

No. 80204-1

SUPREME COURT OF THE STATE
OF WASHINGTON

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STATE OF WASHINGTON
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ARTHUR T. LANE, et al., individually and on behalf of the class of all
persons similarly situated, Respondents,

vs.

THE CITY OF SEATTLE, Respondent,

vs.

THE CITY OF SHORELINE, KING COUNTY, KING COUNTY FIRE
DISTRICT NO. 2, KING COUNTY FIRE DISTRICT NO. 4 (a.k.a.
Shoreline Fire Department), NORTH HIGHLINE FIRE DISTRICT NO.
16 (a.k.a. Northshore Fire Department), and KING COUNTY FIRE
DISTRICT NO. 20, Respondents,

and

THE CITY OF BURIEN and THE CITY OF LAKE FOREST PARK,
Appellants.

REPLY BRIEF OF APPELLANT CITY OF LAKE FOREST PARK
("LFP")

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I. ARGUMENT

The following Argument section addresses the issues raised in the response briefs submitted by the City of Seattle, the “Ratepayers” and the “Fire Districts”.

A. LFP is aggrieved by the judgment entered against Seattle and has standing to appeal that judgment.

Citing RAP 3.1, the Ratepayers argue that LFP is not aggrieved by the judgment requiring Seattle to reimburse the Ratepayers for fire hydrant maintenance cost and therefore cannot appeal that judgment. Brief of Ratepayers at 17-18. As a third party defendant, LFP has the right to assert against the Ratepayers any defenses which Seattle has to the Ratepayer’s claims, including their claim for the reimbursement of fire hydrant maintenance costs. CR 14. LFP has done so throughout these proceedings and should not be prevented from doing so on appeal. The Ratepayer’s argument ignores LFP’s status as a third party defendant whose liability to Seattle arises only from the judgment entered against Seattle. *See Reed v. Streib*, 65 Wn.2d 700, 708, 399 P.2d 338 (1965) (“In order that Rule 14 may apply the claim must originate in the assertion of a liability against the defendant which the defendant then

attempts to pass on, in whole or in part, to the third party.”). Consequently, reversing the Ratepayer’s judgment against Seattle necessitates reversing Seattle’s judgment against LFP. The latter cannot stand without the former.

“Only an aggrieved party may seek review by the appellate court.” RAP 3.1. An aggrieved party is one who was a party to the trial court proceedings and whose proprietary, pecuniary, or personal rights are substantially affected. *Cooper v. City of Tacoma*, 47 Wn.App. 315, 734 P.2d 541 (1987). LFP was a party to the trial court proceedings. Moreover, its pecuniary rights have been substantially affected by the entry of the judgment against Seattle relating to the reimbursement of fire hydrant maintenance costs because LFP is now obligated to pay a portion of this judgment to Seattle. LFP has been “aggrieved” within the meaning of RAP 3.1 and has the right to seek review of the trial court’s judgment as it relates to the reimbursement of fire hydrant maintenance charges in its entirety.

B. The maintenance of fire hydrants is a proprietary function of a municipality.

Stiefel v. City of Kent, 132 Wn. App. 523, 132 P.3d 1111 (2006) held 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. *Id.* at 531. Consequently, plaintiffs' claims against the city of Kent and King County for failing to supply water for firefighting purposes, due to their failure to properly maintain fire hydrants, was barred by the public duty doctrine. *Id.* ("Because [plaintiffs'] claims are directed solely to the governmental function of fire protection services, including the incidental delivery of water through fire hydrants, the claims are barred by the public duty doctrine."). *Id.* at 531

Seattle, the Ratepayers and the Fire Districts each claim *Stiefel* controls the issue of whether the maintenance of fire hydrants is a governmental, as opposed to proprietary, function of a municipality. Brief of Seattle at 13-14; Brief of Ratepayers at 19-20; Brief of Fire Districts at 9-11.

LFP acknowledges that public fire protection is a governmental function. *Capital Hill Methodist Church v. City of Seattle*, 52 Wn.2d 359, 366, 287 P.2d 338 (1955). However, the maintenance of a municipal water supply system, including the fire hydrants which are an integral and essential component of that system, is proprietary in nature.

In *Stiefel*, plaintiffs' claims were barred by the public duty doctrine because they related solely to the governmental function of fire protection services. See *Stiefel*, 132 Wn.App. at 531. In cases not involving fire protection services, where damages are caused by the negligent maintenance of a municipal water system, the public duty doctrine does not apply. See e.g. *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) (court upheld an award of damages for the explosion that resulted when the municipal water system advised residents to release the pressure from combustible gas in the domestic water supply by opening the faucets in the home). This is because the general operation of a municipal water system is proprietary, rather than governmental, in nature. *Stiefel*, 132 Wn.App. at 529 (citing *Russel*, 39 Wn.2d at 553). *Stiefel* did not convert fire hydrant maintenance into a governmental function.

