

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY JW  
DEPUTY

No. 41811-8-II

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COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

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GARY SMITH,

Appellant,

v.

CLARK PUBLIC UTILITIES,  
a municipal corporation of the State of Washington; and  
CLARK COUNTY, by and through the  
DEPARTMENT OF CLARK COUNTY PUBLIC WORKS,  
a political subdivision of the State of Washington,

Respondents.

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BRIEF OF APPELLANT SMITH

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ORIGINAL

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## A. INTRODUCTION

This case presents another example of how the archaic public duty doctrine continues to resurrect sovereign immunity from its legislative grave.

Gary Smith was electrocuted, burned and maimed when he came into contact with a live electrical utility wire while doing his job. The Clark County Code (“CCC”) specifically required the Department of Public Works to ensure that arrangements had been made for the disconnection of utilities along the move route. The code mandated that if this information was not provided, the permit would not be issued. Despite the County’s breach of this clear duty, which directly led to Smith’s severe injuries, the trial court dismissed the County on summary judgment, citing the public duty doctrine.

The court misunderstood and misapplied both the public duty doctrine and the failure-to-enforce exception to that doctrine.

## B. ASSIGNMENTS OF ERROR

### (1) Assignments of Error<sup>1</sup>

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<sup>1</sup> Smith acknowledges that when this Court reviews a summary judgment order, findings of fact and conclusions of law are superfluous. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860, 863 (1978). The function of a summary judgment proceeding is to determine whether a genuine issue of material fact exists. *Id.* It is not, as appears to have happened here, to resolve issues of fact or to arrive at conclusions based thereon. *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 424-25, 367 P.2d 985 (1962). However, Smith is also aware that unchallenged findings and

1. The trial court erred in entering summary judgment in favor of Clark County in its order dated January 21, 2011.

2. The trial court erred in entering finding of fact 5.

3. The trial court erred in entering finding of fact 6.

4. The trial court erred in entering conclusion of law 1.

5. The trial court erred in entering conclusion of law 2.

6. The trial court erred in entering conclusion of law 3.

7. The trial court erred in entering conclusion of law 4.

(2) Issues Relating to Assignments of Error

1. Does a genuine issue of material fact exist in this case regarding duty, breach, causation, and damages such that summary judgment was inappropriate? (Assignments of Error 1-7)

2. Should the public duty doctrine shield the County from liability from negligent actions taken in performance of its duties, despite the fact that sovereign immunity has been abolished? (Assignments of Error 1, 5, 7)

3. If the public duty doctrine does apply in this case, does the failure-to-enforce exception apply when the County had a mandatory duty to enforce its code governing moving oversize structures, actual knowledge of a violation, and failed to correct it, resulting in injury to a worker who was within the ambit of danger the code prevents? (Assignments of Error 1, 3, 6, 7)

4. If the County's laws regarding the safety of oversize structural moves and utilities extend throughout the County, does the fact that the injury occurred a short distance onto a state road within the County absolve the County of any duty to ensure safety relating to a house move? (Assignments of Error 1, 2, 3, 4, 7)

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conclusions are considered verities on appeal, and in an abundance of caution, challenges those findings here.

5. Does the fact that an injury occurred during an oversize structure move a short distance onto a state road within a county, when the County has permitting authority over the entire move, resolve as a matter of law any issue regarding the legal cause of the injury? (Assignments of Error 1, 2, 4, 7)

C. STATEMENT OF THE CASE

Gary D. Smith was electrocuted, burned and seriously injured on April 10, 2005 while doing his job. CP 141, 183. His employer, Northwest Structure Moving (“NSM”) was moving a house along Clark County and Washington State roads. CP 571. Smith’s assignment was to stand on or near the peak of the house and, when encountering utility wires that were lower than the 17’ 6” peak of the roof, to lift them and allow the house to pass underneath. CP 141.

Because the house move took place in Clark County and along county roads, the Clark County Public Works Department (“County”) was responsible for reviewing arrangements for the move, to ensure that the move would not endanger anyone’s health, safety or welfare, and to issue or withhold a permit based on that information. CCC 10.06A.020-.070; CP 253-62. As part of these duties, the County was specifically required to have proof that arrangements had been made to disconnect utility wires in the right of way. CCC 10.06A.070(c)(11). The County was required to refuse the permit if such proof was not provided, or if the building was too large to move without endangering persons or property in the county.

CCC 10.06A.020, .070(c)(13).

NSM filed paperwork with the County to obtain a permit to move an oversized structure entirely within Clark County. CP 40-74. The proposed route was mostly over County roads; one portion of the route in the middle was on a State road. CP 53059. Instead of providing proof that arrangements had been made to disconnect utility wires in the right of way, NSM made the bold assertion that the 17' 6" height of the structure was "below utility wire height." CP 312-15. It made this assertion based on its belief that the "standard height for *most* cable and phone lines is 18 feet." CP 155 (emphasis added). Thus, NSM provided no proof that it had made arrangements with any utilities. CP 312-15.

Clark County Public Works employee Sheila Ensminger<sup>2</sup> reviewed NSM's paperwork regarding the house move. She had recently taken over this responsibility from another employee who was on medical leave. CP 482. Before that employee left, she sat down with Ensminger for "a couple hours" to review permitting procedures. CP 631. In a contemporaneous email, Ensminger admitted that she did not receive "as much time...as [she] would have liked to on training for house moves"

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<sup>2</sup> Ensminger's previous married name was "Morley," and she is referred to as "Morley" in documents and emails at the time of Smith's injury. *See, e.g.*, CP 571. Between the date of Smith's injury and court proceedings, she remarried and took the name "Ensminger." CP 481. She is referred to as "Ensminger" throughout this brief.

before she took over the job. CP 529.

