

No. 41811-8-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

GARY SMITH,
Appellant/Cross-Respondent,

v.

CLARK PUBLIC UTILITIES,
a municipal corporation of the State of Washington,

Cross-Appellant,

v.

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

Respondent.

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A. INTRODUCTION

Because of a failure to take their duties regarding dangerous oversized structure moves seriously, Clark County and Clark Public Utilities (“CPU”) allowed Gary Smith to come into contact with an energized, high voltage electrical wire. Smith suffered horrific mutilation as a result.

As is often the case with multiple tortfeasors, neither CPU nor Clark County wants to face a jury regarding their liability for Gary Smith’s injuries. Each of them ask this Court to place all the blame – as a matter of law – at the other’s feet, at the feet of Smith’s employer, or at the feet of Smith himself.

Regardless of whether other parties are also responsible, both CPU and Clark County had a role to play in causing harm to Smith. The trial court correctly recognized CPU’s role, but erred with respect to the County.

In this consolidated appeal from two summary judgment orders, the trial court’s summary judgment in favor of the County should be reversed, and the denial of summary judgment for CPU should be upheld.

B. CONSOLIDATED REPLY/RESPONSE ON STATEMENT OF THE CASE

Both the County and CPU concede many important facts, or offer no evidence to contradict Smith's fact recitation. Smith laid out the pertinent facts in his opening brief, but highlights some of the more important concessions by the other parties here.

The essential facts of how Smith came to harm are not disputed. Northwest Structural Moving ("NSM") sought a permit under the Clark County Code ("CCC") to move a house along county and state roads. Br. of resp't at 4; br. of appellant CPU at 4.¹ In some paperwork, NSM stated that the loaded height of the house was 17' 2"; in others, it stated the height was 17' 6". In reality, the height was 18' 11." Br. of resp't at 4; br. of appellant CPU at 4, 6, 8.

Regardless of whether the height of the house was 17' 2" or 18' 11", on NSM's proposed route the peak of the house would come within at least 6' 6" of CPU's energized electrical wires. Br. of resp't at 5; br. of appellant CPU at 8. CPU admits that some of its energized lines are as low as 18'. Br. of appellant CPU at 8. CPU also admits that it did not have a complete map of NSM's proposed route. Br. of appellant CPU at 5.

¹ In this consolidated appeal, Smith is appealing the trial court's summary judgment for Clark County. Clark County's brief is therefore referred to as the "brief of respondent." CPU is appealing denial of its motion for summary judgment. Its brief is referred to as "brief of appellant CPU."

State law warns that allowing any object or person within 10' of a high voltage electrical line is dangerous and prohibited. WAC 296-155-428(1)(e); br. of appellant CPU at 20 n.8.

Because non-hazardous utility wires often obstruct oversized structure moves, it is common practice to place workers on top of such structures to lift wires during a move. CP 142. Smith was employed by NSM to lift wires. CP 141. While lifting one wire, his head came into contact with a 7200 volt single phase electrical conductor. CP 141, 186. He was severely and extensively injured. CP 182-87.

Insofar as it offers no evidence to the contrary, the County appears to concede that its employee who approved NSM's permit, Sheila Ensminger, was quickly and insufficiently trained. CP 529; br. of appellant Smith at 4-5. The County states that NSM's failure to make arrangements with CPU for disconnection of utilities was acceptable, because they were "unnecessary" based on the represented height of the house at 17' 6". Br. of resp't at 16-17.

CPU does not dispute that it was responsible to review the proposed move for safety concerns. CP 830; br. of appellant CPU at 15. CPU admits that the move as proposed would bring the peak of the house within 10 feet of its energized electrical wires. CP 847; br. of appellant CPU at 8. CPU admits that it approved NSM's move without de-

energizing its electrical wires, investigating NSM's proposal further, sending along a supervisor on the route, or taking any other action to ensure that no object or person would come within 10 feet of its lines. CP 822; br. of appellant CPU at 5-7.

C. SUMMARY OF ARGUMENT

This case exemplifies how the public duty doctrine – a simple analytical tool used to examine the common law duty of reasonable care when an alleged tortfeasor is a government actor – has been expanded to virtually resurrect the abrogated doctrine of sovereign immunity.

There is no dispute that government entities cannot be held responsible for every injury that occurs within their jurisdictions. But when an agency acts in a specific situation, it must act with reasonable care and in accordance with its own governing laws.

This case involves two entities—a County and a public utility – who both had a role to play in the tragic events leading to Smith's injuries. Although they both had active roles in approving the house move, the trial court dismissed the County citing the public duty doctrine, but ordered trial against the utility.

