

No. 80204-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

ARTHUR T. LANE, KENNETH GOROHOF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated,  
*Respondents/Cross-Appellants,*

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. 11, KING COUNTY 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.*

**RESPONDENT THE CITY OF SEATTLE'S BRIEF IN RESPONSE TO RESPONDENTS/CROSS-APPELLANTS LANE, et al.**

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## I. INTRODUCTION

Respondents/Cross-Appellants (“plaintiffs”) raise two issues in their cross-appeal. First, they assert that a water utility tax increase enacted by the City of Seattle (“Seattle”) was “illegal,” even though, as they have all but admitted, there is absolutely no basis in Washington law to support their theory. Second, they assert that the trial court erred when it followed well-established case law and held that the doctrine of sovereign immunity protects municipalities from liability for prejudgment and postjudgment interest at the statutory rate of 12 percent.<sup>1</sup>

The trial court’s ruling should be affirmed on both issues. The trial court correctly granted summary judgment dismissing plaintiffs’ claim regarding the tax increase, holding that there is no basis to strike down a tax increase enacted in accordance with law, for a legal purpose, and with a legal effect. Plaintiffs’ effort to base a claim on name-calling instead of on any legal authority was unpersuasive to the trial court, and should be rejected by this Court as well. The trial court also correctly noted that the doctrine of sovereign immunity protects a municipality from liability for interest on its debts. Only if the legislature has explicitly or implicitly

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<sup>1</sup> As discussed below, the trial court did award interest to plaintiffs at a lower rate, based on a “prudent investor” standard.

waived that immunity – which it has not done here – is statutory interest mandated.

## **II. COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR ON CROSS-APPEAL**

1. Did the trial court correctly uphold the validity of Seattle’s increase in the water utility tax rate, which was adopted pursuant to legal authority, for a legal purpose, and for a legal effect, and which was not challenged under the statutory referendum process?

2. Did the trial court correctly reject plaintiffs’ invitation to disregard well-established precedent to award plaintiffs prejudgment and postjudgment interest at the statutory rate of 12 percent?

## **III. COUNTERSTATEMENT OF THE CASE**

Seattle believes that the Brief of Respondents/Cross-Appellants Lane, *et al.* (“Plaintiffs’ Brief”) adequately sets forth the procedural history relating to the trial court’s rulings on the tax and interest issues raised in the cross-appeal. Pursuant to RAP 10.3(b), that procedural background will not be reiterated in this brief. However, because plaintiffs’ statement of the case regarding Seattle’s tax increase is incomplete and slanted in the extreme (e.g., the tax increase was a “sham arrangement”), Seattle sets forth the following counterstatement of the case with respect to that issue.

**A. Seattle, in an exercise of its municipal taxation authority, raised the water utility tax on SPU to provide its general fund with revenue to pay for hydrants**

Seattle Public Utilities (“SPU”), a department of the City of Seattle, operates a municipal water system that provides retail water service in Seattle and in certain suburban jurisdictions. CP 21. From the inception of Seattle’s water service in 1898 until January 1, 2005, Seattle included the cost of providing fire hydrant service in the general rates it charged to all retail water ratepayers. CP 905.

In *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) (“*Okeson I*”), this Court held that Seattle City Light had imposed an invalid tax on its ratepayers in order to pay the costs of providing streetlights. *Id.*, 150 Wn.2d at 554. This Court ruled that providing streetlights was a governmental function that must be paid with money from Seattle’s general fund. *Id.*

As Seattle has described in detail in prior briefing to the Court in this case, Seattle undertook a good faith effort to apply the holding of *Okeson I* to fire hydrants. To do this, Seattle voluntarily chose to change its 100-year practice and have SPU, which operates the city’s water utility, bill Seattle’s general fund for fire hydrants within the city limits of Seattle. Before that new policy could be implemented, however, fire hydrant rates needed to be developed for the first time. SPU therefore developed its

first fire hydrant rate recommendations to the Seattle City Council (the "Council") in the summer and fall of 2004. CP 1602 at 157:2-20.

In November 2004, the Council passed, and the Mayor signed, Ordinance 121676, which became effective on January 1, 2005. CP 2393-2400. Ordinance 121676 established separate rates for fire hydrants. Since January 1, 2005, SPU has charged the cost of providing public fire hydrants inside the city limits of Seattle to only one ratepayer – Seattle's general fund. CP 1578 at 59:18–60:5.