Ensminger was aware that the CCC required her to obtain proof that arrangements had been made with utilities regarding disconnection of utility wires. CP 627. However, she did not request such proof from NSM regarding CPU's high-voltage electrical wires because the house was below 18' 6" in height. *Id.*; CP 630. In fact, she did not obtain proof regarding *any* other utility wires, phone, cable, etc., because she believed that no utility wires extended below 18' 6". CP 629. When asked why she did not follow the regulations, she said that her supervisor instructed her not to follow the regulations if the structure was below 18' 6". CP 630. She issued NSM the permit for the move. CP 76.

Many utility wires, signals, and the like can hang over roadways as low as 15.5'. CP 407. Also, "non-hazardous utility wires...may be at a sufficient height to clear the structure, *but they significantly sag in the center* where the structure will be travelling." CP 158 (emphasis added). In fact, the height of the wires can vary based on weather conditions. CP 498. Because of this sagging, stationing employees on top of a structure during a move in order to lift wires is "a common practice." CP 142.

On the day of the move, Smith rode along on the roof of the house, lifting all of the utility wires along the route that hung below the 17' 6" peak of the house. As he stood up to lift and guide one of these wires, a

telephone wire, his head came into contact with a 7200 volt single phase electrical conductor. CP 141, 186. Electricity flowed from his head to his shoulders, through his arms and hands, and then to the grounded wire in his hands. *Id.*

Smith was hospitalized for 47 days. CP 182. He was heavily sedated and nonresponsive for several weeks of that time, and when he revived, he suffered depression described as "catatonia." CP 183. Four of his fingers had to be amputated, he suffered second and third degree burns to his back, face, neck, hands, chest, and legs. Several of his muscles were necrotic and had to be cut out. CP 183, 186. He required skin grafts. CP 187.

After submitting an appropriate notice of claim under RCW 4.96.020, CP 128, Smith filed a complaint for negligence in Clark County Superior Court against CPU<sup>3</sup> and Clark County. CP 1. The case was assigned to the Honorable Rich Melnick. The trial court entered summary judgment dismissing Smith's claims against the County, citing the public duty doctrine. CP 696. Smith timely appealed from the trial court's order.

#### D. SUMMARY OF ARGUMENT

The public duty doctrine should be abolished. It is being

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<sup>3</sup> CPU moved for summary judgment but was denied. It filed an unopposed motion for discretionary review which was granted in Court of Appeals Cause No. 42231-0-II. The two cases were consolidated.

improperly used to revive the long-abolished doctrine of sovereign immunity for local governmental bodies.

Even if the public duty doctrine is still legitimate, it has been used inappropriately here, because the failure-to-enforce exception applies. The County had a mandatory duty to enforce its code, there is evidence that it had actual knowledge of a violation, it took no steps to correct the violation, and Smith was within the ambit of danger that the code was enacted to prevent.

The trial court erroneously concluded that the County is not liable and did not legally cause Smith's injuries because the injuries occurred on a state road. The plain language of the County's code, and the facial information on the County and State permits indicate that the County, was equally if not more responsible than the State to ensure the safe disconnection of utility wires throughout the move, not just on County roads.

This Court should reverse the trial court's summary judgment order, and remand this case for trial against the County.

E. ARGUMENT

(1) Standard of Review

When reviewing an order of summary judgment, this Court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98

Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). This Court must consider all facts submitted and all reasonable inferences from them in the light most favorable to Smith, the nonmoving party. *Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654, 658 (2006); *Wilson*, 98 Wn.2d at 437.

The issue in this appeal is whether the County owed Smith a duty of care. Generally, the issue of whether a duty of care is owed is a question of law for the court. *Waite v. Whatcom County*, 54 Wn. App. 682, 686, 775 P.2d 967, 969 (1989); *Sigurdson v. Seattle*, 48 Wn.2d 155, 156-57, 292 P.2d 214 (1956); *see also, Honcoop v. State*, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988). Whether the public duty doctrine applies at all in these circumstances is a question of law. *Id.*

Smith has also raised the failure-to-enforce exception to the public duty doctrine, which involves mixed questions of law and fact. Specifically, the determination of whether the governmental agent responsible for enforcing statutory requirements possessed actual knowledge of the statutory violation is a question of fact generally left to a jury. *Waite*, 54 Wn. App. at 686.

(2) The Public Duty Doctrine Should Be Abolished Because It Is Too Often Used As a Backdoor Device to Restore Sovereign Immunity<sup>4</sup>

The trial court here erroneously concluded that, as a matter of law, the County owed no duty to Smith under the public duty doctrine. CP 694. In essence, the trial court concluded that during the process of reviewing and permitting oversize structural moves, the County was not responsible for any injuries resulting from any failure to carry out its legal responsibilities with reasonable care. *Id.* Such a finding is akin to a finding that the County has sovereign immunity from suit in permitting cases.

Washington has abolished sovereign immunity for local government entities arising in the course of their duties:

All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, *to the same extent as if they were a private person or corporation.*

RCW 4.96.010.

“The doctrine of governmental immunity springs from the archaic

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<sup>4</sup> Smith is aware that this Court, as an intermediate judicial body, cannot overturn Supreme Court pronouncements regarding the public duty doctrine. However, Smith believes it is important for this Court to consider the specific issue of the doctrine’s application in this case, within the larger context of concerns about the doctrine’s legitimacy.

concept that ‘The King Can Do No Wrong.’” *Kelso v. City of Tacoma*, 63 Wn.2d 913, 914, 390 P.2d 2 (1964). In 1961, the Legislature enacted RCW 4.92.090 abolishing state sovereign immunity. That waiver quickly extended to municipalities in 1967. RCW 4.96.010; *Kelso*, 63 Wn.2d at 918-19; *Hosea v. City of Seattle*, 64 Wn.2d 678, 681, 393 P.2d 967 (1964). Local governments have since been “liable for damages arising out of their tortious conduct ... to the same extent as if they were a private person or corporation.” RCW 4.96.010. These statutes operate to make state and local government “presumptively liable in all instances in which the Legislature has *not* indicated otherwise.” *Savage v. State*, 127 Wn.2d 434, 445, 899 P.2d 1270 (1995) (emphasis in original).

