that have been the subject of several hundred municipal code enforcement cases, dating to the

1980s. In May 2010, the Sisleys filed a complaint for damages. By amended complaint, they alleged that the City violated state constitutional provisions governing privileges and immunities, due process, equal protection, and privacy, and engaged in "tortious conduct," by unlawfully or improperly (1) imposing vacant building monitoring fees, (2) imposing tenant relocation assistance fees, (3) transferring tenant utility bill arrearages to their home account, (4) installing or reinstalling water meters without consent, and (5) entering and searching their properties. They also alleged that City municipal court judgments entered in two code enforcement cases involving 6317 15th Avenue NE and 6515 16th Avenue NE were "excessive and in violation of state law." The municipal court judgments totaled $368,000 and $247,400.[1] Each judgment authorized continuing per diem penalties for uncorrected violations.

The Sisleys filed a motion "seeking enforcement of defendant's procedures for confirming compliance with defendant's housing code." They asked the court to find that they "timely remedied the claimed Housing Code violations for the properties located at 6515 16th Ave. N.E. and 6317 15th Ave. N.E. and that the City has released them from all claims for the property located at 6317 15th Ave. N.E." They argued that a certificate of release issued by the City with respect to the 6317 15th Avenue NE code enforcement action "discharged and extinguished" the municipal court judgment and "all accumulated fines." Br. of Appellant at 43.

[1] In October 2011, this court upheld the municipal court judgments over the Sisleys' claim that the penalty amounts exceeded the $75,000 claim limit applicable to district courts under RCW 3.66.020. City of Seattle v. Sisley, 164 Wn. App. 261, 263 P.3d 610 (2011), review denied, 173 Wn.2d 1022 (2012).

On the City's summary judgment motion, the trial court ruled that (1) all state constitutional claims for money damages failed in the absence of augmentative legislation, (2) the public duty doctrine barred relief on all claims arising from the "City's housing and zoning enforcement actions including tenant relocation assistance and vacant building monitoring," (3) res judicata barred the Sisleys' excessive penalty argument, and (4) no genuine issue of material fact remained as to whether a "certificate of release" issued by the City in a code enforcement case involving the Sisley-owned property at 6317 15th Avenue NE released accrued civil penalties. The court also dismissed the Sisleys' tortious interference claim.

The Sisleys filed a second amended complaint alleging that (1) the City's utility bill collection actions breached express and implied contractual duties and (2) the City "unlawfully and tortiously refused to issue Certificates of Compliance" recognizing correction of code violations at two Sisley-owned properties. A jury rejected both claims, and on December 4, 2012, the trial court entered judgment for the City.

The Sisleys do not challenge the jury's verdict or the trial court's denial of their motion for a new trial. They appeal the trial court's partial summary judgment order dismissing the state constitutional, tort, and certificate of release claims.

ANALYSIS

We review a grant of summary judgment de novo, construing the facts and all reasonable inferences in the light most favorable to the nonmoving party. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). We will affirm the trial court's ruling "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Further, we will not look beyond the evidence and issues called to the trial court's attention. RAP 9.12. We may, however, affirm on any basis supported by the summary judgment record. Gontmakher v. City of Bellevue, 120 Wn. App. 365, 369, 85 P.3d 926 (2004).

State Constitutional Claims

The Sisleys sought money damages for alleged violations of various state constitutional provisions. Washington law contains no counterpart to 42 U.S.C. § 1983, which creates a civil cause of action for violations of the United States Constitution by persons acting under color of state law. Washington courts have "consistently rejected invitations to establish a cause of action for damages based upon constitutional violations 'without the aid of augmentative legislation.'" Blinka v. Wash. State Bar Ass'n, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001) (quoting Sys. Amusement, Inc. v. State, 7 Wn. App. 516, 517, 500 P.2d 1253 (1972)); see also Reid v. Pierce County, 136 Wn.2d 195, 213-14, 961 P.2d 333 (1998) (declining to recognize civil action for damages premised on violation of state constitutional right to privacy). Because the Sisleys identified no augmentative legislation supporting their claims for money damages, this claim fails.[2]

[2] The Sisleys' remaining contentions are unpersuasive. The Sisleys voluntarily dismissed their federal law claims, leaving no basis for a section 1983 action in state court. And their public policy argument is up to the legislature, not the courts.

Tort Claims

The Sisleys also sought money damages based on allegations that the City unlawfully imposed vacant building monitoring and tenant relocation assistance fees under the authority of its Housing and Building Maintenance Code.[3] The trial court dismissed this claim on partial summary judgment, ruling that the public duty doctrine foreclosed relief.

