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STATE OF WASHINGTON

No. 79573-8

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**SUPREME COURT
STATE OF WASHINGTON**

CALVIN and GLORIA FISK, a marital community,

Plaintiffs/Appellants,

v.

CITY OF KIRKLAND, a Washington municipal corporation,

Defendant/Respondent.

**BRIEF OF RESPONDENTS
CITY OF KIRKLAND**

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I. INTRODUCTION

This is the brief of the Respondent and Defendant below, the City of Kirkland. The Plaintiff and Appellants, Calvin and Gloria Fisk, sued the City for property damage to their 36 foot recreational vehicle which caught fire on Interstate 405 near Kirkland. The Fisks claim Kirkland was negligent because the efforts of the firefighters of the City were slowed, to some extent, because the flow from a fire hydrant owned and operated by the City was not sufficient to operate a ground monitor being used by the firefighters. The issue in this case is whether firefighting, and supplying water for firefighting purposes, are governmental functions such that the public duty doctrine controls (“a duty to all is a duty to no one”), and precludes the City from owing a legal duty to any individual for a claim for negligence for property damage arising out of firefighting efforts.

II. COUNTER-STATEMENT OF THE CASE

The City of Kirkland is a non-charter code city, operating under the optional municipal code, entitled 35A RCW. It has created a Fire Department. It has created a Public Works Department and the Water Division is a part of the Public Works Department. The Water Division operates and maintains fire hydrants for use of the Fire Department in the City of Kirkland. There are approximately 1600 fire hydrants in the City of Kirkland. The fire hydrants are served by water mains, which bring

water to the fire hydrants. The City of Kirkland firefighters may use the fire hydrants to obtain water to suppress fires. Clerk's Papers, pp. 14, 27.

On or about January 11, 2004, at approximately 7:52 a.m., firefighters for the City received an alarm for a motor home fire on Interstate 405 freeway. The alarm was received by Mike Jeffrey, Captain and Acting Battalion Chief for the City of Kirkland Fire Department while he was in quarters at Station 21 in the City. Mike Jeffrey responded to the alarm in the command van and when he arrived at the scene, he witnessed that Engineer No. 22 of the Kirkland Fire Department was already at the scene. An engine is a fire engine which has approximately 500 gallons of water on board and is capable of pumping 1500 gallons per minute. There were three firefighters on that engine. Clerk's Papers, pp. 22-23.

When he arrived, Mike Jeffrey observed that the motor home in question was on fire and approximately 25% involved. He saw a thin tall cloud of smoke which is an indicator of a lot of heat. He noticed severe traffic congestion on the freeway and a large backup of cars, two lanes were closed and water was running across the freeway which is a concern for traffic safety. See, Clerk's Papers, p. 23. Mike Jeffery was in charge of the firefighting effort on site. He became aware that there was a gun of some type and ammunition in the motor home, but did not know the exact location of the gun or ammunition. He also became aware there was a

propane tank on the motor home, but he did not know the exact location. Given the ammunition and propane tank were on board the motor home which was on fire, extra care was needed to protect firefighters and civilians. Clerk's papers, p. 23. Because the firefighter operating an inch and three-quarters fire hose which would have pumped approximately 200 gallons a minute was not sufficient to stop the fire in progress, Mike Jeffrey instructed the firefighters on engine no. 6 which had just arrived to place a ground monitor high water flow operation into effect. This required the firefighters to attach a hose from a fire hydrant to a fire engine. The closest fire hydrant was approximately 300 feet from the scene of the incident and from engine no. 6. The fire hydrant was located behind a concrete wall adjacent to the freeway, but there was a door in the wall which allowed access to the fire hydrant. The fire hydrant in question was a village fire hydrant, which typically does not have the same amount of flow as other fire hydrants. After firefighters on engine no. 6 hooked up to the ground monitor they found there not enough flow from the fire hydrant to effectively utilize the ground monitor and accordingly the plan was readjusted and a second hand line was put in operation, a third engine company was instructed to tie into a different fire hydrant approximately 1,000 feet to the north. At about this time, Mike Jeffrey became aware of the location of the ammunition and gun and additionally the interior of a

“slide out” of the motor home opened apparently on its own. These factors allowed the firefighters to become more aggressive in their positions. Mike Jeffrey believes that the internal compartmentalization of the motor home was a deterrent to the firefighting efforts. Clerk’s papers, pp. 23-25.