The trial court here incorrectly immunized the County from its actions, even though it was equally, if not more, responsible for the injuries to Smith. Just as the public duty doctrine does not excuse the

negligent actions of CPU, it does not immunize the County. Summary judgment in favor of the County should be reversed, denial of summary judgment in favor of CPU should be affirmed, and this case should go to trial.

D. ARGUMENT IN REPLY TO RESPONDENT CLARK COUNTY

(1) The County Concedes the Issues of the Decreasing Viability of the Public Duty Doctrine and Its Misuse

Smith argued in his opening brief that the public duty doctrine is antiquated and misused, and that Courts should abandon it, or at least limit its application. Br. of appellant Smith at 9-13. Smith recounted the origins of the public duty doctrine, and pointed out that it is often improperly used to re-institute the abolished doctrine of sovereign immunity. *Id.*

Smith also argued that even if the public duty doctrine is still a useful analytical tool, it was never meant to be applied in all cases involving public entities. *Id.* at 12-13. Smith cited examples of tort claims against public entities where *ordinary negligence doctrine* – rather than the public duty doctrine – was applied to evaluate the duty owed. For example, in *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845, 848 (2002), ordinary negligence principles were applied to evaluate a

city's duty to maintain safe roadways. *Id.* at 13. *See also, Parrilla v. King County*, 138 Wn. App. 427, 441, 157 P.3d 879, 886 (2007).

The County makes no substantive response on the use and application of the public duty doctrine. Br. of resp't County at 12-13. Regarding abandonment of the public duty doctrine, the County simply notes that this Court has declined to do so until the Supreme Court acts. Br. of resp't County at 13. However, this is not an endorsement of the doctrine, simply an acknowledgement of the limitations of this Court's authority.

More surprisingly, the County also makes no argument regarding whether the public duty doctrine must be applied in all tort cases against public entities. It also makes no effort to convince this Court that the doctrine is a relevant analytical tool here, as opposed to ordinary negligence principles. *Id.*

Even if this Court is constrained from abolishing the public duty doctrine altogether, it is not obligated to apply the doctrine in every case against a government entity. Having undertaken to permit the house move, the County's duty can be assessed using the ordinary principles of whether the County acted with reasonable care. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274, 1277 (2003); *Mathis v. Ammons*, 84 Wn. App. 411, 416, 928 P.2d 431, 434 (1996), *review denied*, 132 Wn.2d

1008 (1997). The question is whether Smith was someone who was foreseeably harmed by the County's conduct. *Hansen v. Friend*, 118 Wn.2d 476, 484, 824 P.2d 483 (1992).

Here, the County issued a permit to NSM for the house move. The County admits that its code is concerned with the disconnection of utilities. Br. of resp't County at 4. It admits that it relied solely on NSM's representation in its paperwork that the house was "below utility wire height" and thus did not require proof that any utilities – including hazardous utilities – along the route to be disconnected. *Id.* It is also undisputed that placing workers on the top of structures during such moves is common practice. CP 142. It is indisputable that if the electrical wire had been disconnected, it could not have sent 7200 volts of electricity surging through Smith's body. CP 141, 186.

Summary judgment immunizing the County here was improper. The County had a duty to act with reasonable care in permitting the house move. Whether it breached that duty by relying solely on the representations of the private entity it was supposed to be regulating, and whether the resulting harm to Smith was foreseeable, are questions for a jury.

- (2) The Public Duty Doctrine Does Not Apply Where the County Failed to Enforce Its Laws, and Where It Had Sole Responsibility to Ensure Utility Disconnection for Safety

Smith argued in his opening brief that even if the public duty doctrine should be used in this case, it does not apply to immunize the County here where the County failed to enforce its own code. The County had a mandatory duty to enforce its code regarding oversized structure moves, 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. Br. of appellant Smith at 13-27.

(a) This Case Is Not About Construction or Maintenance of Roads

Seizing upon the fact that Smith's injuries occurred 50 feet off of county property on a portion of the move over a state highway, the County first argues that it has no authority or duty to regulate State highways. Br. of resp't County at 6. It says that "construction and maintenance" of state roads is not within its purview, thus it cannot be held responsible for Smith's injuries, despite the fact that it permitted the entire house move. *Id.* at 7-8. The County relies on a number of cases, mostly foreign, holding that counties are not responsible to construct, repair, or maintain state roads. *Id.* at 9-12.

The County's argument that it is not responsible for defective state roads is a straw man. Smith is not arguing that the County improperly

constructed, repaired, or maintained a state road. Smith is arguing that the County failed to take proper steps as was required to take under own code with respect to the house move that it authorized.