If this Court finds that *Stiefel* resolves the issue of fire hydrant maintenance in favor of the Ratepayers, it should then consider the policy implications of the *Stiefel* decision. The court in *Stiefel* was not confronted with the issues presented in this case, including SPU's obligation to install and maintain fire hydrants in accordance with the

provisions of Chapter 246-293 WAC. As a result, the law finds itself in the uncomfortable state of requiring water purveyors to install and maintain hydrants, but immune from liability for negligent compliance with the law. Legal and public policy should foster compatibility between regulatory and case law, and it should not countenance an incompatibility that provides protection for municipalities that fail to exercise due care, a protection not afforded to private water purveyors subject to the same regulatory requirements; and a protection at odds with the public safety rationale for requiring fire hydrants.

Other state court decisions reinforce this conclusion. In *Malter v. South Pittsburgh Water Co.*, 198 A.2d 850 (Penn. 1964), the plaintiffs owned a house that was destroyed by a fire. *Id.* at 851. The plaintiffs claimed the municipality and water company failed to properly maintain several hydrants servicing the area and that the loss of their house would not have occurred had those hydrants not been allowed to become “rusted, decayed and clogged.” *Id.* The trial court dismissed plaintiffs’ complaint for failing to state a cause of action. *Id.*

The Supreme Court of Pennsylvania reversed, determining that the maintenance of fire hydrants, which are an incidental part of a city

water system, is a proprietary function, and that a city could be sued for negligent failure to maintain hydrants included in that water system. *Id.* at 852-53.

The *Malter* case was followed in *Hall v. City of Youngstown*, 239 N.E.2d 57 (Ohio 1968), where the plaintiff claimed the city's failure to maintain its fire hydrants contributed to the death of her son. *Id.* at 57. The trial court agreed with the city that maintenance and care of fire hydrants as part of a city water system is governmental, not proprietary, and, therefore, the claim was barred by the doctrine of sovereign immunity. *Id.*

On appeal, the Ohio Supreme Court recognized that a municipality acts in a governmental capacity in the acquisition and allocation of resources for fighting fires. *Id.* at 60. Likewise, a municipality acts in a governmental capacity when it brings those resources into action. *Id.* However, in maintaining a municipal water supply system it acts in a proprietary capacity. *Id.* As in *Malter*, the court in *Hall* concluded that the operation and maintenance of fire hydrants is conduct undertaken by a municipality in a proprietary, rather than governmental, capacity. *Id.* Specifically, the court explained:

It is a rather elemental conclusion that the utility of a hydrant stems from its connection with a water supply system. Its primary use is to make immediately available a supply of water for the extinguishment of fires. That supply is accessible only because piped to the hydrant area through water mains. The problem in this case, as we see it, is the question of where water supply (proprietary in nature) ends, and fire fighting (governmental in nature) begins. We believe it to be at the hydrant nozzle.

Id. Accordingly, the doctrine of sovereign immunity did not bar the plaintiff's claims against the city. *Id.*

The courts' decisions in *Malter* and *Hall* are consistent with well-settled Washington law that a city engaged in the business of operating and maintaining a water system acts in its proprietary capacity. *See Russell v. Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951). Fire hydrants are fixtures connected to and supplied by the same mains that pipe water to customers for residential and business uses. While poorly maintained streetlights do not affect the electrical services received by a customer, poorly maintained mains and fire hydrants will result in a reduction in water supply services and/or water quality. In other words, the maintenance and operation of fire hydrants is incidental to, as well as an integral part of, the overall operation and maintenance of the utility's water system.

Therefore, the maintenance and operation of fire hydrants, like the maintenance and operation of the water system to which they are an integral part, is a proprietary function of government.

C. SPU has no authority to charge LFP for the cost of maintaining SPU fire hydrants located within the city's boundaries.

Seattle and the trial court conclude that because providing fire hydrants is a governmental function, a government must be responsible for their cost -- maybe so, but which government? Seattle voluntarily undertook to provide water service beyond its boundaries in other municipal jurisdictions. In LFP's case, this likely happened before the city was incorporated in 1960 and certainly before the area served by Seattle was annexed by LFP in 1996. To the extent Seattle provided fire hydrants to this area, they were provided voluntarily or under authority of state law, not by requirement of LFP building codes, which were not in force when the system was installed.

Seattle operates a business in LFP. It receives service revenues and it taxes LFP residents through its tax on the utility. CP 2453-2455. If that tax includes recovery for the cost of fire hydrants, then Seattle is expecting a windfall from Burien and LFP. If anyone's general fund should be charged it should be Seattle's.