Mike Jeffrey believes that the insufficient flow from the first fire hydrant slowed down, to some extent, the firefighters’ ability to put out the fire, but there were a number of factors, including the uncertainty of ammunition, the location and uncertainty of the propane tank, and the interior configuration of the motor home and the need to protect the lives and safety of the firefighters and citizens that were a factor in the efforts to fight the fire. Clerk’s papers, p. 25. The fire hydrant which was first attempted to be used by the firefighters is currently identified by the City of Kirkland as E-3-001 and is located at approximately 533 Alexander Avenue in the City of Kirkland. At the time of the incident, the fire hydrant was identified as 08-283. The fire hydrant is located behind a sound wall installed by the Washington State Department of Transportation which runs adjacent to the I-405 freeway. Clerk’s papers, p. 28. Water flows to a fire hydrant from a pipe which is called the water main. The fire hydrant’s flow and pressure of water is determined by the elevation of the hydrant in relation to the pressure zone from which the

water main is served, and the size of the water main serving the hydrant. Concerning the fire hydrant in question, based on the water model at the time of the incident, the hydrant in question could provide approximately 535 gallons per minute and had a static pressure of 45 lbs. per square inch. Clerk's papers, p. 28.

The City brought its motion for summary judgment seeking to dismiss the Fisks' property damage lawsuit against the City which alleged that the City Fire Department did not put out the fire in the motor home quickly enough, causing more damage to the motor home than it would have otherwise suffered. The City argued that the claim for property damage, based upon negligence of the City of Kirkland should be dismissed pursuant to the public duty doctrine because the Plaintiff Fisks are unable to establish the existence of any legal duty owed to them as individual recipients of firefighting services rather than to the public as a whole.

Eugene Eckhardt provided a declaration in support of the summary judgment motion by the City of Kirkland in the trial court below. This is found at Clerk's Papers 40-49. Mr. Eckhardt is employed by the Washington Utilities and Transportation Commission as an Assistant Director for Water and Transportation. In his capacity he supervised the development and review of the WUTC's substantive policy determinations

regarding water companies in the State of Washington that are subject to the WUTC jurisdiction. He indicates that the WUTC regulates private investor owned water companies that serve 100 or more customers and/or receive more than \$471 in annual income revenue per customer. The water companies regulated by the WUTC serve less than 5% of the Washington households. The WUTC does not regulate city owned water departments or systems. The WUTC maintains a list of regulated water utilities. The City of Kirkland Water Department is not listed as a regulated utility. See Clerk's Papers No. 40-49.

On November 3, 2006 the Honorable Michael S. Spearman granted the Defendant Kirkland's Motion for Summary Judgment and entered an order dismissing the Fisks' lawsuit. Clerk's papers, p. 59-61.

III. LEGAL ARGUMENT

Firefighting efforts by the firefighters in the City of Kirkland is undisputedly a governmental function covered by the public duty doctrine. The necessarily interrelated task of supplying water for firefighting is likewise a governmental function. Thus, the City of Kirkland's firefighters and the City of Kirkland do not owe a legal duty to any specific owner of property, including Mr. and Mrs. Fisk, to protect their motor home from fire. The fact that the City of Kirkland supplies water for drinking purposes and for firefighting purposes does not alter this fact.

A. **The Public Duty Doctrine: A Duty to the Public in General is *Not* a Duty Owed to Any Particular Individual.**

“It is axiomatic that to maintain a negligence action a duty of care running from the defendant to the plaintiff must be shown.” *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 118 (1988). When the defendant is a public agency, “the duty must be one owed to the injured plaintiff, and not owed to the public in general.” *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). This analysis has in recent years come to be known as the “public duty doctrine.” The general rule is that “state and municipal laws impose duties owed to the public as a whole and not to particular individuals.” *Meaney v. Dood*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988). That is, “a duty to all is a duty to no one.” *Taylor v. Stevens County*, *supra* at p. 163 (quoting *J&B Development Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)). Plaintiffs and Appellants Fisk cannot prevail in this lawsuit because the firefighters for the City of Kirkland, while suppressing the fire in the Plaintiff’s motor home, attempted to use water from a fire hydrant which had insufficient flow for use with a ground monitor because under these facts the City of Kirkland owes the Plaintiff no legal duty.