Also, the County's attempt to disavow its own authority over the permitting process should be rejected. The County issued a permit that authorized NSM to move an oversized structure over both county *and* state roads. CP 571. 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 County's permit authorizes and governs the entire move, not just the portion that occurs on the County's roads. CP 571.

Also, the issue here is not general road management, but who had a duty to ensure that dangerous utilities along the route were disconnected. The *only* entity claiming that specific legal authority on this issue was the County, in its own ordinances. The State's permit does not address utility disconnection at all. CP 568. The County cannot identify a statute that addresses this issue. Br. of resp't County at 6-12. The County's own ordinance declares 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.” CCC 10.06A.070(c)(1). Here, there is no conflict, and thus the County Code’s authority governs.

The County had authority and responsibility to properly address NSM’s entire move, not simply those portions that occurred on its own roads. Having assumed authority to issue permits for house moves, and in particular authority over the disconnection of utility wires, the County cannot disavow that authority because it wants to avoid liability.

(b) The Failure to Enforce Exception to the Public Duty Doctrine Applies Here

Smith argued in his opening brief that even if the County’s duty in this case should be examined under the public duty doctrine rather than ordinary negligence doctrine, summary judgment was inappropriate under the failure-to-enforce exception. Br. of appellant Smith at 13-27. Smith argued (1) that the County had a mandatory duty to take corrective action and failed to do so, (2) there is sufficient evidence to defeat summary judgment of the County’s knowledge of the violation, and (3) Smith was in the ambit of danger the law at issue was enacted to prevent. *Id.*

The County responds on each of these three issues, beginning with the mandatory duty to take corrective action. Brief of resp’t County at 14-17, 22-24. The County argues that it was entitled to rely on NSM’s factual representation that the loaded house was “below utility wire height” and

thus had no duty to investigate. Br. of resp't County at 14-17. The County claims that it has discretion to determine whether arrangements to disconnect utilities was "necessary," citing the language of the ordinance, and that it was entitled to rely on NSM's claim that the house was "below utility wire height" to satisfy this inquiry, citing *Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988). *Id.* The County also argues that the codes at issue did not mandate any action, because they confer discretion. Br. of resp't County at 22-24.

The problem with the County's framing of the ordinance is that it presumes the ordinance is only concerned with whether the loaded structure is below the height of utility wires. It does not say that. The ordinance instructs the County to ensure that necessary arrangements have been made for disconnection of utilities. CCC 10.06A.070(c)(11). Another section of the code requires the County to ensure that the move would not endanger anyone's health, safety or welfare, and to issue or withhold a permit based on the facts. CCC 10.06A.020-.070. Combining these two requirements, the County was required to ensure that arrangements to disconnect utilities were made to avoid endangerment to health, safety, and welfare. That danger existed *even if the house was technically just below wire height*, because wires sag and workers frequently ride atop houses to lift them. CP 158, 498, 142.

Meaney, which discusses an agency's right to rely on permit representations, is distinguishable. First, it addresses the "special relationship exception to the public duty doctrine, not the failure to enforce exception. *Meaney*, 111 Wn.2d at 178. Second, in *Meaney*, applicants sought a permit to build a saw mill, and claimed in their paperwork that the mill would produce only "a minimal increase in noise." *Meaney*, 111 Wn.2d at 180. The permit application was approved, and the mill was built. When the increased noise became disruptive and violated local zoning ordinances, neighbors sued to shut the saw mill down. *Id.* at 176. The mill owners countersued the permitting authority, claiming that it should have warned them about the noise ordinances. Our Supreme Court rejected that claim, holding that the permitting authority had no duty to affirmatively inform the applicants of all of the potentially applicable codes, nor was it required to second guess the applicant's representation that the mill's noise would be minimal. *Id.* at 180.

Here, Smith is not arguing that NSM misrepresented the height of the house in its permit application, so *Meaney* is inapposite. Smith is arguing that the County violated its responsibility to ensure the health, safety and welfare of persons involved in the move by permitting the move without proof of utility disconnection based on the correct, stated

height of the house in the permit application, taking into account workers who would be riding atop the structure.

Sufficient evidence exists to support the first prong of the failure to enforce exception. The County violated its code by permitting the move without requiring proof of utility disconnection, when the stated height of the house put workers in close proximity to dangerous wires. In doing so, it failed in its mandatory duty to ensure the health, safety, and welfare of persons in the County, another code violation.

The County next argues that Smith has not adduced evidence sufficient to survive summary judgment that it had actual knowledge of the dangerous condition the house posed. Br. of resp't County at 18-22. It claims again that it had no knowledge of the truck's actual height, 18' 11", and that the only issue is whether the County correctly believed that 17' 6"—which is what NSM represented in its application — was below the height of any utility wire. *Id.*

The County's argument here is particularly troubling, because it rests upon the admittedly inadequate training it afforded its employees, and on a denial of reality. In essence, the County argues that if it is lacking in the basic factual information needed to adequately enforce its own code, then it cannot be held responsible for its failure to enforce.

