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No. 79573-8

**SUPREME COURT
STATE OF WASHINGTON**

CALVIN and GLORIA FISK, a marital community,

Plaintiffs/Appellants,

v.

CITY OF KIRKLAND, a Washington municipal corporation,

Defendant/Respondent.

**REPLY 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 Reply 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. The trial court below dismissed the Fisks' 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. REPLY TO CITY OF KIRKLAND'S COUNTER-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 rear 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 City of Kirkland admits the fire hydrant the Kirkland Fire Department first connected to was incapable of flowing the minimum fire flow to put out a fire because the water main supplying it was too small to provide enough water to put out a fire. CP 28. 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.

In its opposing brief, City of Kirkland claims that firefighters were hampered by the presence a propane tank and a gun with ammunition in the recreational vehicle. Hopefully, discovery in the future will explore how the presence of propane and a gun with ammunition located in the front of the Fisks' recreational vehicle somehow influenced how to fight a fire that broke out thirty six feet away in the very rear of the Fisks' recreational vehicle in the engine compartment. Moreover, Captain Mike Jeffery, a City of Kirkland Battalion Chief who oversaw firefighting efforts at this fire, can explain in the future why he based his firefighting tactics on the assumption that since

aluminum constitutes a "combustible" he believes the Fisks' motor home was likely to be a total loss regardless of when firefighters put the fire out inside the engine compartment of the Fisks' recreational vehicle. CP 32.

Regardless, the credibility of Captain Jeffery's testimony proffered in support of the City of Kirkland's motion for summary judgment was not relevant to the disposition of this motion.

III. LEGAL ARGUMENT IN REPLY

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

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 Fisks 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 City of Kirkland appears to agree this is the issue presented to this Court for direct review.

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). The City of Kirkland does not disagree that this is the appropriate standard of review in this case.

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 does not contest the fact that there are two conflicting decisions from two different divisions of the Washington Court of Appeals at issue in this appeal: *Shannon v. City of Grand Coulee*, 7 Wn. App. 919, 503 P.2d 760 (1972)(Division Three) and *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006)(Division One).

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

The Fisks believe this Court should overrule the trial court’s dismissal of their lawsuit against the City of Kirkland based on the decision in *Shannon v. City of Grand Coulee, supra*. The City of Kirkland argues the *Shannon* decision is not applicable to this case for three reasons:

1. It was decided in 1972 before the development of the public duty doctrine;
2. It did not consider the "well established" distinctions between proprietary and governmental functions; and
3. RCW 80.04.500 exempts municipal utilities from the statutory requirements contained in RCW 80.28 *et seq.*

i. Public Duty Doctrine.

Although the *Shannon* decision was decided thirty-five years ago, it was decided just five years after the doctrine of sovereign immunity in the State of Washington was abrogated by the state Legislature in 1967 when it enacted RCW 4.96.010. The Fisks readily concede that since the *Shannon* decision was handed down, the public duty doctrine has emerged and evolved. Nevertheless, the Fisks submit to this Court that the *Shannon* decision remained true to the original intent of the Legislature when it abolished sovereign immunity in this state in 1967 and that it is oftentimes helpful for courts to be reminded of the language contained in the first sentence of this statute:

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.
(Emphasis added)

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).

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.

In its opposing brief, the City of Kirkland argues that it does not operate a water system for hire because the provision of the City's fire protection services is not conditioned upon the payment of a fee. This is disingenuous.

At this point, it is important to remember the Fisks' claim against the City of Kirkland is based on its water department's failure to provide an adequate supply of water to fight a fire, not against its fire department for failing to properly fight a fire. The proximate cause of the Fisks' loss was a pipe that the City of Kirkland knew beforehand was too small to provide enough water to put out a fire.

The City of Kirkland charges a fee for anyone who wishes to be supplied with water within its city limits. *See* Kirkland Municipal Code ("KMC") 15.24.020; Appendix A. The water supplied by the City of Kirkland for general purposes travels

through the same water mains as the water supplied for fire protection purposes. City of Kirkland Opposing Brief, p. 4.. In charging its customers for supplying water, the City of Kirkland makes no distinction based upon the purpose for which the water will be used for. To say the City of Kirkland does not charge its customers for providing water for fire protection purposes is contrary to the plain wording of its Municipal Code.