B. Firefighting is a Public Duty.

Fighting fire is a public service and does not create duties owed to any specific individual. *Babcock v. Mason County Fire District No. 6*, 144 Wn.2d 774 (2001). Thus, there is not a general cause of action from “negligent firefighting.” Supplying water for firefighting purposes is a public duty as well. A well reasoned line of cases from other jurisdictions concludes that supply of water for firefighting purposes is also a governmental function. The District of Columbia Court of Appeals decision in *Nealon v. District of Columbia*, 669 A.2d 685 (D.C.App. 1995) is on point. The *Nealon* court considered the question of whether the District could be held liable for low water pressure, which allowed the destruction of homes by fire. The court rejected this theory and stated at page 690:

The provision of water service to a fire hydrant may be viewed as a part of the City’s fire protection function. The availability of adequate water supply is essential to that service. Indeed, claims of a municipality’s failure to provide sufficient water for firefighting purposes have been considered by other courts as a failure to provide fire protection. This approach is reasonable and logical, considering the purpose for which the water provided through the fire hydrant is used.

The court concluded that water supply for fire fighting was a “governmental function.” *See also, Salusti v. Town of Watertown*, 635 N.E.2d 249, 251 (Mass. 1994); *Blancovitch v. City of New York*, 516

N.Y.S.2d 77 (Sup.Ct. N.Y. 1987); and *Wells v. City of Lynchburg*, 331 S.C. 296, 309-310, 501 S.E.2d 746 (S.C. Ct. App. 1998).

C. **The Decision in *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111(April 2006) is Correct and is Controlling.**

The Fisks argue the Court of Appeals Division I in its April 2006 decision in the *Stiefel* case was wrong and that its decision is in conflict with decision by Division III of the Washington Court of Appeals in *Shannon v. City of Grand Coulee*, 7 Wn. App. 919, 503 P.2d 760 (1972). The Fisks do not argue that the facts before the Court in this case are somehow distinguishable from the facts in the *Stiefel* case. The Fisks do concede that the court in the *Stiefel* case considered the ruling in the *Shannon* case and recognized that the *Shannon* case was decided in 1972 (approximately 34 years earlier) before the development of a well reasoned and established line of cases establishing the public duty doctrine.

In the *Stiefel* case, the court considered a situation where the City of Kent firefighters attempted to suppress a fire at the plaintiff's residence. The home owner whose home was damaged when the fire spread from a neighbor's home to theirs then sued the City of Kent and King County alleging, among other things, that Kent had negligently failed to maintain a fire hydrant near their home and it negligently failed to enforce relevant

provisions of the City Code. At the trial court level a summary judgment was granted in favor of the county and the city. In the Court of Appeals, the Court held that the public duty doctrine bars the plaintiff's claims for negligent failure to supply water for firefighting purposes and negligent failure to enforce fire code provisions. The Court of Appeals, in looking at the facts most favorable to the plaintiffs noted that immediately upon arrival at the scene the firefighters from the City of Kent connected a supply hose from a pumper to the nearest fire hydrant which was located about 800 feet away from the fire pumper. After pumping water on the neighbor's house for a brief period the firefighters experienced an interruption in the water supply. The firefighters needed several minutes to transfer the supply hose to a different engine before they could resume pumping water on the fire. The plaintiffs argued that some debris was found in the supply hose which must have blocked the intake screen of the pumper.

In *Stiefel* the court discussed the public duty doctrine and noted that the deficiency alleged by the Stiefels was the negligent operation and maintenance of the city and county fire protection services. Beginning at page 529 the Court of Appeals states:

It is well established that the creation, maintenance and operation of a fire department and all reasonably incident duties are governmental function.

See Lakoduk v. Cruger, 47 Wn.2d 286, 289, 289 P.2d 338 (1955) (firefighter acting in a governmental capacity when responding to a call for first aid assistance); *see also, Babcock v. Mason County Fire District No. 6*, 144 Wn.2d 774, 777, 30 P.3d 1261 (2001) (public duty doctrine provides immunity for firefighters in the performance of their duties).