In order to provide Seattle's general fund with the needed additional revenues to pay for hydrants, the Council also passed Ordinance 121671, which increased the rate of the water utility tax imposed under § 5.48.050C of the Seattle Municipal Code on any person engaged in the business of running a water distribution system (including SPU). CP 2402-04. Ordinance 121671 increased the rate from 10 percent to 14.04 percent of the gross revenues of a water distribution system, effective January 1, 2005. CP 2402-03. As required by RCW 35.21.706, the ordinance was subject to repeal by a referendum vote of the citizens of Seattle. CP 2403. No citizens, including the named plaintiffs in this case, exercised their right to seek repeal of the tax increase by referendum. CP 2384, ¶ 6.

Effective May 15, 2005, the Council further increased the water utility tax rate to the current level of 15.54 percent of gross revenues through Ordinance 121672. CP 2406-07. Neither the named plaintiffs nor any other citizens exercised their statutory right to seek repeal of this tax increase by referendum. CP 2384, ¶ 8.

**B. Revenues from the water utility tax are commingled in Seattle's general fund with revenues from other sources, and are used to pay for general governmental operations and services**

Seattle's general fund is made up largely of tax revenue, a significant portion of which comes from excise taxes imposed on public and private utilities. The general fund is used to pay for a wide array of governmental operations and services, including police, fire, and transportation services. CP 2384-85, 2388.

Accordingly, the water utility tax receipts from SPU are placed into the general fund where they are commingled with other tax receipts and other general fund receipts (e.g., parking fines, property taxes). Those monies are then used to pay any city expenses charged to the general fund, including the costs of streetlights and fire hydrants. CP 2385, ¶ 12; CP 2388.

#### IV. ARGUMENT

**A. Plaintiffs' argument that Seattle must pay refunds, even if this Court concludes that Seattle properly charged the costs of hydrants to ratepayers, is legally unsupported and would produce an absurd result**

A procedural argument raised for the first time by plaintiffs in their cross-appeal merits a brief response before the two substantive issues are addressed. Plaintiffs argue that because Seattle did not file a notice of appeal, it is "bound" by the underlying judgment in its totality, even if this Court agrees with Burien and Lake Forest Park that providing fire hydrants is a proprietary utility function. Plaintiffs' Brief at 17-18. In other words, it is plaintiffs' position that even if this Court concludes that Seattle's long-standing practice of charging the cost of fire hydrant service to retail water ratepayers was legal and appropriate, Seattle must nevertheless pay refunds to those ratepayers. Such a result would be self-evidently absurd and would mandate an enormous waste of public funds, along with a parallel waste of substantial administrative efforts and costs that Seattle would incur.

Plaintiffs' assertion that this Court is prohibited from appropriately modifying the judgment to remove the refund obligation is simply wrong. Plaintiffs' argument is based on the general rule that a successful appeal by one party does not benefit a non-appealing party, even if the theory on

appeal would have been identical for both parties. However, there are exceptions to this rule – as the very case cited by plaintiffs notes.

Moreover, the policy underlying the general rule has no applicability here.

**1. This Court has the power to modify the judgment to prevent an absurd and unwarranted result**

In *Genie Industries, Inc. v. Market Transport Ltd.*, 138 Wn. App. 694, 158 P.3d 1217 (2007), the court refused to permit a defendant who had not filed a notice of appeal to “join” in the appeal brief of another party. The court noted that while the general rule is that appellate courts will not grant affirmative relief to a party that did not file a notice of appeal, there are exceptions. Specifically, RAP 2.4(a)(2) provides that an appellate court may grant a respondent affirmative relief by modifying the lower court decision “if demanded by the necessities of the case.” A similar rule, RAP 5.3(i)(3), provides that where there are multiple parties on a side of the case, and fewer than all of them file a notice of appeal, the court may grant relief “to a party if demanded by the necessities of the case.” The *Genie* court chose not to apply those exceptions, stressing that the policy underlying the general rule is to prevent a non-appealing party to get a “free ride” on the efforts of another:

There are a variety of reasons why one party may choose to press an appeal while a similarly situated party decides to abide by the result at trial. Allowing Market a free ride to

the appellate court on Genie's coattails would create a precedent undermining the finality of many judgments.

*Id.*, 138 Wn. App. at 715.