The County admits that it believed the minimum height of utility wires was 18'6." CP 630. This is incorrect; the record shows that many utility wires hang as low as 15' 6". CP 407. It is also undisputed on the record that such wires can sag significantly, and that placing workers on top of houses to lift them is common practice. CP 142, 158, 498. The County assumes that if a structure's stated height is below this false 18'6" threshold, then utilities never need to be disconnected. This is incorrect; workers are frequently positioned atop houses during moves, and that fact must be considered if the County is to obey its own law to ensure the health, safety, and welfare of persons in the County. Thus, the County's belief that the house was below utility wire height is irrelevant.

The issue on summary judgment was whether sufficient evidence existed of the County's actual knowledge that utilities had not been disconnected, whether NSM's claimed height of 17'6" was actually below any conceivable utility wire height, whether that knowledge should have prompted further investigation, and whether that failure posed a risk to the health, safety, or welfare of anyone in the County. There is sufficient evidence of these facts to defeat summary judgment. Smith has met his burden on the second prong of the failure-to-enforce exception.

Regarding the final prong of the failure-to-enforce exception, the County argues that Smith was not in the "class protected by the

ordinance.” Br. of resp’t County at 24-26. The County avers that its duty under the code was to protect all persons, not Smith specifically, and that this fact goes to the heart of the public duty doctrine, that a duty to all is a duty to no one. *Id.*

The first flaw in the County’s response is that it cites the wrong standard.² The failure-to-enforce exception does *not* refer to the “class of persons” the statute was enacted to protect. It examines whether the injured person was “within the ambit of 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). These are two very different standards: the “class of persons” standard requires the court to examine the statute to see if the victim is identified there, the other requires the court to examine the hazard the victim suffered, to determine whether that hazard is among those addressed by the statute.

Second, the County’s “duty to all is a duty to none” argument in these circumstances was rejected in *Campbell*. There, a city electrical inspector knew of the extreme danger created by a nonconforming

² The County here repeats a tactic it used below, arguing cases analyzing the legislative intent exception which does concern itself with a “class of persons” analysis. 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.

underwater lighting system, which later electrocuted the plaintiff's wife. *Campbell v. City of Bellevue*, 85 Wn.2d 1, 13, 530 P.2d 234 (1975). 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. The County makes no attempt to distinguish *Campbell*, and it cannot.

Finally, the County reiterates its argument below, that its code regulating oversized structure moves is only concerned with inconvenience to the travelling public, and not safety. Br. of resp't County at 24-25.

As explained in Smith's opening brief, the code repeatedly and specifically addresses safety concerns throughout. The County must investigate whether the activity is "appropriate and consistent with the public health, safety, and welfare," CCC 10.06A.030, and whether "the application should otherwise be disapproved based on public safety considerations." CCC 10.06A.030(d). 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). The

County may change the route “in the interests of the protection of the public health, safety, and welfare....” CCC 10.06A.070(c)(4).

Here, Smith was within the ambit of danger that the move posed. The County’s code does not simply concern itself with disruption of traffic, it specifically identifies health, safety, and welfare of the participants in the move. The fact that this duty may also have applied to other persons besides Smith does not negate the County’s duty, nor does it remove him from the ambit of danger that the move under nearby live electrical wires posed.

Smith has raised sufficient evidence to survive summary judgment on whether the failure-to-enforce exception removes this case from the public duty doctrine. The trial court’s rulings to the contrary should be reversed.

(3) There Is Sufficient Evidence of Causation to Present to a Jury

Smith argued in his opening brief that legal cause exists here, and that cause-in-fact can be decided by a jury based on Smith’s evidence. Br. of appellant Smith at 27-31. The trial court ruled, incorrectly, that the County was not the legal cause of Smith’s injuries as a matter of law because the injuries occurred on a section of the route that was a state road. CP 692.

The County adopts the trial court's reasoning that legal cause is absent because the injury occurred on a state road. Br. of resp't County at 32-33.

The County's argument regarding legal causation is identical to its duty argument, addressed *supra* in section D(2)(a). Again, the County had sole responsibility for utility disconnection along the route of the entire move. No state law addresses that issue, and the County's own code says that such laws would apply only if they conflict with the County's code. The State permit specifically disavowed any guarantee of height clearances, while the County's permitting process specifically addressed the issue. CP 568, 571.