The City's Housing and Building Maintenance Code requires quarterly inspection of vacant buildings that are found to violate minimum standards. SMC 22.206.200. The City may impose vacant building monitoring fees. SMC 22.206.200. The code also authorizes the issuance of emergency orders directing closure of buildings found to pose imminent health or safety risks. SMC 22.206.260. The City may seek reimbursement for relocation assistance paid to displaced tenants. SMC 22.206.260.

Here, the record establishes that the City imposed vacant building monitoring fees in connection with Sisley-owned properties at 1322 NE 65th Street and 6418 Brooklyn Ave NE.[4] The fees totaled $604. In both cases, the City suspended collection efforts or reversed the fees.[5] The record also establishes that the City imposed tenant

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[3] Seattle Municipal Code chapters 22.200 - 22.208.

[4] The Sisleys advise that their claim relating to vacant building monitoring fees "involves properties located at 1509 NE 66th Street, 6418 Brooklyn Avenue NE, and 1322 NE 65th Street." Br. of Appellant at 14 n.13. They raise no issue on appeal with regard to 1509 NE 66th Street.

[5] The City reversed the fees associated with 6418 Brooklyn Avenue NE after a City employee "determined that City code required a notice of violation or Director's order be issued before vacant building monitoring fees could be sought." Resp't's Br. at 10. The City now claims that determination was erroneous. We are not asked to review the merits of this issue.

relocation assistance fees after issuing a series of emergency orders directing the closure of the Sisley-owned property at 6526 15th Ave NE due to hazardous conditions. The Sisleys challenged that action, and the City sued to recover the fees. That suit was one of four alleging failure to pay tenant relocation assistance fees. The City states it "exercised prosecutorial discretion" and dismissed three of the cases. Resp't's Br. at 12. In the fourth, the City obtained a final judgment. The Sisleys never paid the fees.

"In a negligence action, whether an actionable duty was owed to the plaintiff is a threshold determination." Munich v. Skagit Emergency Commc'n Ctr., 175 Wn.2d 871, 877, 288 P.3d 328 (2012). Our review is de novo. Munich, 175 Wn.2d at 877.

> When the defendant in a negligence action is a governmental entity, the public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular, and was not the breach of an obligation owed to the public in general, i.e., a duty owed to all is a duty owed to none.

Munich, 175 Wn.2d at 878. The public duty doctrine does not apply when the entity acts in a proprietary capacity, as opposed to a governmental capacity—that is, when the entity "engages in businesslike activities that are normally performed by private enterprise." Stiefel v. City of Kent, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006). "The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity." Okeson v. City of Seattle, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003); see, e.g., Russell v. City of Grandview, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) (city engaged in a proprietary function when operating a municipal water plant and distribution system); Borden v. City of Olympia, 113 Wn. App. 359, 371, 53 P.3d 1020 (2002) (city engaged in a proprietary function when it "helped private

developers design, engineer, and pay for a new stormwater drainage system."); City of Mercer Island v. Steinmann, 9 Wn. App. 479, 482, 513 P.2d 80 (1973) (city engaged in a governmental capacity when administering zoning ordinance). Another distinguishing factor is whether the act involves the performance of "uniquely governmental duties." Hoffer v. State, 110 Wn.2d 415, 422, 755 P.2d 781 (1988) (state auditor acted in a governmental capacity when auditing public offices).

The Sisleys argue that the public duty doctrine does not apply because the City acted in a proprietary capacity when it imposed vacant building monitoring and tenant relocation assistance fees under the authority of its housing code. Br. of Appellant at 38-39. To the contrary, our Supreme Court has recognized a "traditional public duty rule" holding that "building codes impose duties that are owed to the public at large." Taylor v. Stevens County, 111 Wn.2d 159, 165, 759 P.2d 447 (1988). Consistent with this rule, the City's Housing and Building Maintenance Code states:

> The express purpose of this Code is to provide for and promote the health, safety and welfare of the general public, and not to protect individuals or create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this Code.

SMC 22.200.020(G). There was nothing evidently "businesslike" about the City's efforts to enforce this code. Stiefel, 132 Wn. App. at 529. The summary judgment record contains no evidence that vacant building monitoring, for purposes of code compliance, and tenant relocation assistance are activities "normally performed by private enterprise." Stiefel, 132 Wn. App. at 529. We conclude the City acted in a governmental capacity and the public duty doctrine bars relief.

The Sisleys argue in the alternative that the "special relationship" exception applies. Br. of Appellant at 39-41. Under the special relationship exception, an entity may incur liability "if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public." Cummins v. Lewis County, 156 Wn.2d 844, 854, 133 P.3d 458 (2006). "A special relationship arises where (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff." Taylor, 111 Wn.2d at 166. The exception "requires evidence of the plaintiff's inquiries and the [public entity's] specific assurances." Moore v. Wayman, 85 Wn. App. 710, 721, 934 P.2d 707 (1997); see, e.g., Sundberg v. Evans, 78 Wn. App. 616, 624, 897 P.2d 1285 (1995) (record, which included plaintiff's affidavit and transcript of county employee's deposition, raised genuine issues of material fact regarding applicability of special relationship exception).