Seattle is incorrect when it argues that if the city is responsible for fire hydrant maintenance costs within its boundaries, there must be an analogous general government responsible for fire hydrant maintenance costs outside its boundaries. Acceptance of this argument would allow a general government unilaterally to extend governmental services beyond its boundaries with an expectation that another government (that may not have chosen to provide such service) will be required to foot the bill.

The fundamental flaw in Seattle's argument and the trial court's ruling is their shared belief that cities are required to provide a water supply for fire protection services. As the trial court stated in its oral ruling:

Individual ratepayers are not obligated to provide water for fire protection services. Cities and counties are. And since they are so obligated, the service provided by SPU is a direct benefit to them since it allows them to meet this obligation. Accordingly, the charges imposed by SPU are not a tax but, rather, a fee, which, pursuant to RCW 43.90.210, the Cities and County must not only be properly billed but which they are also obligated to pay.

CP 4119.

Within a city, the decision to provide a utility service is discretionary and left to the local legislature, not a neighboring legislature. *See* Chapter 35.92 RCW; Chapter 35A.80 RCW. This is because such decisions implicitly affect other local government activities, budgets and taxes. Contrary to Seattle's argument and the trial court's ruling, a local general government is not required to provide water service to its jurisdiction, and LFP has chosen not to, leaving water service to Shoreline Water District, Northshore Utility District, Lake Forest Park Water District, and Seattle.¹

Seattle argues that LFP's building codes require Seattle to install hydrants in LFP. Brief of Seattle at 10-11. As noted, however, Seattle's system predates LFP's jurisdiction over the area. Furthermore, building codes require nothing of utilities; they regulate development of property and apply to developers of property. Once hydrants are installed, LFP requires nothing of Seattle. Any requirement imposed upon Seattle concerning hydrants derives from state regulations requiring the water

¹ Seattle is not acting a surrogate for LFP and Burien by providing a service they are legally obligated to provide. They are not so obligated. Therefore, unless Seattle can show some other recognized ground for recovery – and it cannot – it has not plead a cause of action justifying relief. Contrary to Seattle's argument a ruling against it will not result in SPU customers absorbing these costs. Seattle's general fund which

service provider to maintain hydrants. And Seattle acted consistently with the foregoing, treating hydrant cost as a regulatory cost of doing business. Seattle never suggested that local governments (not otherwise providing water service) should bear any responsibility for these costs because they were requiring hydrants.

Seattle argues the payments are not taxes because LFP is receiving "utility service." But the cost of utility service is borne by the ratepayer – the party served – not local government. Seattle is in the odd position of arguing that although LFP's responsibility for hydrant service is founded on its governmental nature, LFP is being billed for utility service. Seattle recognizes hydrant service is governmental and adopted an ordinance that levied a tax on LFP and Burien for that service. There is a substantial question about a city's authority to tax another municipality on activities within the city's jurisdiction, but LFP knows of no authority for a city to tax another municipality outside the city's boundaries¹

is supported by Seattle taxpayers will bear the cost of discretionary decisions made by officials elected by those taxpayers.

¹ Seattle argues that it imposes an extra-territorial tax on its retail water sales outside city limits, citing *Burba v. City of Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989). However, that tax is a tax on the utility and its gross revenues; it is not a direct

D. Seattle is not entitled to a judgment against LFP for fire hydrant expenses incurred after January 1, 2005.

Seattle's judgment against LFP and Burien requires these cities to pay SPU for fire hydrant services provided by SPU within their respective jurisdictions indefinitely, despite Seattle's decision to increase its utility tax on SPU. To avoid redundancy, pages 5 through 10 of the Ratepayers' Brief are incorporated herein by reference. This tax increase was imposed by Seattle in an effort to recover fire hydrant expenses from SPU and its ratepayers (including those residing within LFP). While LFP takes no position regarding the validity of this tax increase, it believes the tax adequately reimburses Seattle's general fund for the cost of maintaining SPU fire hydrants located within LFP. Thus, Seattle's judgment, if not entirely reversed, must be reversed to the extent it requires LFP to pay for fire hydrant maintenance costs incurred after January 1, 2005.

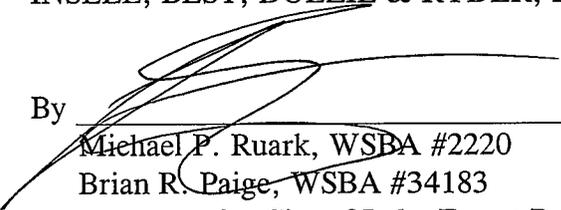
tax on residents or municipalities outside the city. that is very different from the imposition Seattle's city council has levied against LFP and Burien.

II. CONCLUSION

Based on the foregoing, LFP respectfully requests that the Court reverse that portion of the trial court's judgment relating to the reimbursement of fire hydrant maintenance costs or, alternatively, reverse that portion of the judgment granting a judgment in favor of Seattle against LFP.

Respectfully submitted this 7th day of December, 2007.

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