Smith has established legal cause here. The County was in the best position to regulate and coordinate the safety of the entire move with respect to disconnection of utilities. Logic, common sense, and policy dictate that an entity with sole control over the approval or disapproval of a move, that was capable of foreseeing the danger, and was statutorily charged with ensuring its safety should have a legal duty to those involved in the process. *See Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749, 754 (1998). The County should be responsible for its actions in issuing the permit to NSM.

Regarding cause-in-fact, the County argues that even if it had required proof of necessary utility disconnection from NSM, Smith still would have been injured because CPU did not do its duty to disconnect the wires when presented with the plans from NSM.³ Br. of resp't County at 29-33. The County also urges this Court to reject the opinion of Smith's expert, an electrical engineer, as "speculative." *Id.* at 32. That expert's testimony was not stricken by the trial court and is of record.

As the County acknowledges, establishing cause-in-fact involves a determination of what actually occurred and is generally left to the jury. Br. of resp't County at 28; *Tyner v. State Dep't of Soc. & Health Services, Child Protective Services*, 141 Wn.2d 68, 82, 1 P.3d 1148, 1156 (2000).

Here, the trial court ruled, and the County now argues, that causation was lacking as a matter of law. In other words, Smith allegedly could prove no set of facts to support his claim that the County's failure to ensure that utility wires were disconnected caused him to be electrocuted.

The County's claim that CPU's actions negate cause-in-fact is flawed. The simple fact of causation is this: the utility lines were not

³ Of course, CPU argues that it had no duty to ensure the safety of the house move because "CPU lacks permitting authority over a structure move...." Br. of resp't CPU at 15. CPU's arguments will be addressed more fully *infra* in section E, but the arguments of these two defendants do set up an interesting Catch-22 for Smith.

disconnected, and if they had been, Smith would not have been electrocuted. The County's arguments that CPU should have seen the danger and disconnected the lines is an argument about duty, not causation. The County, not CPU, was concerned with the overall safety of the house move. If the County had acted to demand the disconnection of the utilities lines to ensure safety, Smith would not have been injured. Evidence of cause-in-fact exists here.

Nor should this Court accept the County's suggestion to ignore Smith's expert on causation, electrical engineer Donald R. Johnson. The County emphasizes the one portion of Johnson's declaration that it considers speculative, while ignoring the rest of the declaration that is of record. For example, Johnson states that, given the route of the house move passed under uninsulated high voltage wires, NSM's statement that the house was "below utility wire height" was not sufficient to demonstrate that disconnection was unnecessary. CP 143. He also states that it is "common practice" to have people stationed on top of houses during a move. *Id.* These are factual statements that contradict the County's assertion that disconnection of utilities was unnecessary simply because the house was "below utility wire height."

Evidence of cause-in-fact exists here, sufficient to go to the jury. Setting aside the blame-shifting by the defendants, which go to duty,

Smith has adduced facts to demonstrate that if the County had followed its own code, properly trained its employees, and exercised concern for safety, the utility wires would have been disconnected and Smith would not have been injured. Summary judgment dismissing the County was inappropriate, and the trial court's ruling should be reversed.

E. ARGUMENT IN RESPONSE TO CROSS-APPELLANT CPU

After the trial court dismissed the County below on public duty doctrine grounds, it denied summary judgment to CPU on the same grounds. CP 984-89.

CPU argues that it should benefit from the protection of the public duty doctrine, because Smith is claiming a safety violation, and CPU's role to ensure safety is a governmental function. Br. of appellant CPU at 12-16. It asserts that under the doctrine, it owed no duty to Smith to prevent him from coming into contact with their energized electrical lines, because there was no express assurance from CPU to Smith that the move would not put him in proximity to those wires. Br. of appellant CPU at 16-19. Finally, CPU argues that even under ordinary negligence principles, CPU had no duty to ensure the move would be safe for workers, because that was NSM's duty. *Id.* at 19-23.

As a threshold matter, Smith incorporates by reference his prior reply regarding the abrogation or limitation of the public duty doctrine,

particularly in cases where government agencies choose to act, rather than refrain from acting. *See infra* section D(1).

CPU cannot avoid a trial here on the many factual issues relating to duty by using arguments that are an exercise in contradiction. It claims on the one hand that it is not liable because it was primarily concerned with safety with respect to the house move. On the other hand, it claims it is not liable because it was not responsible for safety issues with respect to the house move. Neither argument can properly be decided as a matter of law.