The court noted that the same water supply lines can serve both fire hydrants and domestic water systems but that does not convert a fundamentally governmental function such as fire fighting into a proprietary function. At page 530 the court in the *Stiefel* case states as follows:

The general rule is that supplying water for public purposes, such as fire protection services is a governmental function and that a municipality is not liable for damages for the negligent failure to supply water for extinguishing fires. *See 18A Eugene McQuillen, Municipal Corporations*, 53-105, at 192-93 (3rd Ed. 2002).

The facts in one case are never exactly the same as the facts in another case. Here, however, the similarity in facts between what happened in the *Stiefel* case and what happened in the case before this Court involving the City of Kirkland firefighters is strikingly similar. Indeed, the Fisks do not apparently attempt to argue that there is a factual distinction between what happened in the *Stiefel* case and what happened in this case. Here, a number of factors made it apparently even more

difficult for the Kirkland firefighters. The motor home in question was apparently 25% involved in the fire when Mike Jeffrey arrived. There were concerns about traffic safety on the I-405 freeway, concerns about ammunition and propane tanks in the motor home and problems with the internal configuration of the motor home. The additional factor which Plaintiffs rely on, was lack of a sufficient flow from a fire hydrant which had some impact on the time needed by the firefighters to extinguish the fire. The Court of Appeals Division I correctly decided the *Stiefel* case, the facts before the Court at this time are for all practical purposes identical to those in the *Stiefel* case and this Court of Appeals should affirm the summary judgment order dismissing the Fisk case at the trial court level.

The Fisks challenge the holding in the *Stiefel* decision that supplying water for fire protection purposes constituted a governmental function that a municipality was not liable for. The Fisks argue that the holding that supplying water for fire protection purposes was a governmental function was directly contrary to the holding in the case of *Russell v. Grandview*, 39 Wn.2d 551, 553, 236 P1.2d 1061 (1951). It is respectfully suggested that the Fisks misread the intent of the *Russell* court. The Fisks apparently argue that the supplying of water for firefighting purposes is a “proprietary” function. The only case the Fisks

cite to support this characterization is the *Russell* case. The *Russell* case is easily distinguishable on its facts, and its legal analysis is actually consistent with the position taken by the City of Kirkland here. The *Russell* case involved a very distinct situation of water sold to customers for drinking purposes. The water at issue here is not supplied for drinking purposes but for fire suppression. The distinction changes the outcome. The *Russell* case does not involve firefighting in any way. When water is supplied for firefighting purposes it is a governmental function and the public duty doctrine applies. At page 553 in the *Russell* decision, the court states as follows:

Cities are limited governmental arms of the 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.

This language clearly suggests that if the suit had included negligence supplying of water for firefighting purposes a different rule would have occurred.

In addition, four years following this decision, the Supreme Court reaffirmed that municipal corporations are engaged in a governmental function when providing fire protection services. *Lakoduk v. Cruger*, 47

Wn.2d 286, 289, 287 P.2d 338 (1955) (internal citations omitted) (operation of a fireman in his normal duties was a governmental function, not a proprietary action, as the city was acting for the benefit of the common good, not for the profit of the municipal entity).

Finally, the language contained in the statutory definition of a "water company" clearly recognizes the distinction between the proprietary function of providing water services to customers and the governmental function of providing fire protection as it specifically defines a "water company" which is subject to the regulation of RCW 80.04 as that which operates a water system "**for hire.**" There is no evidence in the record, and indeed Appellant does not argue, that the City's fire protection services were being provided for hire, or conditioned on payment of a fee.

D. The Decision in *Shannon v. Grand Coulee*, 7 Wn. App. 919, 503 P.2d 760 is Not Applicable.

The Fisks argue that our state's Supreme Court should hear this appeal directly because they believe that the case of *Shannon v. Grand Coulee, supra*, is controlling and that the state Supreme Court should overrule the *Stiefel* decision in Division I, confirm in some fashion, the Shannon case from Division III and also overrule the case of *Silver Firs*

Townhomes v. Silver Lake Water District, 103 Wn. App. 411, 12 P.3d 1022 (2000).