The public duty doctrine is not supposed to immunize public officials from negligent actions that foreseeably harm individuals. It is a focusing tool that allows courts to distinguish between duties officials owe to exercise reasonable care in the execution of their responsibilities, and more nebulous public “duties” that officials owe to all citizens.<sup>5</sup>

The public duty doctrine “began its useful life as a tool to assist courts in determining the intent of legislative bodies when interpreting statutes and codes.” *Cummins v. Lewis County*, 156 Wn.2d 844, 863, 133

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<sup>5</sup> The public duty doctrine has been criticized by jurists and scholars alike. *J&B Development Co. v. King County*, 100 Wn.2d 299, 311, 669 P.2d 468 (1983) (Utter, J., concurring); Jenifer Kay Marcus, *Washington’s Special Relationship Exception to the Public Duty Doctrine*, 64 Wash. L. Rev. 401, 414-17 (1989).

P.3d 458 (2006) (Chambers, J. concurring). If a court determined that the Legislature “intended to protect certain individuals or a class of individuals to which the plaintiff belonged,” a duty to that plaintiff attached. *Id.* at 864. In recent years, the doctrine has evolved into a “focusing tool” used to determine whether the state owed a specific duty to a particular individual, the breach of which is actionable, or merely a duty to the “nebulous public,” the breach of which is not actionable. *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006).

Public duty doctrine analysis is not triggered simply because the defendant happens to be a public entity. *Id.* It is not the same as sovereign immunity: “The public duty doctrine does not serve to bar a suit in negligence against a government entity.” *Cummins*, 156 Wn.2d at 853. Rather, it is an analytical tool designed to determine if a traditional tort duty of care, the threshold determination in a negligence action, is owed. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784-85, 30 P.3d 1261 (2001).

The public duty doctrine simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory or common law duty of care to an identified individual, as opposed to the nebulous public. And its “exceptions” indicate when a statutory or common law duty exists. The question whether an exception to the public

duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff. *Osborn*, 157 Wn.2d at 27-28 (internal quotations omitted).

In tort negligence cases, the proper analytical framework is well known: the court must decide whether the alleged tortfeasor had a duty to act with reasonable care, whether that duty was breached, and whether that breach caused damages to the plaintiff. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274, 1277 (2003).

In traditional tort cases, “duty” is the duty to exercise ordinary or reasonable care. *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431, 434 (1996), *review denied*, 132 Wn.2d 1008 (1997). A court must not only decide who owes the duty, but also to whom the duty is owed, and what nature of duty is owed. *Wick v. Clark County*, 86 Wn. App. 376, 385, 936 P.2d 1201, *review denied*, 133 Wn.2d 1019 (1997) (Morgan, J., concurring). The answer to the second question defines the class protected by the duty and the answer to the third question defines the standard of care. *Id.* at 386. The class protected generally includes anyone foreseeably harmed by the defendant's conduct. *Hansen v. Friend*, 118 Wn.2d 476, 484, 824 P.2d 483 (1992).

Even in cases involving local government entities such as municipalities, our Supreme Court has analyzed duty under this traditional

tort framework. See, e.g., *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845, 848 (2002). In *Keller*, the Court applied ordinary negligence principles to determine a city's duty to maintain safe roadways for travelers. The Court observed that the city's duty was to exercise ordinary care, bounded by the concept of foreseeability. *Id.* The fact that that duty was owed to all users of the roadways did not absolve the municipality, because the danger to the plaintiff was foreseeable. *Id.*

This case is a perfect example of the pernicious nature of the public duty doctrine. Had the trial court analyzed the County's duty under traditional tort principles, the duty of ordinary care to prevent foreseeable harm, surely the genuine issues of material fact Smith raised would have defeated summary judgment for the County. At the very least, it is uncertain that the trial court would have reached the same result if it had applied basic negligence principles as the Supreme Court did in *Keller*.

Therefore, to the extent that the public duty doctrine is used to immunize government entities in situations where private citizens or entities would be held liable, it is contrary to RCW 4.96.010 and should be abolished.

(3) The Public Duty Doctrine Does Not Bar Smith's Action Because the County Failed in Its Mandatory Duty to Enforce Its Safety Code

The trial court erroneously concluded that the failure-to-enforce

exception to the public duty doctrine did not apply to the County. CP 694. On that basis, the trial court entered final judgment in favor of the County. CP 694.

Even if this Court concludes that the public duty doctrine is at issue, this case falls under an exception to that doctrine, the failure-to-enforce exception. The Washington Supreme Court has recognized four exceptions to the public duty doctrine: (1) where there is legislative intent to impose a duty of care; (2) where a “special relationship” exists between plaintiff and the public entity; (3) where the government has engaged in “volunteer rescue” efforts; or (4) where the government is guilty of a failure-to-enforce a specific statute. *Babcock*, 144 Wn.2d at 786; *Donohoe*, 135 Wn. App. at 834. These exceptions are tools courts use to analyze whether the government entity owed the plaintiff a common law duty. See, e.g., *Harvey v. County of Snohomish*, 124 Wn. App. 806, 103 P.3d 836 (2004), *rev'd*, 157 Wn.2d 33 (2006); *1515–1519 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 146 Wn.2d 194, 43 P.3d 1233 (2002).