(1) CPU's Involvement in the Move Was Primarily Proprietary, Not Regulatory, and the Public Duty Doctrine Does Not Apply

CPU argues in its opening brief that the public duty doctrine should apply to assess its duty in this case. Br. of appellant CPU at 12-16. It claims that it was acting in a governmental regulatory capacity, rather than a private proprietary capacity, when it reviewed plans for the house move. *Id.* CPU admits that it has both governmental and proprietary functions, and admits that it has no statutory regulatory authority over structure moves. *Id.* However, CPU claims that because the danger of power lines is a "public safety concern," the public duty doctrine applies to its actions here. *Id.* In particular, it claims that "the critical issue is not

the predominant character of the activity, but rather the target of the plaintiff's allegations." *Id.* at 15.

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. *Lakoduk v. Cruger*, 47 Wn.2d 286, 288-89, 287 P.2d 338 (1955) (citing *Hagerman v. City of Seattle*, 189 Wash. 694, 701, 66 P.2d 1152 (1937)). A city's electric utility serves a proprietary function of the government. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d at 679, 743 P.2d 793 (1987) ("Actions taken pursuant to RCW 35.92.050 serve a business, proprietary function, rather than a governmental function."). The electric utility operates for the benefit of its customers, not the general public. For example, our Supreme Court long ago determined that water rates are not taxes because the "consumer pays for a commodity which is furnished for his comfort and use." *Twitchell v. City of Spokane*, 55 Wash. 86, 89, 104 P. 150 (1909). The same reasoning applies to electric utility customers. A utility will not provide electricity to a customer that does not request service. Thus, the electric utility is a proprietary function of government.

CPU's argument is a unique take on the public duty doctrine's "proprietary function" exception, because it frames the analysis in terms

of the harm suffered, rather than the utility's actions. CPU's logic suggests that any time utility's actions result in injury, then retroactively that utility was "performing a governmental function" i.e., ensuring (or failing to ensure) public safety. In other words, the only way an injury can result is from the failure to ensure safety, which is a governmental and not a proprietary function. The failure to prevent harm becomes the shield against liability.

The strange logic of CPU's argument can be understood by applying it to a case in which this Court had no trouble concluding that a utility's function was proprietary. In *Borden v. City of Olympia*, 113 Wn. App. 359, 363, 53 P.3d 1020, 1022 (2002), *review denied*, 149 Wn.2d 1021 (2003) private developers built a new stormwater drainage project on privately owned land. The City of Olympia permitted the project, but also helped design and pay for it. *Id.* at 363. When the water project later flooded the plaintiffs' property, they sued the City. The City claimed the public duty doctrine applied, but this Court concluded otherwise, focusing on the activity undertaken—building and operating a sewer system—rather than the injury suffered. *Id.* at 371.

Under CPU's public duty doctrine analysis, if the victims in *Borden* had drowned, rather than suffered property damage, then the public duty doctrine would apply. As CPU sees it, the failure to prevent

drowning is an issue of public safety, and if the victims drowned, then the failure of the City to prevent that drowning was by definition a governmental function.

The public duty doctrine analysis does not focus on the nature of the injury suffered, but on the activity performed. *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003). Although a utility might be engaged in governmental activity, such as providing streetlights for public use, the focus is always on the actions of the entity, not the resulting harm. *Id.*

CPU's authority for focusing on the injury, *Stiefel v. City of Kent*, 132 Wn. App. 523, 529, 132 P.3d 1111, 1114 (2006), does not so hold. In *Stiefel*, the plaintiffs alleged that the City's negligent maintenance of fire hydrants connected to the public water system resulted in damage to their home. *Id.* at 526. The City argued that the public duty doctrine applied, because fire hydrants are part of the firefighting system, which is a public, not private, function. This Court, Division I, agreed, noting that the "creation, maintenance, and operation of a fire department and all reasonably incident duties are a governmental function." *Stiefel*, 132 Wn. App. at 529-30. The Court made no reference to the type of harm suffered.

Also, CPU incorrectly suggests that Smith's injuries could *only* be related to CPU's public failure to ensure safety. Allowing persons to come into contact with CPU's live electrical wires not only endangers those persons, but also threatens CPU's property and ability to provide electrical service to its customers.

By its own admission, CPU's review of NSM's house move plans was proprietary, because it was acting to protect its property and preserve service for its customers. It admitted below that its participation in house moves is required to protect its own property and equipment. CP 874, 934. Although safety concerns are part of its assessment, there is ample evidence to support a finding that CPU was acting to protect its business equipment and avoid disruption of electrical service to its customers. *Id.*

Here, there is evidence that CPU failed in its duty to assess the house move to ensure both the safety of those involved *and* to protect its proprietary interests. As the trial court correctly ruled, the dual nature of CPU's participation in the house move precludes summary judgment here on the basis of the public duty doctrine. Summary judgment is inappropriate when the existence of a duty depends upon disputed facts. Because reasonable minds can disagree about whether CPU's actions relating to the house move were propriety or governmental, summary judgment on the issue was appropriately denied.