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, at a minimum, the statutory intent exception of the public duty doctrine would apply to the situation presented in this case.

ii. Proprietary v. Governmental Function.

This Court has previously held the supplying of water for fire protection purposes is a proprietary function, not a governmental function. In *Russell v. Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951), this 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.*** The negligence of which complaint was made did not arise in the performance of such functions. (emphasis added)

In *Bjork v. Tacoma*, 76 Wn. 225, 228, 135 P. 1005 (1913),

a negligence action based on a theory of attractive nuisance, this

Court stated:

The city, in the maintenance and operation of its water works, was acting in a proprietary and not a governmental capacity. Its liability must, therefore, be the same as that of a private owner under the same circumstances.

In *Aronson v. Everett*, 136 Wn. 312, 316, 239 P. 1011

(1925), a negligence action for supplying polluted water, this

Court stated:

There is ample authority that a city engaged in furnishing water, electricity or other kindred services to its inhabitants for a profit is liable for negligence the same as

any private corporation engaged in the same business; that the city does not act in a governmental capacity, and that there is an implied warranty that the water is fit for human consumption.

In *Shandrow v. Tacoma*, 188 Wn. 389, 391, 62 P.2d 1090

(1936), a slip and fall case, this Court stated:

In the construction and the operation of its water plant, including the mains serving its inhabitants, the city acts in a proprietary capacity, and is liable for negligence to the same extent as any private corporation engaged in the same business would be.

It therefore is unfair to criticize the holding in *Shannon v. City of Grand Coulee, supra*, on the basis that it failed to consider the distinction between proprietary and governmental functions when this Court has previously held the provision of water for any purpose was a proprietary function, not a governmental function.

In its opposing brief, the City of Kirkland cites McQuillen on Municipal Corporations and decisions from the District of Columbia and three other states for the general proposition that supplying water for public purposes, including fire protection, is a governmental function and that a municipality is not liable for damages for the negligent failure to supply water for fire

extinguishing purposes. Whether this is true or not in general, it certainly is not true in the state of Washington. First, this Court has held otherwise since 1913. *Bjork v. Tacoma*, 76 Wn. 225, 135 P. 1005 (1913).

Secondly, the Washington Legislature determined in 1911 as a matter of public policy that supplying water for public purposes would be viewed as a proprietary function when it passed RCW 80.28.010 and RCW 80.04.440 (formerly c 117 § 26; RRS § 10362 and c 117 § 102; RRS § 10451 respectively).

iii. RCW 80.04.500.

As pointed out in the Fisks' Opening Brief, 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, even if it is not subject to direct regulation by the Washington Utilities & Transportation Commission. This Fisks consequently believe this Court should overturn the trial court's dismissal of the Fisks' lawsuit by adopting the reasoning contained in *Shannon v. City of Grand Coulee*, 7 Wn. App. 919, 503 P.2d 760 (1972).

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).

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). 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. *See 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 by this Court in *Russell v. Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951),

The City of Kirkland tries to distinguish the *Russell* decision from the situation involved in this case on the grounds that the *Russell* decision involved supplying water for drinking purposes, not for fire protection purposes. As the City of Kirkland puts it, "The distinction changes the outcome." In reply, the Fisks would respond by stating this Court did not seem to agree when it stated the distinction was immaterial for purposes of establishing liability. *Russell v. Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951).

Moreover, the water supplied by the City of Kirkland to its customers for either general purposes or fire protection purposes travels through the same water mains. City of Kirkland Opposing Brief, p. 4. The crux of the Fisks' claim against the City of Kirkland in this lawsuit is that a water main its its water system was too small. Whether waters enters a fire hydrant or comes out of a household faucet, it travels from the same

reservoir through the same water main to arrive at its eventual destination. The operation of the water system that delivers this water is the same, whether the water is used for drinking purposes or to fight a fire. Regardless of what the water is used for, the City of Kirkland charges a fee to supply this water from its water system. KMC 15.24.020, Appendix A. The City of Kirkland's liability to the Fisks in this lawsuit is grounded on where the water comes from, not what it is used for.