Under the failure-to-enforce exception, the public duty doctrine does not apply when governments fail to enforce the law and harm results. *Campbell v. City of Bellevue*, 85 Wn.2d 1, 12, 530 P.2d 234 (1975); *Bailey*

v. *Town of Forks*, 108 Wn.2d 262, 268-69, 737 P.2d 1257 (1987).<sup>6</sup> The exception applies when (1) there is a statutory duty to take corrective action; (2) governmental agents responsible for enforcing the statutory requirements possess actual knowledge of a statutory violation; (3) they fail to take corrective action; and (4) the plaintiff is within the ambit of the danger the statute intended to protect against. *Halleran v. Nu W., Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52, 58 (2004), *review denied*, 154 Wn.2d 1005 (2005); *Bailey*, 108 Wn.2d at 269-70. Liability can attach if the plaintiff has evidence that the governmental agent failed to take care “commensurate with the risk involved.” *Bailey*, 108 Wn.2d at 270 (quoting *Campbell*, 85 Wn.2d at 12).

*Campbell* is highly instructive of the proper application of the failure-to-enforce exception. In *Campbell*, a dead raccoon was discovered in a stream and the police were called. *Campbell*, 85 Wn.2d at 3. A neighbor attempted to remove the raccoon and was electrically shocked. *Id.* A bare, live electrical wire ran through the creek, providing power to a nearby home. Prior to the accident, a city of Bellevue inspector concluded that having wiring running through the creek was unsafe. *Id.* at 3-4. The inspector claimed to have had a conversation with the homeowner but

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<sup>6</sup> Although *Campbell* opinion does not explicitly state that it is an application of the failure-to-enforce exception, and includes some language related to the special relationship exception, the Supreme Court subsequently clarified that *Campbell* is indeed a failure-to-enforce case. *Bailey*, 108 Wn.2d at 268.

took no corrective action. *Id.* Subsequently, another neighbor, six-year-old Eric Campbell, was playing in the stream and received a paralyzing electrical shock. *Id.* The Court concluded that Bellevue's own code required the city to disconnect the electrical system until it was brought into compliance, and that its failure-to-enforce its own rule was sufficient to sustain a cause of action for negligence for anyone within the "ambit of the danger" created by the violation:

These [electrical code] requirements were not only designed for the protection of the general public but more particularly for the benefit of those persons or class of persons residing within the ambit of the danger involved, a category into which the plaintiff and his neighbors readily fall.

*Id.* at 13. The Court therefore, found a duty to the class of persons that included the Campbells and held the city liable for its negligent enforcement of its own rules. *Id.*

Here, the County failed to enforce its own code and take corrective action to ensure disconnection of utilities along the move route. This violation created a danger. Smith was within the ambit of that danger. The failure-to-enforce exception to the public duty doctrine applies.

(a) The County Had a Statutory Duty to Take Corrective Action, and Failed to Do So

Under the first and third prongs of the failure-to-enforce test, Smith must present evidence that the County had a statutory to duty to

take action, but failed to do so. *Halleran*, 123 Wn. App. at 714. The duty must be mandatory, not discretionary. *Id.*

For example, in *Bailey*, a state statute required police officers to take publicly intoxicated individuals into custody. *Bailey*, 108 Wn.2d at 269. A police officer from the town of Forks encountered a publicly intoxicated man after an altercation at a bar. *Id.* The officer did not take the man into custody. Shortly thereafter, the man drove his truck and collided with the plaintiff, injuring her. Our Supreme Court held that the officer had a mandatory duty to take the man into custody under the language of the statute. *Id.* at 269.

In building code cases, a plaintiff can meet the mandatory duty prong of the test if the applicable law provides no room for discretion, and requires specific corrective action. *Waite*, 54 Wn. App. at 686. In *Waite*, a contractor installed a propane furnace in a basement and asked a city inspector to review the installation. Although the applicable codes forbade installation of a propane heater in a basement, the inspector took no corrective action. *Id.* This Court concluded that the statute imposed a mandatory duty on the inspector to correct the violation. *Id.*

Here, the code governing oversized structural moves imposed a mandatory and specific duty on the County to refuse a permit if the applicant fails to provide proof of arrangements for the disconnection of

utilities in the right of way. CCC 10.06A.020; 10.06A.070(c)(11); CP 253, 261. The code does not allow the County discretion to ignore this requirement just because the applicant boldly states that the structure is lower than utility wires. *Id.* At the least, the County had a duty to investigate and confirm that the wires would pose no danger. CCC 10.06A.030. The code also requires that “A permit to move a building or other structure shall not be granted if [t]he building is too large to move without endangering persons or property in the County.” CCC 10.06A.070(c)(13); CP 261.

Despite these statutory duties, the trial court entered “finding of fact” 5, ruling the County was under no duty because Smith’s injury occurred while the house was on a state road. Finding of Fact 5; CP 692.<sup>7</sup> The court’s “finding” suggests that the County was only responsible to enforce its code provisions with respect to those portions of the move that took place on County roads. The trial court also entered conclusion of law 1, stating that “Clark County is not as a matter of law liable for occurrences on a State road.” CP 694.

As a threshold matter, “finding of fact 5” is actually a conclusion of law. The question of whether the County had a duty to enforce its permitting laws regarding the entire move, or only those portions of the

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<sup>7</sup> Again, Smith acknowledges that findings of fact and conclusions of law are superfluous here, but addresses them in an abundance of caution.

move that occurred on County roads, is an issue of interpretation of the county code and state statutes, which are pure questions of law that are reviewed de novo. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846, 850 (2007). A finding of fact is the assertion that a phenomenon has happened, is happening, or will be happening, independent of any assertion as to its legal effect. *Leschi v. Highway Comm'n*, 84 Wn.2d 271, 283, 525 P.2d 774 (1974). In contrast, a conclusion of law is a “determination [that] is made by a process of legal reasoning from facts in evidence.” *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986).