(2) Even If the Public Duty Doctrine Applies to CPU, the Special Relationship Exception Applies

CPU argues that if the public duty doctrine applies, there is no issue of material fact as to whether the special relationship exception to that doctrine applies. Br. of appellant CPU at 16-19.

The special relationship exception to the public duty doctrine applies if (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. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261, 1268 (2001). CPU claims there is no evidence to support any of these three elements.

(a) There Is Evidence of Privity Between Smith and CPU

CPU's recitation of the first element of the special relationship exception omits one critical element: there must be contact *or privity* between the government and the injured plaintiff. CPU focuses on the lack of evidence of contact between Smith and CPU. Br. of appellant CPU at 17. It ignores the question of privity altogether, claiming that NSM is merely a "third party" and that no court has established that privity can exist between an employer and an employee. *Id.*

Privity under the special relationship exception “is used in the broad sense of the word and refers to the relationship between the [government agency] and any reasonably foreseeable plaintiff.” *Babcock*, 144 Wn.2d at 787. The privity between the public official and an injured plaintiff must set the injured plaintiff apart from the general public. *Id.* In other contexts, this Court has concluded that the employer/employee relationship is sufficient to establish privity. *Ensley v. Pitcher*, 152 Wn. App. 891, 902, 222 P.3d 99, 104 (2009), *review denied*, 168 Wn.2d 1028 (2010) (employee/employer in privity for res judicata purposes).

CPU admits it had direct contact with NSM. Smith, as a worker directly involved with the move, was a reasonably foreseeable plaintiff, set apart from the public in general. Smith was in privity with NSM. There is sufficient evidence to support the first element of the special relationship exception to the public duty doctrine.

(b) There Is Evidence of Express Assurances

CPU argues that there is no evidence of express assurances from CPU to NSM regarding the danger posed by energized electrical wires during the house move. Br. of appellant CPU at 17. CPU claims that any assurance Smith may have had with regard to CPU’s decision to rubber stamp NSM’s proposed house move, was “inherent,” not express. *Id.*

Whether an assurance is express turns on the specificity of the inquiry and the public official's responsibility to provide accurate information in responding. *Taylor*, 111 Wn.2d at 171. A duty of care may arise where a public official charged with the responsibility to provide accurate information fails to correctly answer a specific inquiry from a plaintiff intended to benefit from the dissemination of the information. *Rogers v. Toppenish*, 23 Wn. App. 554, 559, 596 P.2d 1096, review denied, 92 Wn.2d 1030 (1979).

In *Rogers*, this Court, Division III, imposed a duty of care on a public official, where the official in response to a specific inquiry, gave the plaintiff inaccurate zoning information. *Id.* at 561. This Court relied on RESTATEMENT (SECOND) OF TORTS § 552(3) (1977) which provides:

The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Id.

Here, NSM (as required by the Clark County Code) sought assurances from CPU regarding any potential hazards posed by its house move as it related to electrical wires. CP 156. CPU's employee, Hinkel, assured NSM that "everything was within the distance [from CPU's facilities] that was necessary" CP 832. NSM relied upon CPU's response,

which was that no electrical wires needed to be de-energized or moved, and that CPU did not need to have any supervisors present during the move. *Id.* In the context of NSM's *specific* inquiry, this constituted an express assurance that the proposed route posed no danger from CPU's lines. There is evidence that CPU gave express assurances to NSM, and by privity Smith, that their energized power lines posed no danger.

(c) There Is Evidence that Smith Justifiably Relied on CPU's Assurance

Finally, CPU argues that because there was no express assurance, there can be no justifiable reliance on that assurance here. Br. of appellant CPU at 19. NSM did, in fact, rely upon CPU's assurances. CP 156.

Reliance on CPU's assurance that the move would not be jeopardized by electrical wires was justifiable. CPU was in the best position, as owner and operator of the electrical wires, to determine whether the move posed a danger.

Because an express assurance was made that the proposed move posed no danger, and because CPU concedes the issue of justifiable reliance, all three elements of the public duty doctrine are met, or at least, enough evidence exists to take the issue to a jury, and the trial court correctly denied summary judgment on the special relationship exception.

(3) Smith's Status as an Employee of NSM Does Not Absolve CPU of Its Duty to Ensure the Safety of the Move as the Sole Controlling Authority Over Its Own Facilities

CPU argues that even if the public duty doctrine does not apply, it had no duty here because Smith was an employee of NSM. Br. of appellant CPU at 20-23. CPU maintains that NSM alone was responsible for making sure its workers did not come within ten feet of any energized electrical wires. *Id.* CPU cites cases involving general and subcontractor liability, such as *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 275, 635 P.2d 426, 427 (1981), *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002), and *Stute v. P.B.M.C. Inc.*, 114 Wn.2d 454, 464, 788 P.2d 545 (1990).