In the *Stiefel* decision, Division One also 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 & Transportation Commission, and that under RCW 80.04.500 municipal water systems are exempted from WUTC control.

The forerunner to RCW 80.04.500 was 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.

The City of Kirkland argues RCW 80.04.440 is of no value to the Fisks in this lawsuit because "there is no showing by the Fisks that the City's operation of its water system which is used for fire hydrants and the fire department is unlawful, forbidden or prohibited." RCW 80.28.010 mandates that a water system must be operated and maintained at all times in a safe manner. The City of Kirkland does not dispute there was insufficient water pressure to put out the fire that forms the basis of this lawsuit. The City of Kirkland also does not dispute that operating a water system with insufficient water pressure for firefighting purposes is unsafe. Consequently, the Fisks submit the City of Kirkland is liable under RCW 80.04.440 for violation of RCW 80.28.010.

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

The City of Kirkland does not attempt in any serious fashion to defend the 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).

The Fisks submit the *Silver Firs* decision is indefensible.

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.

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. Moreover, the City of Kirkland is a city that owns, controls, operates and manages a water system for hire. Thus, the City of Kirkland falls within the ambit of RCW 80.04.010.

Division One noted in the *Silver Firs* decision that Title 80 RCW authorizes the Washington Utilities and Transportation Commission (WUTC) to regulate water companies and provides a broad definition of a "water company." RCW 80.04.010. Division One also noted 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). The City of Kirkland does not dispute this.

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 8th day of August, 2007.

LAW OFFICE OF
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By 
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CALVIN and GLORIA FISK

Appendix A

**Chapter 15.24
MONTHLY SERVICE AND CONSUMPTION RATES***

Sections:

- 15.24.010 Service rates established.**
- 15.24.020 Monthly water rates.**
- 15.24.030 Service to condominium.**
- 15.24.040 Hydrant meter water usage rates.**
- 15.24.050 Reduction for lost water.**
- 15.24.060 Water service for fire protection only.**
- 15.24.070 Monthly volume-based sewer rates.**
- 15.24.080 Exempt meters—Nonresidential customers only.**
- 15.24.100 Qualified senior citizen rate.**

* For the statutory provisions regarding the rates that may be charged by a city and the factors that the city may consider when determining its fees, see RCW 35.67.020.

15.24.010 Service rates established.

The monthly service rates to be paid to the city by customers of the water-sewer system are established as set forth in this chapter. The basic or minimum rates for both water and sewer shall be charged whether the premises are occupied or vacant. (Ord. 3368 § 7 (part), 1993; Ord. 3238 § 2, 1990)

15.24.020 Monthly water rates.

The monthly water charge required to be paid to the city by customers of the water system is established in Table 15.24.020.

Table 15.24.020 (Effective 2007)

Customer Class	Rate
a. Single-family residential	
(1) Basic charge (includes 200 cubic feet of water consumed)	\$13.18
PLUS	
(2) Water consumption charge – 201 cubic feet to 1,200 cubic feet	\$3.15 per 100 cubic feet
PLUS	
(3) Water consumption charge – over 1,200 cubic feet	\$4.14 per 100 cubic feet
b. All other customers, including commercial and multifamily residential	

	Meter Size (inches)	Rate
(1) Basic charge per size of meter	5/8 x 3/4	\$12.12
	1	\$20.84
	1-1/2	\$33.12
	2	\$53.14
	3	\$150.95
	4	\$208.50
	5	\$269.61
	6	\$356.96
	8	\$531.68

PLUS

(2) Water consumption charge \$3.66 per 100 cubic feet of water consumed

PLUS

(3) Sprinkler consumption charge \$4.14 per 100 cubic feet of water consumed

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: 23
which this certificate is attached, on the following counsel of
record:

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DATED this 8th day of August, 2007.



William E. Pierson, Jr.