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No. 53920-5-I

(KING COUNTY SUPERIOR COURT NO. 03-2-25260-3 SEA)

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

JOSEF VENTENBERGS, et al.,

Appellants,

v.

CITY OF SEATTLE, et al.,

Respondents.

**BRIEF OF RESPONDENT
WASTE MANAGEMENT OF WASHINGTON, INC.**

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I. INTRODUCTION

This case involves a challenge to the City of Seattle's rightful exercise of authority over solid waste collection within its municipal boundaries. For years, plaintiffs have been performing illegal hauling of solid waste (consisting of construction, demolition and land clearing debris) in the City of Seattle. Once they became apprised of the unauthorized nature of their activities, instead of asking forgiveness or even permission, the plaintiffs boldly sued the City. Their lawsuit ignores the clear mandates of state statutes and Washington case law and attempts to characterize their illegal businesses as constitutionally-protected vocations. Plaintiffs have taken the adage that the best defense is a good offense to a whole new level. The trial court's dismissal of their claims must be upheld.

II. JOINDER IN BRIEFING

Waste Management of Washington, Inc. (Waste Management) was added to this case as a defendant almost six months after plaintiffs initiated their lawsuit. Presumably, plaintiffs believed that Waste Management's contractually-granted rights could be affected by the outcome of this case. The heart of plaintiffs' lawsuit, however, is constitutionally-based and directed to the City of Seattle, not the private contractors who serve as the City's agents. Thus, Waste Management here adopts the statements of issues and facts in the Brief of Respondents City of Seattle, Seattle Public Utilities, and Chuck Clarke, and joins in the arguments presented therein. Waste Management similarly joins in the

legal analysis presented by its co-defendant and the City's other contractor, Rabanco, Ltd. (Rabanco) (collectively, the two will be referred to herein as the City Contractors).

III. ARGUMENT

Plaintiffs complain that the City of Seattle infringed on their constitutional rights by exercising its jurisdiction over "Construction, Demolition and Land Clearing Waste" ("CDL"). Despite the fact that solid waste collection is in all instances a regulated activity in the State of Washington, and despite the fact that plaintiffs have heretofore operated outside of that regulated system, plaintiffs claim that the City's actions unconstitutionally impaired their contracts. Plaintiffs' seek approval to continue business operations in contravention of legitimate legal constraints on performing solid waste services imposed by the laws of Washington. Ultimately, this case revolves around the statutory interpretation of a straight-forward legislative provision. If plaintiffs desire relief, they should take it to the state legislature, not the Court.

A. Plaintiffs Ventenbergs and Kendall Trucking were hauling solid waste without legal authority and without regulatory oversight, and contracts for their services were therefore unauthorized.

In Washington, except where an individual entity hauls its own garbage, solid waste collection is performed under the regulatory auspices of either the State (through the Washington Utilities and Transportation Commission ("WUTC")) or a city that exercises its police powers to assert jurisdiction. The legislature has provided:

No person, his lessees, receivers, or trustees, shall engage in the business of operating as a solid waste collection company in this state, except in accordance with the provisions of this chapter: PROVIDED, That the provisions of this chapter shall not apply to the operations of any solid waste collection company under a contract of solid waste disposal with any city or town, nor to any city or town which itself undertakes the disposal of solid waste.

RCW 81.77.020. In our state, solid waste collection not something that just anyone can undertake. The environmental implications of illegal dumping and inexperienced handling are obvious. The legislature thus determined that solid waste should not be collected without governmental oversight ensuring proper regulatory standards. Any private entity wishing to provide legal solid waste collection in Washington must either obtain a certificate of public convenience and necessity from the WUTC, or contract authority from a city.

In some ways, under this state statutory scheme solid waste is handled similar to the manner in which utility services are typically provided. Like a telephone company or a water company, in exchange for the exclusive right to provide services, a solid waste company has its rates established and its operations scrutinized by a governmental entity. The regulatory scheme attempts to ensure universal service at reasonable rates and guards against “cream-skimming” in urban areas. *See Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 400 (9th Cir. 1995) (upholding the WUTC statute against a Commerce Clause challenge). Where a city, like Seattle, has taken over

regulation of solid waste collection, whether the city provides the service through its own employees and equipment, or whether it contracts with a private entity, it is providing a necessary utility to its citizens.

Plaintiffs admit that Ventenbergs and Kendall Trucking were hauling solid waste without either a certificate of convenience and necessity from the WUTC or a contract with the City. Any contracts that may have existed for solid waste collection without the proper authority would be contrary to the terms of the statute and therefore illegal. There can be no constitutionally-protected right in an illegal business. *Griffith v. Connecticut*, 218 U.S. 563, 571 S.Ct. 132, 54 L.Ed. 1151 (1910). *See also, Vedder v. Spellman*, 78 Wn .2d 834, 837, 480 P.2d 207 (1971) (a contract that is contrary to the terms and policy of a statute is illegal and unenforceable).

B. Ignorance of the law, wishing it were otherwise, and failure to have it enforced do not make plaintiffs' illegal hauling operations legitimate.

The plaintiffs seem to infer that because no one ever told them their operations were regulated before 2003, somehow that means they have a vested right to continue their unauthorized collection of solid waste. The fact that neither the WUTC nor Seattle took any enforcement action does not convert illegal behavior into legal actions, however. Operating illegally in the absence of enforcement does not create a protectable property right or expectation.