The key issue in cases involving contractors and subcontractors like *Kamla* and *Tauscher* is control over the worksite. These cases turn upon which party is in the best position to ensure workers' safety. If a general contractor or third party jobsite owner has control over the facilities, then that party will be held liable for safety violations. *Stute*, 114 Wn.2d at 464 (a general contractor's supervisory authority is per se control over the workplace); *Kamla*, 147 Wn.2d at 122 (same); *Tauscher*, 96 Wn.2d at 287 ("There are exceptions to this rule of nonliability when the owner retains control over the work place...").

This, of course, is not a case involving contractors, so the usefulness of such cases here is limited. However, the crucial question in such cases is the degree of control the alleged tortfeasor had over the particular safety aspects of the work being performed. *Kinney v. Space Needle Corp.*, 121 Wn. App. 242, 247, 85 P.3d 918, 920 (2004). The test of control is not the actual interference with the work of the subcontractor, but the *right* to exercise such control. *Id.*⁴

The issue of control is factually complex here, because unlike in the *Kinney* and *Kamla* line of cases, there is no “jobsite.” The job site is a moving target, and the question becomes: who had control over the “dangerous aspects” of this house move?

While NSM certainly had control over the route and configuration of the house move, CPU retained full control over its facilities, including control over whether it de-energized its own lines or sent along a supervisor to watch over the move. CPU also had the working knowledge of its own facilities to know whether the proposed move would bring objects or persons within the zone of danger of its lines. While CPU may not have had control over how close persons got to its lines, it was the only party in control of whether those lines were live, or de-energized.

⁴ *Kamla* and *Kinney*, which both arose from the same justice, produced different legal outcomes. This is due to the very fact-intensive nature of the “right to control” test.

The factual complexity here demonstrates why CPU's request for summary judgment from this Court is inappropriate. The issue is not whether CPU had a duty to enforce workplace safety laws, the issue is whether CPU had a duty to perform its review of the house move with reasonable care. CPU had a duty to control its own facilities to ensure their operation and to inform NSM if they posed a danger. Regardless of whether CPU knew that the house was in fact 18' 11" high, the move of a 17' 2" or 17' 6" house brought workers within the 10' zone warned of in state regulations. Summary judgment on this issue was correctly denied.

(4) Smith Adduced Sufficient Evidence of Breach

CPU also argues that there is no evidence of a breach of its duty. Br. of appellant CPU at 24. Its sole argument is that NSM represented that the house was below utility wire height, that CPU was not responsible for verifying this information, and that CPU "did everything it was asked to do" by NSM.

CPU is incorrect in assuming that NSM's representations of the height of the house have any bearing on whether it breached its duty. CPU does not dispute that: (1) it was responsible for reviewing the proposed move for safety concerns (CP 830; br. of appellant CPU at 15); (2) the move as proposed would bring the peak of the house within 10 feet of its energized electrical wires (CP 847; br. of appellant CPU at 8); (3)

the route map from NSM was incomplete (CP 831, 933); (4) state law specifies that bringing persons or objects within 10 feet of an energized line is not permitted (WAC 296-155-428(1)(e); br. of appellant CPU at 20 n.8) and (5) CPU did not de-energize its electrical wires, investigate NSM's proposal further, send along a supervisor on the route, or take any other action to ensure that no object or person would come within 10 feet of the line (CP 822; br. of appellant CPU at 5-7).

There is evidence here, sufficient to present to a jury, that CPU breached its duty. The trial court correctly denied CPU summary judgment.

F. ADOPTION OF CPU AND CLARK COUNTY'S ARGUMENTS REGARDING REVERSAL OF SUMMARY JUDGMENT AGAINST EACH OTHER

CPU and Clark County each argue in their briefs that the other should have to present its defense to the jury, rather than prevailing on summary judgment as a matter of law. To the extent these arguments do not conflict with Smith's position, Smith hereby joins in these arguments.

G. CONCLUSION

The trial court properly refrained from applying the public duty doctrine to dismiss Smith's claim against CPU, but misapplied it to the County. Both entities should go to trial on the issue of whether each was negligent in its actions relating to the house move that injured Smith.

Summary judgment in favor of the County should be reversed,
denial of summary judgment in favor of CPU should be affirmed.

DATED this 24th day of April, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

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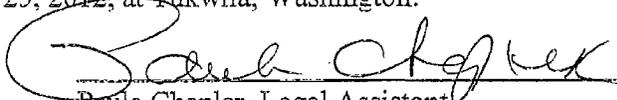
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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