The Sisleys claim that the City "made numerous promises" over the years, and that the summary judgment record "created a factual issue as to whether the City was in [a] special relationship with Mr. and Mrs. Sisley." Br. of Appellant at 40-41. Contrary to RAP 10.3(a)(6), they fail to cite the record. "It is not the function of trial or appellate courts to do counsel's thinking and briefing." Orwick v. City of Seattle, 103 Wn.2d 249, 256, 692 P.2d 793 (1984). Nonetheless, our review of the record reveals no evidence that the City made specific assurances regarding vacant building monitoring or tenant relocation assistance fees. This claim fails.

The Sisleys also contend that the public duty doctrine does not apply to their tortious interference claim. See Vergeson v. Kitsap County, 145 Wn. App. 526, 543-44, 186 P.3d 1140 (2008) (public duty doctrine does not apply to intentional torts). They argue, "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." Br. of Appellant at 39 n.22.

The Sisleys failed to meet their burden to raise a genuine issue of material fact regarding the elements of tortious interference: (1) the existence of a valid contractual relationship or business expectancy, (2) the City's knowledge of that relationship or expectancy, (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) proof that the City interfered for an improper purpose or used improper means, and (5) resultant damage.[6] Hudson v. City of Wenatchee, 94 Wn. App. 990, 998, 974 P.2d 342 (1999). The claim is premised on a few sentences of unsupported argument. For example, the Sisleys argue the City "interrupted their business and scared away clients."[7] Br. of Appellant at 39 n.22. The tortious interference claim fails.

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[6] The trial court ruled, "The City's enforcement of its housing and zoning codes did not give rise to a claim of tortious interference with business expectations when the City's interest in protecting the public's health, safety, and welfare outweighs the plaintiffs' rental interest." We may affirm the trial court on any basis supported by the summary judgment record. Gontmakher, 120 Wn. App. at 369.

[7] The Sisleys cite the trial testimony of city employee Jill Vanneman to support their contention that "the City has admitted that it subjects Mr. and Mrs. Sisley to more oversight and enforcement action than anyone else in the City." Br. of Appellant at 27.

For similar reasons, the Sisleys' remaining "negligence-based tort claims" also fail. Br. of Appellant at 37 (formatting omitted). Their entire argument consists of two paragraphs:

> 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.

Br. of Appellant at 37. These "arguments" consist of nothing more than a list of unsupported complaints about the City. Counsel's arguments are not evidence. Bravo v. Dolsen Companies, 71 Wn. App. 769, 777, 862 P.2d 623 (1993) (unsworn allegation of fact in appellate brief falls outside materials that court can consider), reversed on other grounds, 125 Wn.2d 745, 888 P.2d 147 (1995). The Sisleys fail to even suggest which facts raise a material fact issue. We decline to "comb the record" to find support they failed to provide.[8] Fishburn v. Pierce County Planning & Land Servs. Dep't, 161 Wn. App. 452, 468, 250 P.3d 146 (2011).

When reviewing a grant of summary judgment, "the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12.

[8] Even if the Sisleys identified a genuine issue of material fact, we question whether they are entitled to further proceedings on their "negligence-based tort claims." Br. of Appellant at 37 (formatting omitted). On partial summary judgment, the trial court ruled, "The supply of power by City Light to the plaintiffs' properties is governed by

The Sisleys also assert that the City "improperly installed water services."[9] Br. of Appellant at 17 (formatting omitted). The trial court ruled, "There is no genuine issue of material fact that the property at 6544 16th Ave. NE was occupied after the City reinstalled a water meter at the property, and the plaintiffs were required to provide and pay for water after the individuals occupied the property." The Sisleys now claim the trial court "incorrectly" found the property was occupied. Br. of Appellant at 17. Trial court summary judgment findings are superfluous. Hamilton v. Huggins, 70 Wn. App. 842, 848, 855 P.2d 1216 (1993). Our review of this issue is de novo. The record evidence indicates no material issues of fact. The trial court properly granted summary judgment.

Penalty Judgments—Eighth Amendment Excessive Fines Clause

The Sisleys also sought money damages premised on the two municipal court judgments discussed above. They claim the judgments violate the Eighth Amendment's excessive fines clause and thus entitle them to sue for money damages.[10] They assert the penalties were constitutionally excessive.[11]

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contract." The Sisleys assigned no error to this ruling. Arguably, they have waived all tort-based claims related to the City's "supply of power."