The "free ride" concern is in no way implicated in this case, for two reasons. First, Seattle could not have appealed the underlying judgment, because it had in good faith voluntarily chosen to change the allocation of fire hydrant costs based on its reading of *Okeson I*. This change was made not only prior to the entry of judgment, but prior to the filing of this case by plaintiffs. The trial court affirmed Seattle's reading of *Okeson I*, ruling that its change in charging for fire hydrant service was proper, and that SPU must pay refunds to water ratepayers for fire hydrant costs going back to March 1, 2002. CP 1921-22. While Seattle had argued that no retroactive refunds should be ordered, the refund obligation ordered by the trial court is based on the underlying conclusion of law that paying for hydrants is a general fund responsibility. Seattle was therefore in no position to appeal the underlying legal ruling since it – along with plaintiffs – was the prevailing party on that underlying issue of law.<sup>2</sup>

Second, Seattle has not sought a "free ride" on the efforts of other parties. Seattle has continued to play an active part in the briefing on the issues pursued in this appeal by Burien and Lake Forest Park. Seattle has

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<sup>2</sup> "Only an aggrieved party may seek review by the appellate court." RAP 3.1.

provided substantive briefing both on those points where it believes the suburban cities' position is meritorious, and where it believes their arguments are flawed.<sup>3</sup> Seattle has been careful to explain its procedural posture in this case, and has clearly stated that it will proceed with the refund obligations ordered by the trial court if this Court affirms the trial court's ruling, and will return to its historical allocation of fire hydrant costs if the trial court is reversed. Respondent The City of Seattle's Brief in Response to Burien and Lake Forest Park at 2-8.

If the trial court were reversed and plaintiffs' procedural argument accepted, Seattle would have to expend significant time and resources refunding money that had in fact been properly charged. As evidenced by the "necessities of the case" exception referenced above, the appellate rules do not tie the hands of this Court, particularly when the result would be absurd and unfair. Moreover, the rules are to be liberally interpreted to promote justice. RAP 1.2(a) provides in part:

These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands . . .

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<sup>3</sup> As to the former, *see, e.g.*, CP 1674-77; Respondent The City of Seattle's Answer to Burien's Statement of Grounds for Direct Review at 3-6. As to the latter, *see* Respondent The City of Seattle's Brief in Response to Burien and Lake Forest Park at 13-15.

Under the authority and discretion provided under the rules, this Court should reject plaintiffs' procedural argument. If this Court determines that fire hydrant costs are properly borne by water ratepayers, Seattle should have no obligation to pay refunds that are based on an erroneous legal ruling, and the judgment should be modified accordingly.

**B. Plaintiffs' arguments concerning the validity of the tax increase are without merit**

**1. Summary of argument**

Plaintiffs' attack on the validity of Ordinance 121671 consists largely of fulmination about Seattle's decision to raise the revenue needed by the general fund to pay for fire hydrants through an increase in the water utility tax – a decision that plaintiffs assert violates *Okeson I*.

Plaintiffs accuse the City, and particularly the Council, of everything from engaging in an "improper end run" to "openly defying" to "thumbing its nose" at *Okeson I*. Plaintiffs' Brief at, respectively, 1, 10 & 43.<sup>4</sup>

Presumably, this tactic is designed to divert the Court's attention from the utter dearth of legal authority supporting plaintiffs' claim.

Seattle has authority under state law to impose excise/business and occupation taxes on water distribution businesses such as SPU, and Seattle

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<sup>4</sup> For good measure, plaintiffs also accuse Seattle of "paying mere lip service" to *Okeson I* (Plaintiffs' Brief at 8), and twice accuse Seattle of engaging in a "sham arrangement" (*id.* at 10 & 11).

properly exercised that authority when it adopted Ordinance 121671.

Plaintiffs argue that Ordinance 121671 is invalid based upon the Council's "purpose" in adopting it. There is no basis in Washington law for such an assertion. Nor does Washington law support the argument that the manner in which Seattle has chosen to spend revenue from the tax renders it invalid. The fact that general fund monies, including commingled revenues from the water utility tax on SPU, are used to pay for streetlights and fire hydrants does not invalidate that portion of the excise tax on SPU's water distribution business established by Ordinance 121671, and nothing in *Okeson I* suggests otherwise.

Plaintiffs' assertion that the purpose of Ordinance 121671 was "unlawful" is similarly unsupported. The increase in the water utility tax was expressly designed to raise the necessary revenue for the general fund to pay the cost of hydrants. This is without question a lawful purpose.