Plaintiffs obviously wish that solid waste collection were a free-market endeavor. The legislature apparently disagreed. Despite plaintiffs'

arguments to the contrary, at this point in time solid waste collection in Washington is not a free market activity and is not open to competition. The legislature only sanctioned limited options. Because they had neither a certificate nor a contract authorizing their operations, the plaintiffs' actions were illegal. The fact that they wish it were otherwise does not convert an unauthorized business to a legal endeavor for which the constitution provides protection.

Even if solid waste collection were an openly-competitive business in Washington, though, still illegal operations would not be sanctioned. Compliance with licensing and regulatory requirements is not somehow made permissible by characterizing the a business as free-market. For example, unlike solid waste *collection*, solid waste *disposal* is an open-market industry: yet if plaintiffs were operating a dump without having obtained a permit from the local health department or approval from the Department of Ecology, they would not have a vested right exempting them from those regulations, either. Such intentional ignorance would be even more troubling, but nonetheless lead to the same result of requiring compliance with the law, rather than providing a basis for challenging it.

Nor does ignorance of the legal constraints on solid waste collection make plaintiffs' business legitimate. Plaintiffs' unawareness of the regulatory requirements for a business in which environmental risks are so obvious is hard to fathom. In any event, ignorance of the law has never been an adequate defense. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 175, 937 P.2d 565 (1997).

C. The City had legitimate reasons for contracting with Waste Management and Rabanco for commercial waste collection services, including CDL.

Plaintiffs make much of the fact that both City Contractors are large corporations, but dismiss the City's legitimate reasons for expecting that Waste Management and Rabanco could provide its solid waste collection services more competently, more efficiently, and more consistently than others.

Certainly, it is not disputed that Waste Management and Rabanco each owned a WUTC certificate of convenience and necessity to perform commercial solid waste collection in Seattle prior to the City's decision to assert jurisdiction and contract for the services. Both the City Contractors were the only entities who were legally performing commercial waste collection in the City before it decided to enter into service contracts. The City was aware of the prior WUTC-certificated operations of the two City Contractors, and familiar with the skills and competency of both.

Thus, the City's decision to contract with these two companies was legitimate, and indeed to do otherwise would have been contrary to the public's interest. Prior to the City's decision to assert jurisdiction, only Waste Management and Rabanco held the WUTC certificate rights for commercial solid waste in Seattle. It is within the City's prerogative to determine that the two City Contractors were best adapted to service its purposes. *Smith v. Spokane*, 55 Wn.2d 219, 221, 104 P. 249 (1909) (a waste collection ordinance is a "proper exercise of the police power, and

from this power is necessarily implied the duty to determine the means and agencies best adapted to the end in view”).

The companies’ demonstrated expertise was for handling all kinds of “solid waste” as defined by state law. It means: “all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof,” RCW 70.95.030(22) (emphasis added). The term has the same definition in Ch. 81.77 RCW, which defines the scope of the WUTC’s regulatory authority, as the one provided in Ch. 70.95 RCW (The Solid Waste Management Act), which establishes the regulatory reach of the Department of Ecology and other jurisdictions with an interest in solid waste handling, including municipalities.

As a result, Seattle determined that its City Contractors should also be obliged to provide CDL collection under the Contract. *See* Section 90 (granting to the contractor the City’s rights of ownership and control over Commercial Waste – which includes both Municipal Solid Waste and CDL); Section 120 (requiring the contractor to provide CDL collection throughout the City, not just in the exclusive zones established for MSW).

The fact that the manner of collection is different from curbside collection of residential and even commercial solid waste is not relevant. Plaintiffs indulge in dangerous hairsplitting by inferring that some solid waste (i.e., CDL) does not present the same risks as other solid waste (i.e., garbage). It’s all discarded material potentially containing constituents of

environmental hazard, and there is no legitimate reason for distinguishing. People throwing away their garbage in Seattle expect it to be handled properly, whether they are at home, at work or at the construction job. The Supreme Court of Washington has recognized the potential risk to public health even with material as seemingly benign as cardboard. *Spokane v. Carlson*, 73 Wn.2d 76, 80, 436 P.2d 454 (1968).

The Ninth Circuit has confirmed that even the smallest amount of solid waste in any given truck-load triggers sufficient public health concerns to justify regulation. *AGG Enterprises v. Washington County*, 281 F.3d 1324 (9th Cir. 2002). The Court upheld the local governments' laws requiring an exclusive franchise for collecting even de minimis amounts of solid waste. It rejected a challenge brought by a commercial "recycler" who claimed that his loads contained only ten percent solid waste and ninety percent commercial recyclables, and therefore constituted "property" the regulation of which is preempted by federal law.

The two City Contractors had a history of experience and a solid waste handling infrastructure that offered assurance to the City of safe, responsible – and legal – services. The City's decision to contract with Waste Management and Rabanco was entirely supportable.

IV. CONCLUSION

State statutes create the regulatory scheme governing solid waste collection, and the City of Seattle's actions in implementing those laws have been entirely consistent with the policies established by the

legislature. Plaintiffs' grievance with the City ordinance is therefore misplaced. It is the state statutory scheme, not the City's actions to effectuate it, that underlies plaintiffs' alleged injustice.

DATED this 20th day of July, 2004.

Respectfully submitted,

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COUNTY OF KING)

The undersigned, being first duly sworn, on oath states:

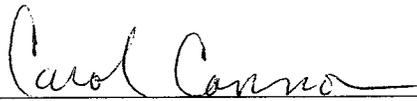
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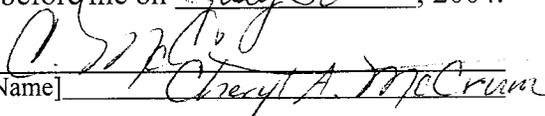
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My appointment expires: 10/9/04