First, the *Shannon* case is not applicable, it was decided in 1972, approximately 35 years ago, and it was decided before the development of the public duty doctrine line of cases in the State of Washington. The plaintiffs in the *Stiefel* case urged Division I to follow the *Shannon* case however, Division I, in the *Stiefel* case was able to distinguish the *Shannon* case. At page 531, in *Stiefel*, the court states as follows:

But *Grand Coulee (Shannon)* predates the development of a public duty doctrine in the state. Moreover, the court's analysis does not consider the well established distinctions between proprietary and governmental functions. Finally, the court's determination of a statutory duty rests solely on a brief reference in RCW 80.28.010(2), requires every water system to supply service that is 'safe, adequate and efficient, and in all respects just and reasonable. This provision is part of a statutory scheme governing the Washington Utilities and Transportation Commission (WUTC), and the *Shannon* court's analysis fails to address other provisions limiting WUTC's regulation of municipal water systems. See RCW 80.04.500 (exempting municipal utilities from WUTC control). For these reasons, *Grand Coulee (Shannon)* provides no support for the *Stiefel*'s arguments in this case.

In addition, RCW 80.04.500 precludes the WUTC from making any order effecting "the adequacy or sufficiency of the facilities, equipment, instrumentalities or buildings" owned or operated by a city, nor can the WUTC make or enforce any order relating to the safety of a

water system owned by a city. Also, the WUTC has adopted regulations that confirm this statutory framework. See Washington Administrative Code 48.110.255(2). The commissioner does not regulate the following providers of water service: (a) cities, towns or counties. See also, *Silver Firs v. Silver Lake Water District*, 103 Wn. App. 411 (2000) where the court held that the statute applies to private water companies and not municipal corporations, specifically see pages 421-422 of the *Silver Firs* opinion. Clerk's Papers 40-49 is the Declaration of Eugene Eckhardt and attachment indicating the City of Kirkland Water Department is not regulated by the WUTC. The Fisks are not able to cite to any case, other than *Stiefel*, where our Courts of Appeals have considered this factual situation, the public duty doctrine, the difference between governmental and proprietary functions, and the applicability of RCW 80.28.010(2). The *Stiefel* case considered this nearly identical factual situation, the public duty doctrine, the difference between governmental and proprietary functions, the Washington statutes concerning the Washington Utilities and Transportation Commission and concluded, in April of 2006, that the City of Kent was protected from the claims in the *Stiefel* case by the public duty doctrine and this court is respectfully urged to conclude that the City of Kirkland is likewise protected by the public duty doctrine for the facts in this case. The Fisks' reliance on RCW 80.04.440 is of no value because

that section is part of a general regulatory statute which does not apply to a water department of the City of Kirkland. In addition, even if it did apply to the City of Kirkland the act purports to create liability for a public service company who does something or causes something to be done in a manner which is prohibited, forbidden or declared to be unlawful, or shall omit to do a thing which is required to be done. There is no showing by the Fisks that the City's operation of its water system which is used by fire hydrants and the fire department is unlawful, forbidden or prohibited. For the legislative intent exception of the public duty doctrine to apply there must be a clear intent to identify and protect a particular circumscribed class of persons. *Taylor v. Stevens County*, 111 Wn.2d 159 (1988). General welfare statutes do not create duty to specific individuals. *Halvorson v. Dull*, 89 Wn.2d 673 (1978).

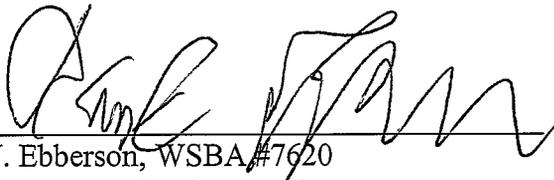
The Fisks criticize the holding in the case of *Silver Firs v. Silver Lake Water District*, *supra*. However, this is a decision by the Court of Appeals Division I in the year 2000 and the Fisks are not able to cite any case to the contrary. In *Silver Firs* the court held that the statute the plaintiff cites applies to private water companies and not municipal corporations.

IV. CONCLUSION

The Court should affirm the summary judgment granted at the trial court level dismissing the claims by Mr. and Mrs. Fisk against the City of Kirkland in this case pursuant to the public duty doctrine, the distinction between governmental proprietary functions.

Respectfully submitted this 9th day of July, 2007.

KEATING, BUCKLIN & McCORMACK, INC., P.S.

A handwritten signature in black ink, appearing to read "Randal W. Ebberson", is written over a horizontal line.

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