In essence, plaintiffs' substantive argument on this issue rests on a single case – a 1973 federal court decision from Georgia. This case is easily distinguished, as the trial court found. The remainder of plaintiffs' argument is a discussion of a number of non-Washington cases that stand for the proposition that tax increases must be for a lawful purpose. Seattle

does not dispute this general rule, but plaintiffs' authorities shed no light on the question concerning the validity of Ordinance 121671.<sup>5</sup>

**2. The ordinance is presumed to be valid, and plaintiffs must prove invalidity beyond a reasonable doubt**

Plaintiffs bear a heavy burden of proof in an action challenging the validity of a tax ordinance:

A statute is presumed to be constitutional and the party attacking the statute bears the burden of establishing its unconstitutionality beyond a reasonable doubt. *Leonard v. City of Spokane*, 127 Wn.2d 194, 197-98, 897 P.2d 358 (1995). Municipal ordinances are afforded the same presumption of constitutionality. *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991). Whenever possible an enactment must be interpreted in a manner which upholds its constitutionality. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992).

*Smith v. Spokane County*, 89 Wn. App. 340, 348, 948 P.2d 1301 (1997).

Plaintiffs have not met this high burden, and have not shown "beyond a reasonable doubt" that Seattle's water utility tax is invalid.

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<sup>5</sup> Plaintiffs also spend several pages discussing the issue of standing. In the trial court, Seattle argued that plaintiffs lacked standing to challenge Ordinance 121671, because the water utility tax is imposed upon SPU, not the ratepayers. Seattle believes that this is a meritorious argument, based on recent Washington case law. *See, e.g., Adams v. City of Spokane*, 136 Wn. App. 363, 366-67, 149 P.3d 420 (2006), *rev. denied*, 161 Wn.2d 1019 (2007). However, in light of the trial court's ruling on this issue, Seattle has chosen not to challenge plaintiffs' standing to pursue its claim on the validity of the tax ordinance.

**3. Municipal taxes, including excise taxes, are authorized by state law**

Plaintiffs contend that Ordinance 121671 is invalid because proceeds are placed in the general fund, and general fund revenue is then used to pay for fire hydrants. In fact, Washington's constitution, statutes, and case law uphold Seattle's water utility tax and its right to spend the proceeds on fire hydrants as well as on other government purposes.

Constitution. Article VII, section 9 of the Washington State Constitution authorizes the state legislature to vest cities with the authority to assess and collect taxes "for all corporate purposes." Similarly, Article XI, section 12 authorizes assessment and collection of taxes by municipalities for "municipal purposes."

Statutes. Based on its constitutional authority, the Washington legislature has vested municipalities with the authority to impose taxes, including excise taxes upon water distribution businesses such as SPU. Under RCW 35.22.280(32), a first class city is authorized to "grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor." This statute authorizes excise taxes on business. *City of Seattle v. Campbell*, 27 Wn. App. 37, 40, 611 P.2d 1347 (1980). In addition, RCW 35.23.440(8) authorizes second class cities to "fix and

collect a license tax for the purposes of revenue,” a power extended to first class cities such as Seattle under RCW 35.22.570.

Case law. Washington courts have consistently held that excise taxes on businesses are authorized by law. *Community Telecable of Seattle v. City of Seattle*, 136 Wn. App. 169, 184, 149 P.3d 380 (2006), *rev. granted*, 161 Wn.2d 1025 (2007); *Sprint Spectrum, L.P. v. City of Seattle*, 131 Wn. App. 339, 342, 127 P.3d 755, *rev. denied*, 158 Wn.2d 1015 (2006); *Campbell*, 27 Wn. App. at 40. Washington courts have affirmed that the authority to tax is a very broad, sovereign power. *City of Tacoma v. Hyster Co.*, 93 Wn.2d 815, 821, 613 P.2d 784 (1980); *Allis-Chalmers Corp. v. City of North Bonneville*, 113 Wn.2d 108, 775 P.2d 953 (1989). This authority may be exercised as the city sees fit. *Commonwealth Title Ins. Co. v. City of Tacoma*, 81 Wn.2d 391, 394-95, 502 P.2d 1024 (1972).

Plaintiffs implicitly have admitted that Seattle has the legal authority to impose excise taxes on SPU, and to use the revenues from those taxes for general governmental purposes. They did so when they declined to challenge the additional 1.5-percent increase in the water utility tax rate adopted by Ordinance 121672, effective May 15, 2005.