A conclusion of law is a conclusion of law wherever it appears, even if it is erroneously labeled a finding of fact. *Union Local 1296, Int'l Ass'n of Firefighters v. City of Kennewick*, 86 Wn.2d 156, 161-62, 542 P.2d 1252 (1975). Thus, the standard for evaluating “finding of fact 5” and conclusion of law 1 is *de novo*. It is not whether sufficient evidence supports the trial court’s conclusion, as is the case with true findings of fact.

The trial court erred as a matter of law in entering “finding of fact” (actually “conclusion of law”) 5, and conclusion of law 1. The code clearly states that the applicant must provide proof of arrangements with utilities *without reference* to whether those utilities span County roads or

State roads. CCC 10.06A.070(c)(11). Applicants are required to provide maps to the County of the entire route for all “rights of way *in* Clark County,” not just for those portions of the move *on* Clark County roads. CCC 10.06A.070(c)(4) (emphasis added). The code specifically states that, when a portion of the move occurs on a state highway, permits issued by the County are “subject to” state statutes “if conflicting with the County Code.”<sup>8</sup> CCC 10.06.070(c)(1). If the trial court’s interpretation is correct, and the County has no jurisdiction to permit that part of the move on state road, the County’s permit would not be “subject to” state statutes.

Also, the County’s permit on its face covers the entire route of the house move, not just those portions occurring on County roads. CP 571. The described route includes repeated references to “SR 500,” or State Route 500. *Id.* The State permit, in contrast, makes no references to utilities or their disconnection. CP 568. The County permit has a section entitled “Verifications” that lists “Phone, Gas, PUD, and CC Transportation.” CP 571. It also has a line stating “Deposits made for utility services to: (Utility name and amount of deposit).”<sup>9</sup> There is no indication that utility arrangements relate only to the County road portion

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<sup>8</sup> There is no state statute that conflicts with the County’s requirements regarding disconnection of utilities.

<sup>9</sup> Unfortunately, the County did not ensure that arrangements for disconnection were made with utilities, and the box where the County was supposed to enter the name of the utilities is blank. CP 571.

of the move.

Thus, the applicable ordinances and permits on their face prove that the County had jurisdiction to enforce – and more importantly was *required* to enforce – its code regarding utility disconnection over the entirety of the route. There is absolutely nothing in the County code that supports the trial court's legal conclusion that County could issue a permit without evidence of arrangements with utilities, if those utilities happen to span state roads. The finding is erroneous. The County had a mandatory duty to take corrective action.

Under the first element of the failure-to-enforce test, the County had authority, responsibility, and a mandatory duty to ensure that arrangements had been made with utilities regarding their disconnection, and to ensure that the house move would be safe. That duty did not end simply because the truck moved a short distance onto a State road.

Regarding the third element of the failure-to-enforce exception, the County's failure to take corrective action, there can be no dispute. The County was required to either obtain proof that arrangements had been made, and that moving a house of that height would be safe for persons in the County, or to deny the permit. CCC 10.06A.010, .070. It did neither. CP 571.

Therefore, Smith has adduced evidence sufficient to satisfy the

first and third elements of the failure-to-enforce exception. The County's duties under the code are mandatory and specific, not discretionary and general. It failed in its mandatory duties, and did not take corrective action. The trial court erred in finding otherwise, specifically in concluding as a matter of law that the County had no duty. This case meets the first and third tests of the failure-to-enforce exception to the public duty doctrine.

(b) There Is Sufficient Direct and Circumstantial Evidence that the County Had Actual Knowledge of a Violation

Smith presented sufficient evidence to raise a genuine issue of material fact regarding the County's knowledge of a violation. As stated above, the determination of whether the failure-to-enforce exception applies involves a question of fact: whether the governmental agent responsible for enforcing statutory requirements possessed actual knowledge of the statutory violation. *Waite*, 54 Wn. App. at 686. Direct evidence of actual knowledge can be difficult to adduce, however, the fact of actual knowledge can also be supported by circumstantial evidence. *Id.*

In *Waite*, a building inspector specifically approved installation of a propane heater in the basement of a house when the code clearly stated that a propane heater may not be installed in a basement. *Waite*, 54 Wn. App. at 686. The heater exploded, injuring Waite. Waite presented

evidence that the inspector knew that the heater was installed in the basement and adduced expert testimony that a trained inspector would know such an installation was a code violation. The court held that these facts were sufficient to submit the issue of a failure-to-enforce to the jury for a fact determination regarding actual knowledge of the violation. *Id.*

Smith has adduced sufficient evidence to survive summary judgment on the issue of the failure-to-enforce exception. This case is indistinguishable from *Waite*, and in some ways is more egregious. Smith presented evidence that the County, through Ensminger, was responsible for enforcing safety codes governing a hazardous activity. CCC ch. 10.06A; CP 482. Smith adduced evidence that Ensminger had actual knowledge that NSM had violated the code by failing to provide proof of arrangements with the utilities. CP 483, 571. Ensminger did not deny that she had actual knowledge of NSM's failure to provide her with proof. She alleged that she thought the proof was unnecessary. CP 483.

The trial court entered finding of fact 6, stating that there was no direct or circumstantial evidence that County agents had actual knowledge of a code violation. This finding was not supported by the record. The issue of the County's actual knowledge should go to the finder of fact.

(c) Smith Was in the Ambit of Danger the Code Was Enacted to Prevent

Under the final element of the failure-to-enforce exception, Smith must have been a person within the ambit of danger the Code was enacted to prevent. The trial court entered no specific finding or conclusion on this point. CP 692.

For example, in *Campbell*, a city electrical inspector knew of the extreme danger created by a nonconforming underwater lighting system, which later electrocuted the plaintiff's wife. The City argued that its electrical code was enacted for the safety of the public at large, rather than specific individuals. Our Supreme Court held that a duty of due care existed with reference to "those persons or class of persons residing within the ambit of the danger involved," which included persons electrocuted by a dangerous electrical installation. *Campbell*, 185 Wn.2d at 13.