[9] This assertion appears in the section of the Sisleys' opening brief titled "Statement of the Case." It is unclear whether the assertion is part of the appeal and, if so, to which assignment of error it pertains. See RAP 10.3(a) ("The brief of the appellant or [respondent] should contain . . . (5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument.") (emphasis added).

[10] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII. In their opening brief, the Sisleys state, "Although Article I, § 14 of the Washington Constitution has an excessive

This claim fails on several grounds. First, the Sisleys cite no authority authorizing a money damages claim based on an alleged excessive fines clause violation. They rely on United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) (reviewing forfeiture imposed under federal statutes), and State v. WWJ Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999) (declining to review untimely argument regarding penalty imposed under state consumer protection statutes), but neither case involved a money damages claim based on an alleged excessive fines clause violation.

Next, the United States Supreme Court has determined that the excessive fines clause "'limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'" Bajakajian, 524 U.S. at 328 (internal quotation marks omitted) (quoting Austin v. United States, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)). The Sisleys fail to address whether the enforcement penalties constitute punishment. See State v. Frodert, 84 Wn. App. 20, 29-30, 924 P.2d 933 (1996) ("As with the double jeopardy clause, the excessive fines clause only protects against 'punishment.'").

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fines clause, this memo analyzes the applicability of only the Eighth Amendment of the U.S. Constitution." Br. of Appellant at 32 n.20.

[11] As a preliminary matter, our record does not reflect precisely how much money the Sisleys presently owe the City. The Sisleys assert, "Today, the total fines presently exceed two million dollars—more than $2,500,000, and the fines grow by $1,600 a day." Br. of Appellant at 16. They do not explain how they calculated this figure.

Finally, to the extent this claim arises under 42 U.S.C. § 1983, it fails because the Sisleys dismissed all federal claims after the City removed the case to federal court.[12]

The trial court properly granted summary judgment dismissal.

Certificate of Release

The Sisleys contend that the trial court erred in ruling that a City-issued certificate of release released no accrued civil penalties with respect to code violations at 6317 15th Ave NE. Br. of Appellant at 41. The certificate stated:

> The above described property [6317 15th Ave NE] 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.

(Boldface omitted.) The City issued the certificate on August 3, 2012, nearly three years after the municipal court entered a final $368,000 judgment in the case.

The Sisleys argue that the certificate is a binding contract under which "the existing judgment and all of the accumulated fines have been discharged and extinguished." Br. of Appellant at 43. They add, "The meaning of the City's 'Certificate of Release' should be determined and construed in the same manner as other contractual documents." Reply Br. of Appellant at 2. Neither the record nor reasoned argument supports these contentions. Among other elements, an enforceable contract requires an offer, acceptance, and consideration. FDIC v. Uribe, Inc., 171 Wn. App.

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[12] Given our resolution of the excessive fines claim, we need not address the claim or issue preclusion question. However, we question whether the doctrines of res judicata or collateral estoppel apply to bar the Sisleys' Eighth Amendment excessive fines claim involving the Seattle Municipal Court judgments, given the protracted litigation history in this case involving prior near identical issues and claims between these parties.

683, 688, 287 P.3d 694 (2012). As a matter of law, the certificate of release is not a contract.

The dispositive question is whether the certificate satisfied or voided the City's judgment. The Sisleys offer no plausible theory as to how satisfaction or voiding occurred. By its terms, the certificate releases the "above described property" from the requirements of the notice of violation. During her deposition, City employee Carol Anderson agreed with the statement that "the Certificate of Release means that the person who received the Notice of Violation is no longer obligated to take the corrective action . . . ." She did not testify that the certificate satisfies or voids existing penalty judgments. City employee Diane Davis explained via deposition that the City might issue a certificate to clear title:

> Q. Have you ever heard of a Certificate of Release?
> A. Yes.
> Q. What is your understanding [of] what that is?
> A. That is a document that is occasionally issued when there's some reason to suspend the Notice of Violation. The usual time we would issue one of those is if there was a, there was a violation on the record and the property was being transferred and needed to clear the title in order for the title company to accept the transfer. A Certificate of Release might be issued in that circumstance preserving the rights or preserving the—making it clear the violation still exists, but that it's being issued so that title can be transferred; in other words, it's not saying it's in compliance. It's specifically when we can't determine compliance that we would issue a Certificate of Release.

The certificate itself states, "You are strongly encouraged to record this Certificate with King County to ensure a clear title to this property." And while the certificate identifies "HUGH K AND MARTHA E SISLEY" as the property's owners, it nowhere references the City's $368,000 municipal court judgment. On this record, the trial court properly

found no genuine issue of material fact existed as to the enforceability of the judgment or the underlying penalties.

CONCLUSION

Because the trial court properly granted partial summary judgment in favor of the City on all claims, we affirm the partial summary judgment order dismissing the constitutional, tort, and certificate of release claims.

WE CONCUR: