

No. 79573-8

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**SUPREME COURT  
STATE OF WASHINGTON**

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CALVIN and GLORIA FISK, a marital community,

Plaintiffs/Appellants,

v.

CITY OF KIRKLAND, a Washington municipal corporation

Defendant/Respondent.

**BRIEF OF APPELLANTS  
CALVIN AND GLORIA FISK**

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## **I. ASSIGNMENTS OF ERROR**

Appellants/plaintiffs, CALVIN and GLORIA FISK (hereinafter "the Fisks"), hereby file their Opening Brief in this appeal whereby they seek to overturn the dismissal of their lawsuit against respondent/defendant, CITY OF KIRKLAND (hereinafter "the City of Kirkland"). Specifically, the Fisks believe the trial court below erred as a matter of law when it granted the City of Kirkland's motion for summary judgment and dismissed the Fisk's lawsuit against the City on the grounds that the City was not a "water company" for purposes of RCW 80.04.010 and therefore not subject to liability to the Fisks under RCW 80.04.440.

## **II. STATEMENT OF THE CASE**

On the morning of January 11, 2004 the Fisks were driving their 36 foot recreational vehicle southbound on Interstate 405 near Kirkland, Washington when they noticed a burning odor. CP 14. The Fisks pulled their recreational vehicle off the road and discovered a fire in the rear of their vehicle in the area of the engine compartment. CP 14. The Fisks called 911 to report the fire and the Kirkland Fire Department responded. CP 14.

When the Kirkland Fire Department arrived and attempted

to put the fire out, they were unable to do so because they could not fill their fire hoses with water from the fire hydrant they first hooked up to. CP 14. The fire hydrant the Kirkland Fire Department first connected to was incapable of supplying an adequate supply of water to fight a fire. CP 14. The City of Kirkland admits that insufficient fire flow from this first hydrant slowed down the firefighters' ability to put the fire out. CP 22-26; CP 27-29.

The City of Kirkland brought a motion for summary judgment seeking to dismiss the Fisks' lawsuit contending the City of Kirkland did not owe the Fisks an actionable duty under the public duty doctrine to put out the fire. CP 13-21. The City of Kirkland claims that fire suppression services municipalities perform are obligations to the public as a whole, and not to any individual citizen. Consequently, the City of Kirkland argues there is no legal basis for the Fisks' lawsuit against the City of Kirkland under the public duty doctrine. CP 17-20.

The Fisks contend the City of Kirkland had a statutory duty to operate and maintain a water system capable of delivering an adequate and sufficient supply of water to the fire

hydrant involved in this case. The Fisks contend the maintenance of the City of Kirkland's water system is an act performed for the benefit of its customers, and is not an act performed for the common good of all. Consequently, the Fisks contend the public duty doctrine does not apply to the circumstances involved in this case. CP 31-39.

On November 3, 2006, the Honorable Michael S. Spearman granted the City of Kirkland's motion for summary judgment and dismissed the Fisks' lawsuit. CP 59-61.

### **III. LEGAL ARGUMENT**

#### **A. Issue Presented For Direct Review: Is The City of Kirkland Entitled To a Dismissal of the Fisks' Lawsuit as a Matter of Law?**

**ANSWER:** NO. The Fisks believe the specific issue presented for direct review by the Washington Supreme Court in this case is whether the City of Kirkland owed the Fisk's a legal duty to maintain an adequate water supply for a fire hydrant that was part of the City of Kirkland's water system and utilized by the City of Kirkland's fire department in an attempt to put out a fire on January 11, 2004. The Fisks believe: (1) the City of Kirkland qualifies as a "water company" under RCW 80.04.010; (2) and therefore owes a duty to plaintiffs to conduct its operations in a safe manner pursuant to RCW 80.28.010; and (3)

finally is potentially liable to the Fisks pursuant to RCW 80.04.440 for failing to operate in a safe manner.

**B. Standard Of Review.**

An appellate court reviews a trial court's ruling on summary judgment *de novo*, performing the same inquiry as the trial court. *Herron v. Tribune Publishing Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

**C. The City of Kirkland Is A "Water Company" Under RCW 80.04.010, Subjecting It to Potential Liability To The Fisks In This Lawsuit Under RCW 80.28.010 and RCW 80.04.440.**

**1. Overview of Conflicting Decisions.**

The Fisks seek direct review by the Washington Supreme Court of the trial court's dismissal of the Fisks' lawsuit in accordance with RAP 4.2(a)(3).

The City of Kirkland argued below that the trial court should grant the City's motion for summary judgment based on the decision by Division One of the Washington Court of Appeals in *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006).

The Fisks argued to the trial court that the trial court should deny the City of Kirkland's motion based on the decision by Division Three of the Washington Court of Appeals in

*Shannon v. City of Grand Coulee*, 7 Wn. App. 919, 503 P.2d 760 (1972).

The trial court felt that it was bound by Division One's decision in *Stiefel v. City of Kent*, *supra*, and consequently granted the City of Kirkland's motion.

Plaintiffs believe this Court should overrule the trial court's decision based on the decision in *Shannon v. City of Grand Coulee*, *supra*.

a. ***Shannon v. City of Grand Coulee.***

The doctrine of sovereign immunity in the State of Washington was abrogated in 1967 when the state Legislature enacted RCW 4.96.010. RCW 4.96.010(1) states:

***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. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory. (Emphasis added)***

RCW 80.28.010(2) provides:

Every gas company, electrical company and **water company** shall furnish and supply such service, instrumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable. (Emphasis added)

RCW 80.04.010, entitled *Definitions*, defines a "water

company" as:

"Water company" includes *every* corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town owning, controlling, *operating or managing any water system for hire within this state*: PROVIDED, that for purposes of commission jurisdiction, it shall not include any water systems serving less than 100 customers where the average annual gross revenue per customer does not exceed \$300 per year, which revenue figure may be increased annually by the commission by rule adopted pursuant to Chapter 34.05 RCW to reflect the rate of inflation as determined by the implicit price deflator of the United States Department of Commerce; AND PROVIDED FURTHER, that such measurement of customers or revenue shall include all portions of water companies having common ownership or control, regardless of location or corporate designation. "Control" as used herein shall be defined by the commission by rule and shall not include management by a satellite agency as defined in Chapter 70.116 RCW if the satellite agency is not an owner of the water company. "Water company" also includes, for auditing purposes only, non-municipal water systems which were referred to the commission pursuant to an administrative order from the department, or the city or

county as provided in RCW 80.04.110. However, water companies exempt from commission regulation shall be subject to the provisions of Chapter 19.86 RCW. A water company cannot be removed from regulation except with the approval of the commission. Water companies subject to regulation may petition the commission for removal from regulation if the number of customers falls below 100 or the average annual revenue per customer falls below \$300. The commission is authorized to maintain continued regulation if it finds that the public interest so requires. (Emphasis added)

The Fisks believe this Court should overturn the trial court's dismissal of the Fisks' lawsuit based on the decision by Division Three of the Washington Court of Appeals in *Shannon v. City of Grand Coulee*, 7 Wn. App. 919, 503 P.2d 760 (1972).

The material facts involved in the *Shannon* decision are remarkably similar to those involved in this case. A fire broke out in the plaintiff's business. Within minutes, the local fire department arrived on the scene and hooked up to the fire hydrant nearest plaintiff's property. Unfortunately, this fire hydrant was dry. By the time the fire department hooked up to two other fire hydrants, plaintiff's business had burned down.

In the *Shannon* decision, Division Three found that the defendant, City of Grand Coulee, had a duty to furnish an adequate, efficient and safe water service to its residents under

RCW 80.04.010 and RCW 80.28.010 and that the failure of the City of Grand Coulee to properly maintain the fire hydrant that was dry on the day of the fire constituted actionable negligence. Division Three held that the City of Grand Coulee met the definition of what constituted a "water company" for purposes of RCW 80.04.010 and had a duty to provide an adequate water supply for firefighting purposes under RCW 80.28.010.

We have no hesitancy to hold that a city maintaining a water system to which fire hydrants are connected has a duty to regularly inspect that system to ensure an adequate supply of water flows to those hydrants. Only by so doing, does a city meet the statutory duty to provide an efficient water system at least when that system is supportive of fire protection. This failure to so inspect over a three-year period is breach of that duty as a matter of law.

*Shannon v. City of Grand Coulee*, 7 Wn. App. 919, 922, 503 P.2d 760 (1972). Division Three in the *Shannon* decision determined that the trial court had erred in not granting the plaintiff's motion for a directed verdict on the issue of liability. A petition for review of this decision was filed with the Washington State Supreme Court and denied.

In this case, the City of Kirkland meets the definition of a "water company" contained in RCW 80.04.010. It is a municipal corporation/city that operates a water system for hire, *i.e.* it

charges its customers to provide a supply of water. Under RCW 80.28.010, the City of Kirkland had a duty to properly maintain and otherwise see that city's water system was capable of supplying a sufficient and adequate fire flow to the fire hydrant involved in this case. The City of Kirkland's alleged breach of this statutory duty is consequently actionable by the Fisks under RCW 80.04.440 which states:

In case any public service company shall do, cause to be done, or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful [RCW 80.28.010], or shall admit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the Commission, such public service company shall be liable to the persons or corporations effected thereby for all loss, damage or injury thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was willful, it may, in its discretion, affix a reasonable counsel or attorneys' fees, which shall be taxed and collected as part of the costs in the case. An action for recovery for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

A "water company" qualifies as a "public service" company. RCW 80.04.010.

**b. *Stiefel v. City of Kent.***

The City of Kirkland based its motion for summary

judgment on the decision by Division One in *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006). The Fisks argued to the trial court that the *Stiefel* decision ignored established Washington State Supreme Court precedent, repudiated the Washington State Legislature's 1967 abrogation of sovereign immunity in this state, and immunized the City of Kirkland from liability for which the state Legislature has already determined the City of Kirkland should be held responsible for. The trial court still felt bound to follow the *Stiefel* decision.

In the *Stiefel* decision, the Kent Fire Department responded to a fire at a neighbor's house next to plaintiff's residence. After pumping water on the neighbor's house for a short period of time, a fire supply hose was clogged with debris from the City of Kent's water system. In the course of trying to re-establish water for the fire hoses, the fire spread from the neighbor's house and substantially damaged plaintiff's home. The trial court granted the City of Kent's motion for summary judgment on the grounds that the plaintiff's lawsuit was barred by the public duty doctrine. In a *per curiam* decision, Division One upheld the trial court's dismissal of plaintiff's lawsuit based on the public duty doctrine.

In the *Stiefel* decision, Division One decided not to follow

the decision by Division Three in *Shannon v. City of Grand Coulee*, 7 Wn. App. 919, 503 P.2d 760 (1972), on the grounds that the *Shannon* decision was decided before the public duty doctrine had been recognized by the Washington Supreme Court in *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987). In the *Stiefel* decision, Division One proceeded to analyze whether the City of Kent owed plaintiffs an actionable duty to maintain the City's public water system under the law defining the scope of the public duty doctrine that had been developed since the *Bailey* decision.

In beginning this analysis, Division One observed in the *Stiefel* decision that if a public entity is performing a proprietary function, it is held to the same duty of care as a private individual or corporation engaged in the same activity. *Dorsch v. City of Tacoma*, 92 Wn. App. 131, 135, 960 P.2d 489 (1998). A public entity acts in a proprietary rather than a governmental capacity when it engages in business-like activities that are normally performed by private enterprise. *Id.*, 92 Wn. App. at 135. In the *Stiefel* decision, Division One recognized that the "general" operation of a municipal water system is a proprietary function. *Russell v. Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951). This is consistent with RCW 35.92.010 that authorizes a city

operating a local water utility to set its rate structure in order to maintain fire hydrants as part of the water system.

In the *Stiefel* decision, Division One also observed that the creation, maintenance and operation of a fire department and all reasonably incident duties is a governmental function. *Lakoduk v. Cruger*, 47 Wn.2d 2286, 289, 287 P.2d 338 (1955).

In the *Stiefel* Decision, Division One held that supplying water for fire protection purposes constituted a governmental function and that a municipality was not liable for damages for the negligent failure to supply water for extinguishing fires. *Stiefel v. City of Kent*, 132 Wn. App. at 531. However, the holding that supplying water for fire protection purposes was a governmental function was directly contrary to the holding in *Russell v. Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951), wherein the Washington Supreme Court specifically held:

The City urges nonliability on its part upon the theory that in the operation of its water system it was performing a governmental function. The law in this State is to the contrary. *Bjork v. Tacoma*, 76 Wn. 225, 135 P. 1005 (1913); *Aronson v. Everett*, 136 Wn. 312, 239 P. 1011 (1925); *Shandrow v. Tacoma*, 188 Wn. 389, 62 P.2d 1090 (1936). We decided in those cases that a city engaged in such an activity acts in its proprietary capacity and is liability for negligence the same as any private corporation engaged in the same business. Cities are limited

governmental arms of this state, and when permitted by the State to engage in activities normally performed by private enterprise, they, to that extent, depart from their governmental functions. ***The fact that some of the water is used in fire protection and in connection with health and sanitation is not material.*** (emphasis added)

Contrary to the above-quoted language from *Russell v. Grandview, supra*, Division One in the *Stiefel* decision found the difference between supplying water in general and supplying water for fire protection purposes to be material.

In the *Stiefel* decision, Division One further held that the reliance by Division Three on RCW 80.28.010 in *Shannon v. City of Grand Coulee, supra*, was misplaced since this provision was part of the statutory scheme governing the Washington Utilities and Transportation Commission, and that under RCW 80.04.500 municipal water systems are exempted from WUTC control. This interpretation of RCW 80.04.500 by Division One in the *Stiefel* decision was factually and legally incorrect.

RCW 80.04.500 states:

Nothing in the title shall authorize the Commission to make or enforce any order affecting rates, tolls, rentals, contracts or charges or service rendered, or the adequacy or sufficiency of the facilities, equipment, instrumentalities or buildings, or the reasonableness of rules or regulations made, furnished, used, supplied or enforced

affecting any telecommunications line, gas plant, electrical plant or water system owned or operated by any city or town, or to make or enforce any order relating to the safety of any telecommunications line, electrical plant or water system owned and operated by any city or town, ***but all other provisions enumerated herein [Title 80 RCW] shall apply to public utilities owned by any city or town.***  
(Emphasis added)

The forerunner to RCW 80.04.500 [(chapter 117, Laws of 1911, p. 538, Rem. Rev. Stat., SS 10339 [P. C. SS 5528] et seq.)] has been construed in the past to prevent the WUTC from controlling the rates and tolls charged by a municipality based on actions taken by the state Legislature in 1917 and 1933 making it clear cities would be free to decide without hindrance from the state what cities would charge for municipal utilities. *See e.g. State ex rel. Westside Improvement Club v. Department of Public Service of Washington*, 186 Wash. 378, 58 P.2d 350 (1936). However, the proviso language found at the end of RCW 80.04.500 makes it evident that a municipality that operates a water system may still be subject to liability under RCW 80.04.440 for the violation of its statutory duty contained in RCW 80.28.010.

Finally, the most glaring omission by Division One in the *Stiefel* decision was its failure to recognize the import of RCW 80.04.440. In the *Stiefel* decision, the plaintiff had contended that

the “statutory intent” exception to the public duty doctrine applied. *See e.g. Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 929, 969 P.2d 75 (1998). The Court of Appeals in the *Stiefel* decision held that neither Title 80 RCW nor any provision in the Kent City Code governing fire hydrants and the enforcement of the municipal fire code cited by the plaintiffs evidenced an intent to protect a particular and circumscribed class of persons with respect to the provision of fire protection services. Division One was apparently not made aware of RCW 80.04.440. RCW 80.04.440 specifically recognizes a cause of action may be pursued by any individual or corporation for the failure of a water company, like the City of Kirkland, to provide an adequate water supply for fire protection purposes as mandated by RCW 80.28.010. Consequently, the statutory intent exception of the public duty doctrine would apply to the situation presented in this case.

*c. Silver Firs Townhomes v. Silver Lake Water District.*

The City of Kirkland also based its contention that RCW 80.04 *et seq.* does not apply to a municipal corporation on another decision by Division One in *Silver Firs Townhomes, Inc., v. Silver Lake Water District*, 103 Wn. App. 411, 12 P.3d 1022 (2000), *rev. denied* 143 Wn.2d 1013 (2001). In the *Silver Firs*

decision, Division One held that RCW 80.04.010 did not apply to a municipal corporation because RCW 80.04.010 made no specific mention that it applied to a municipal corporation. "The statute defining 'water company' makes no mention of municipal corporations." *Id.*, 103 Wn. App. 421. This statement by the Court in the *Silver Firs* decision was a manifest error of law.

Once again, RCW 80.04.010 defines a "water company" as follows:

Water company" includes *every* corporation, company, association, joint stock association, partnership and person, there lessees, trustees or receivers appointed by any court whatsoever, *and every city or town owning, controlling, operating or managing any water system for hire within this state...*  
(Emphasis added)

The plain and unambiguous language employed in RCW 80.04.010 states unequivocally that it applies to every corporation and every city or town owning operating, controlling or managing any water system for hire. *Every* corporation includes a municipal corporation. Even if it somehow doesn't, there can be no argument the City of Kirkland is a city that owns, controls, operates and manages a water system for hire.

Division One noted in the *Silver Firs* decision that Title 80 RCW authorizes the Washington Utilities and Transportation

Commission (WUTC) to regulate, *inter alia*, water companies and provides a broad definition of a "water company." RCW 80.04.010. Division One also noted in the *Silver Firs* decision that a WUTC regulation, WAC 480-110-255, clarifies that the commission regulates only investor-owned water companies. Division One concluded that municipal corporations were therefore not subject to Title 80 RCW.

An administrative regulation cannot limit the scope of a statute if to do so would contravene the original legislative intent behind passage of the statute. *See, e.g. Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 E2d 1241 (1998). It is submitted that Division One has never fully taken into account the complete text of RCW 80.04.500. RCW 80.04.500 specifically prohibits the WUTC from regulating the rates charged by municipally owned utilities. This would explain the wording contained in WAC 480-110-255, defining the WUTC's jurisdiction. Yet, the proviso language at the end of RCW 80.04.500 explicitly states that nothing in RCW 80.04.500 should be read to change any other obligation imposed on a municipal utility under Title 80 RCW, including the municipal utility's obligations under RCW 80.28.010 and corresponding potential liability under RCW 80.04.440. This, however, is precisely what

the *Silver Firs* and *Stiefel* decisions attempt to accomplish. This Court should enforce the proviso language contained at the end of RCW 80.04.500 and overrule the *Silver Firs* and *Stiefel* decisions.

#### IV. CONCLUSION

This Court should reverse the trial court's decision below granting the City of Kirkland's motion for summary judgment by affirming the rationale contained in the decision in *Shannon v. City of Grand Coulee*, 7 Wash. App. 919, 503 P.2d 760 (1972), and hold that RCW 80.04.010 and RCW 80.28.010 impose upon the City of Kirkland the duty to supply an adequate and sufficient supply of water to its fire hydrants which it willfully violated in this case rendering it potentially liable to the Fisks under RCW 80.04.440.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of June, 2007.

LAW OFFICE OF  
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By 

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## CERTIFICATE OF SERVICE

The undersigned certifies that on this day he caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

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