Here, Smith is "within the ambit of the danger involved" in moving an oversized structure on County roads. A code enacted to regulate a dangerous activity certainly brings those who are *actually participating* in that activity within the ambit of the danger involved. Smith has presented sufficient evidence to take his negligence claim to a finder of fact under the failure-to-enforce exception.

Below, the County muddied the waters regarding the issue of Smith's status by arguing cases analyzing the legislative intent exception. CP 554-56. Specifically, the County argued that dismissal was required

under *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988), a legislative intent case, because the CCC does not identify a “more circumscribed class of persons” or a “specific class” than the general public. CP 556.

*Taylor* and related cases enforcing the legislative intent rule are inapplicable. The County’s argument below that the protected class must be specific and circumscribed does not apply in failure-to-enforce cases.

Even if this Court were to examine this case under *Taylor* and related building code cases, the failure-to-enforce exception would still apply to the County. In building code failure-to-enforce cases, plaintiffs can prevail if they show that the code violation constituted “an inherently dangerous and hazardous condition.” *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

Allowing a move of an oversized structure where persons will be riding atop the structure within six feet of deadly high voltage utility wires, without assurances that those wires have been disconnected, is inherently dangerous. Smith presented evidence that it is common practice to assign workers to ride atop structures during such moves. CP 142, 158. He also presented evidence that safety standards require a minimum of 10 feet buffer between workers and energized high voltage

wires. CP 142, 156, 407. The failure-to-enforce exception applies because Smith was subjected to this inherently dangerous condition by the County's actions.

The County also argued below that Smith was not within the ambit of danger because the code provisions governing oversized structural moves were enacted solely to prevent the traffic inconveniences caused by "interruption of the use of county roads by the movement of oversize loads that temporarily block those roads." CP 248.

The County's assertion that the code is purely intended to minimize inconvenience, and is not a safety code, is totally contradicted by the plain language of the code. The code is peppered with references to the need for safety. For example, the code requires investigation of whether the activity is "appropriate and consistent with the public *health, safety, and welfare*." CCC 10.06A.030 (emphasis added). Such an investigation should include "Whether the application should otherwise be disapproved based on *public safety considerations*." CCC 10.06A.030(d) (emphasis added). Activities subject to permitting require "approval for specific routes, locations, dates, and times for the participants, *public safety, and traffic control*." CCC 10.06A.070(a) (emphasis added). The County may change the route "in the interests of the protection of the *public health, safety, and welfare....*" CCC 10.06.070(c)(4) (emphasis

added).

This code is intended to protect safety, health and welfare, as well as to minimize inconvenience to drivers. Smith, as a participant in the dangerous activity, was within the ambit of danger the code was enacted to prevent.

Even if this Court concludes that the public duty doctrine encompasses the County's actions, the failure-to-enforce exception applies. The County was under a mandatory duty to enforce its code, and failed to do so. There is sufficient evidence to present to the factfinder that the County had actual knowledge of the violation. Smith, as a direct participant in the house move, was within the ambit of danger the code was enacted to prevent. The trial court erred in entering conclusion of law 3 and 4, and entering summary judgment dismissing the County as a matter of law under the public duty doctrine.

(4) Smith Presented Sufficient Evidence that the County's Actions Proximately Caused His Injuries

The trial court found that even if the County was negligent in issuing the permit, that negligence did not proximately cause Smith's injuries "[b]ecause [Smith's] injuries occurred on a State road." CP 692.<sup>10</sup> The trial court also found that the State had permitting authority over state

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<sup>10</sup> Again, this "finding of fact" is actually a conclusion of law, subject to *de novo* review. *Bostain*, 159 Wn.2d at 708.

roads, and that the County “has authority to issue permits over roads under its jurisdiction.” CP 692.<sup>11</sup> The trial court did not expand upon this conclusion in its findings, but it appears to be another conclusion of law reviewed *de novo*. *Bostain*, 159 Wn.2d at 708.

Proximate causation is divided into two elements: cause-in-fact and legal causation. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749, 754 (1998). “Cause in fact” refers to the actual, “but for,” cause of the injury, i.e., “but for” the defendant's actions the plaintiff would not be injured. *Id.*

Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury. *Id.*; *Tyner v. State Dep't of Soc. & Health Services, Child Protective Services*, 141 Wn.2d 68, 82, 1 P.3d 1148, 1156 (2000); *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974).<sup>12</sup>

Unlike factual causation, which is based on a physical connection between an act and an injury, legal cause is grounded in policy

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<sup>11</sup> Smith does not disagree that the County has permitting authority over “roads under its jurisdiction.” However, the trial court’s subsequent legal conclusion, that State roads within the County’s borders are not under the County’s jurisdiction when it comes to disconnection of utilities, is erroneous.

<sup>12</sup> If the trial court’s ruling on causation rested on implicit findings that the County’s actions were not the cause in fact of Smith injuries, that finding is inappropriate and should be reversed. However, the proviso to “finding of fact” 6, that proximate cause is absent “because plaintiff’s injury occurred on a State road” suggests that legal cause, not cause in fact, was at issue.

determinations as to how far the consequences of a defendant's acts should extend. Thus, where the facts are not in dispute, legal causation is for the court to decide as a matter of law. *Id.* The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *Id.* at 478-79. A determination of legal liability will depend upon "mixed considerations of logic, common sense, justice, policy, and precedent." *Id.* (quoting 1 Thomas Atkins Street, *Foundations of Legal Liability* 100, 110 (1906)).

To the extent that trial court ruled upon legal cause, its conclusion rests upon the erroneous legal thesis that the County had no jurisdiction to enforce its code regarding utilities on those parts of the move occurring on state roads. CP 692. As stated *supra* § V.C(1), the County had authority and responsibility to enforce its code with respect to the entire move, not just that portion of the move occurring on its own roads. CCC ch. 10.06A; CP 571. Specifically, the County had responsibility for ensuring the disconnection of utilities, as stated on the face of its own permit. CP 571. The State permit makes no reference to arrangements with utilities, and simply says "Route does not guarantee height clearances." CP 568.