**4. Seattle's authority to impose an excise tax on SPU's water distribution business is unrestricted**

A statutory limitation on municipal taxation, set forth in RCW 35.21.710, generally limits the maximum tax rate that may be imposed on certain businesses. However, that statute also contains an exception for those business activities subject to taxation under RCW 82.16, which includes "water distribution businesses" such as that operated by SPU. RCW 82.16.010(4). Therefore, there is no statutory "cap" on the tax rate that may be imposed by Seattle on SPU.<sup>6</sup> Seattle has the authority, through its legislative process, to raise the water utility tax rate from 10 percent to 14.4 percent or higher.<sup>7</sup>

Plaintiffs argue that the increase in the water utility tax is unlawful because the Council intended that the increase cover the cost of providing fire hydrants. However, Washington courts have held that unrestricted tax money can be used for any general fund purpose. The motives of the Council are irrelevant:

As we have heretofore pointed out, the power of the legislature to select and define the activity upon which an

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<sup>6</sup> This fact has been recognized by the Washington State Department of Revenue in its guidelines regarding RCW ch. 35. CP 2431-37.

<sup>7</sup> As pointed out by the Court of Appeals in *Adams, supra*, the City of Spokane now charges a utility tax of 20 percent of the gross revenue of that city's water and other utilities. 136 Wn. App. at 364 n.1.

excise tax will be levied, within these restrictions and limitations, is plenary, and is an exercise of legislative discretion which is rarely upset by the courts.

It is not the function of this court in cases like this to consider the propriety of the tax, or to seek for the motives or to criticize the public policy which may have prompted adoption of the legislation.

*State ex rel. Namer Inv. Corp. v. Williams*, 73 Wn.2d 1, 7, 435 P.2d 935 (1968).

Similarly, in *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 802 P.2d 784 (1991), this Court upheld the right of the City of Walla Walla to spend some of the revenue received from a tax on gambling, authorized by RCW 9.46.110, on other purposes, even though the statute provided that the money must be spent “primarily” for enforcement of gambling provisions: “There is no authority, nor does Legion provide any, that renders an otherwise constitutionally levied tax unconstitutional merely because it is purportedly utilized for a purpose other than what is required.” *Id.*, 116 Wn.2d at 7. Here, the validity of the ordinance is even clearer, because there is no statutory restriction at all. The tax money derived from the excise tax on SPU can be spent to pay for hydrants, streetlights or any other general fund expense.

The trial court correctly rejected plaintiffs’ contention that the Council’s announced intent – i.e., to offset the expense of fire hydrant service through an increase in the water utility tax – could not invalidate

an otherwise lawful act. The trial court did so by focusing on the fact that, prior to the enactment of Ordinance 121671, there was already a 10 percent tax on SPU in effect (which plaintiffs had not challenged), some portion of which would likely go towards paying for fire hydrant service. Whether or not the Council expressed some “intent” regarding these tax proceeds would not affect the validity of the tax:

Plaintiffs do not contest the ten percent tax on SPU that was already in effect. Plaintiffs also concede that some portion of the revenue generated by that tax will likely go toward cost of fire hydrant service. But following the plaintiffs’ line of reasoning, if the city council, in its wisdom, explicitly stated in an ordinance that some portion of that tax would be used to defray the cost of fire hydrant service, then the ten percent tax that was well within the city’s authority now exceeds that authority.

RP 10 (2-13-07).

Nor is there any unlawful “effect” as a result of Ordinance 121671. Nothing in Washington law prevents Seattle from using a portion of the tax revenue received by Seattle’s general fund from the water utility tax imposed upon SPU to pay the costs of fire hydrants from that same general fund. The trial court highlighted the inconsistency and infeasibility of plaintiffs’ “effect” arguments by again focusing on the existing 10 percent tax that plaintiffs had not challenged:

*Okeson* does not hold it is unlawful for Seattle to tax SPU to obtain funds for its general fund. Indeed, it is undisputed that Seattle has this authority. Nor does *Okeson* hold that

it's unlawful for Seattle to use the tax money it receives from SPU to service the city's fire hydrants. Indeed, it is undisputed that even before the enactment of Ordinance 121671, Seattle imposed a 10 percent tax on SPU's gross revenues, and that a portion, if not all, of those funds so received likely went towards paying the cost of Seattle's governmental activities.

RP 7 (2-13-07).