In addition to resting its causation conclusion on faulty legal grounds regarding jurisdiction, the trial court's piecemeal approach to

issues of public safety and tort liability is contrary to logic and common sense. This move took place entirely within Clark County. CP 571. Clark County's own laws assign the County primary responsibility to ensuring that arrangements have been made with utilities *without reference* to whether those utilities span County roads or State roads. CCC 10.06A.070(c)(11).

Every government organization that oversees the public safety within its jurisdiction should have concurrent responsibility to enforce its own safety laws. To say that Clark County had no duty because the State also had a duty is illogical. For example, if a citizen is being attacked in the street in the presence of both county and state police officers, and both of those officers have jurisdiction, the presence of one officer does not eliminate the duty of the other to respond. They both have a duty to respond to rescue the citizen.

The logic of keeping this responsibility within the County also stems from the fact that utility development and oversight is a local concern, not a state concern. *See, e.g.,* RCW 36.70A.070(4) (mandates that counties and/or cities develop comprehensive plans with “[a] utilities element consisting of the general location, proposed location, and capacity of all existing and proposed utilities, including, but not limited to, electrical lines, telecommunication lines, and natural gas lines”).

The record shows that both Clark County and the State of Washington had some authority with respect to this house move. However, it also shows that Clark County had primary responsibility specifically regarding the disconnection of utilities along the entire route. As such, the failure of either in its duty could cause injury to a citizen, and in this case the County's failure did cause injury to Smith.

Smith has presented enough evidence of proximate causation to take his case to the factfinder. The trial court's summary judgment order should be reversed, and this case remanded for trial.

#### F. CONCLUSION

The trial court erred in dismissing the County on summary judgment. The public duty doctrine does not bar Smith's claim against the County for injuries resulting from the County's negligence. The County had a duty to Smith, and Smith adduced sufficient evidence of breach, causation, and damages to take to a jury.

The trial court's summary judgment order should be reversed, and Smith's case against the County should be remanded to the trial court.

DATED this 5<sup>TH</sup> day of December, 2011.

Respectfully submitted,



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# APPENDIX

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**FILED**  
**JAN 21 2011**  
9:50  
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

GARY SMITH,	)	Case No.: 08 2 03709 0
Plaintiff,	)	
vs.	)	ORDER GRANTING DEFENDANT CLARK
	)	COUNTY'S MOTION FOR SUMMARY
	)	JUDGMENT CERTIFIED UNDER CR 54(b)
CLARK PUBLIC UTILITIES, a municipal	)	
corporation of the State of Washington;	)	
and CLARK COUNTY, by and through	)	
the DEPARTMENT OF CLARK	)	
COUNTY PUBLIC WORKS, a political	)	
subdivision of the State of Washington,	)	
Defendants.	)	

This matter came for hearing before the above-entitled Court upon defendant Clark County's ("Clark County" or "County") motion for summary judgment and on plaintiff Gary Smith's ("Plaintiff" or "Mr. Smith") motion for certification of the Court's judgment under CR 54(b) or in the alternative under RAP 2.3(b)(4). The Court has reviewed the files and records herein, including the following:

1. Defendant Clark County's Memorandum in Support of Motion for Summary Judgment, including the Declarations of Bernard Veljacic and Sheila Ensminger and the exhibits attached thereto;
2. Plaintiff's Motion for Continuance and Memorandum in Opposition to Defendant Clark County's Motion for Summary Judgment, including the Declarations of

**PROPOSED** ORDER GRANTING DEFENDANT CLARK COUNTY'S  
MOTION FOR SUMMARY JUDGMENT CERTIFIED UNDER CR 54(b)  
- Page 1

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107

- 1 Gregory Price and Donald R. Johnson and exhibits attached thereto;
- 2 3. Defendant Clark County's Reply Memorandum in Support of Summary  
3 Judgment and in Response to Plaintiffs Motion to Continue;
- 4 4. Defendant Clark Public Utilities' Response in Opposition to Defendant Clark  
5 County's Motion for Summary Judgment, including the Declaration of Nicholas P. Scarpelli,  
6 Jr., and exhibits attached thereto;
- 7 5. Plaintiff's Supplemental Memorandum in Opposition to Defendant Clark  
8 County's Motion for Summary Judgment, including the Declaration of Gregory E. Price and  
9 the exhibits attached thereto;
- 10 6. Clark County's Second Reply Memorandum in Support of Motion for  
11 Summary Judgment, including the Declaration of E. Bronson Potter and the exhibits  
12 attached thereto;
- 13 7. Plaintiffs Supplemental Memorandum in Opposition to Defendant Clark  
14 County's Motion for Summary Judgment Re: State and County Liability, including the  
15 Declaration of Laurance R. Wagner and the exhibits attached thereto;
- 16 8. Defendant Clark Public Utilities' Supplemental Response in Opposition to  
17 Clark County's Motion for Summary Judgment, including the Declaration of Justin P. Wade  
18 and the exhibits attached thereto;
- 19 9. Clark County's Third Reply Memorandum in Support of Motion for  
20 Summary Judgment; and
- 21 10. Plaintiff's Motion for Certification of Order under CR 54(b) or in the  
22 Alternative under RAP 2.3(b)(4), including the Amended Declaration of Emily Smith.

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1 I. FINDINGS OF FACT

2 Based on the evidence presented, the Court hereby finds:

3 1. Plaintiff came into contact with an electrical wire owned and maintained by  
4 Defendant Clark Public Utilities ("Clark Public Utilities") while riding atop a house being  
5 moved on State and County roadways in Clark County, Washington.

6 2. Plaintiff's actual injury occurred on a State road, SR 500.

7 3. Plaintiff's employer, Settle Construction, obtained permits to move the house  
8 from both the State of Washington and Clark County.

9 4. The State has the authority to issue permits for house moves over State roads  
10 and Clark County has the authority to issue permits over roads under its jurisdiction.

11 5. Because plaintiff's injury occurred on a State road, any negligence by Clark  
12 County in issuing a permit for the house move was not a proximate cause of any damages to  
13 plaintiff. *Clark County did not have a duty with respect to state road conditions or the permitting of house moves on a state road.*

14 6. There has been no direct or circumstantial evidence that any governmental  
15 agent of Clark County responsible for enforcing the requirements of Clark County Code  
16 10.06A.070 concerning issuance of a permit for the house move had actual knowledge of a  
17 violation of its terms.

18 II. FINDINGS FOR CERTIFICATION UNDER CR 54(b)

19 The Court makes the following findings with regard to certification of this order  
20 under CR 54(b), pursuant to *Nelbro Packing Co. v. Baypack Fisheries, L.L.C.*, 101 Wn.  
21 App. 517, 525, 6 P. 3d 22 (2000):

22 1. *Relationship between the adjudicated and the unadjudicated claims.* The  
23 factual basis underlying plaintiff's claims against Clark County is materially different from  
24 the factual basis underlying plaintiff's claims against Clark Public Utilities. The Court  
25 granted the County summary judgment on the basis that the accident occurred on a State  
26 road, *and no exception to the public duty doctrine applied.* This fact is not material with regard to plaintiff's claim against Clark Public Utilities.

1           2.     *Whether questions which would be reviewed on appeal are still before the*  
2 *trial court for determination in the unadjudicated portion of the case.* The questions  
3 decided by the Court in granting Clark County summary judgment were whether any <sup>those was</sup>  
4 negligence by Clark County <sup>and whether Clark County's actions were</sup> a proximate cause of plaintiff's injuries and whether the  
5 County owed plaintiff any duty under the failure to enforce exception to the public duty  
6 doctrine. Neither of these questions remain before the Court with regard to plaintiff's claims  
7 against Clark Public Utilities.

8           3.     *Whether it is likely that the need for review may be mooted by future*  
9 *developments in the trial court.* If this matter proceeds to trial on plaintiff's claims against  
10 Clark Public Utilities prior to resolution of an appeal of the dismissal of Clark County by  
11 summary judgment, the party losing at trial will likely appeal the dismissal of Clark County  
12 before trial on the grounds that the outcome of the trial was materially affected by the  
13 absence of the County at trial. So the need for review will not be mooted by further  
14 developments in this Court.

15          4.     *Whether an immediate appeal will delay the trial of the unadjudicated*  
16 *matters without gaining any offsetting advantage in terms of the simplification and*  
17 *facilitation of that trial.* Any delay of trial of plaintiff's claim against Clark Public Utilities  
18 will be offset by the advantages of an immediate appeal. There likely will be an appeal  
19 concerning Clark County's dismissal regardless of the outcome of trial on plaintiff's claim  
20 against Clark Public Utilities. An immediate appeal will facilitate trial by resolving the  
21 issues with regard to Clark County's liability before trial.

22          5.     *The practical effects of allowing an immediate appeal.*  
23                *Judicial Economy.* Judicial economy is best served by an immediate appeal because  
24 appeal is likely regardless of the outcome of trial of plaintiff's claims against Clark Public  
25 Utilities, increasing the probability of multiple rulings and trials. An immediate appeal will  
26 streamline the ensuing litigation by eliminating the possibility of two proceedings with

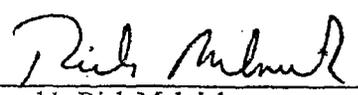


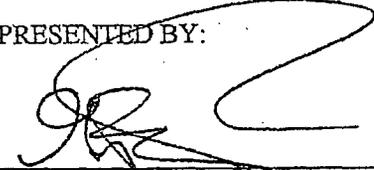
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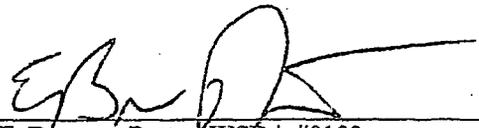
IV. ORDER

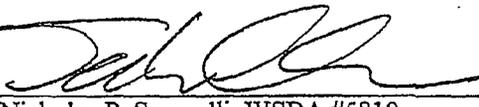
Based on the above findings and conclusions, NOW THEREFORE, THE COURT  
ORDERS that plaintiff's claims against Clark County are hereby dismissed with prejudice.  
The award of fees and costs shall be the subject of future motion and final judgment.

DONE IN OPEN COURT this 21 day of JANUARY, 2011.

  
Honorable Rich Melnick  
Clark County Superior Court Judge

PRESENTED BY:  
  
Thomas S. Boothe, WSBA #21759  
Gregory E. Price, WSBA #17048  
Of Attorneys for Plaintiff

APPROVED AS TO FORM;  
NOTICE OF PRESENTMENT WAIVED:  
  
E. Bronson Potter, WSBA #9102  
Chief Civil Deputy Prosecuting Attorney  
Of Attorneys for Defendant Clark County

  
Nicholas P. Scarpelli, WSBA #5810  
Of Attorneys for Defendant Clark Public Utilities  
*Jason W. Anderson WSBA 30512*

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of Brief of Appellant Smith in Court of Appeals Cause No. 41811-8-II to the following parties:

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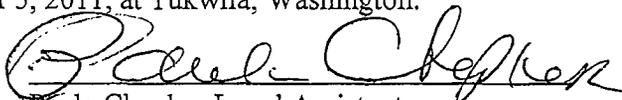
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Original efiled:  
Court of Appeals, Division II  
Clerk's Office  
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Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 5, 2011, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

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