**5. *Okeson I* does not support plaintiffs' claim of invalidity**

This Court's decision in *Okeson I* has been the foundation of most of the litigation plaintiffs have brought against Seattle since that time, including its claim that Seattle's tax rate increase was invalid. But far from supporting plaintiffs' allegations, *Okeson I* in fact supports Seattle's funding of fire hydrants with money from the general fund, including revenue from the water utility tax imposed on SPU.

**a. *Okeson I* provides a road map for validly increasing a tax on a municipal utility, and Seattle followed it**

What this Court provided in *Okeson I* is, in essence, a road map for a city to validly increase a tax on a utility to provide sufficient revenues to its general government fund to pay for the city's consumption of utility services (in this case, Seattle's consumption of fire hydrant services).<sup>8</sup>

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<sup>8</sup> This Court restated its analytic framework – and provided a concise statement of this road map – in *Okeson v. City of Seattle*, 159 Wn.2d 436, 150 P.3d 556 (2007) (“*Okeson III*”). The Court's plurality opinion noted:

This Court's analysis in *Okeson I* began with the question of whether the ordinance treating streetlight costs as costs of operating the utility was lawful at the time it was passed in 1999. *Okeson I*, 150 Wn.2d at 549. This Court found that the ordinance imposed a tax, not a fee. *Id.* at 550. To determine whether the tax was lawful, this Court then asked whether it was lawfully imposed and whether it violated a statutory limit. *Id.* at 556. The Court held that the ordinance in question had not been lawfully imposed because Seattle had failed to identify it as a tax, and that it was therefore unconstitutional. *Id.* The Court further held that the streetlight ordinance was unlawful as a tax, because it caused the effective tax rate on City Light to exceed the 6 percent statutory cap absent approval of the voters, as required by RCW 35.21.870(1). *Id.*

In so holding, this Court implicitly recognized that if Seattle's voters had approved a referendum raising the cap on electric rate taxes beyond 6 percent, then any tax Seattle levied above 6 percent and up to the

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Although the 2002 amendment specifically authorized city utilities to charge their ratepayers for streetlights, we concluded that City Light could not do so because: (a) providing streetlights is a general government function, (b) streetlight-related charges constituted taxes rather than fees because they were designed to raise general revenue rather than to pay for specific customer services, (c) there must be express statutory or constitutional authority for a local government to impose a tax, and (d) the 2002 amendment did not include such taxing authority.

*Id.*, 159 Wn.2d at 449 n.4 (citing *Okeson I*, 150 Wn.2d at 557-58).

new voter-approved cap would be lawful, and could be used to pay for streetlights – or any other general fund expenditure. *Okeson I*, 150 Wn.2d at 556.

Ordinance 121671 now before the Court was lawfully imposed because it unambiguously identified itself as a tax. As a result, that aspect of this Court’s analysis in *Okeson I* is unavailing to plaintiffs. Similarly, because there is no statutory cap on the tax that may be imposed upon a water distribution business, that portion of the *Okeson I* opinion is similarly unhelpful to plaintiffs. *Id.* Far from supporting plaintiffs’ claims, *Okeson I* supports the voluntary actions taken by Seattle in response.

**b. *Okeson I* required the costs of streetlights to be paid with taxes, and that is exactly what Seattle did with fire hydrants**

In Seattle’s view, applying the *Okeson I* streetlight rationale to fire hydrants required that fire hydrants be paid for with tax monies (or taxes in combination with other general fund receipts, such as parking fines). That is exactly what Seattle did to pay for fire hydrants in Seattle as of January 1, 2005. Rather than “openly defying” *Okeson I*, as plaintiffs allege, Seattle sought to abide by that decision by using tax monies to pay for fire hydrant service.

To be logically consistent, plaintiffs would have to argue that all tax money coming into the general fund must be separately “color coded” and tracked so that no SPU water utility tax revenue whatsoever would be used to pay for fire hydrants, and no electric utility tax revenue would be used to pay for streetlights. Yet, in *Okeson I* this Court rejected such an approach by implicitly recognizing that if Seattle’s voters had approved an increase in the six percent cap on the electric utility tax, as they are authorized to do by RCW 35.21.870, then any tax money above the prior six percent cap and up to the newly established cap (if any) could be used to pay for streetlights. *Okeson*, 150 Wn.2d at 556.

Thus, this Court has approved the very financing mechanism that plaintiffs object to in this case – i.e., paying for governmental services such as streetlights and fire hydrants with money from the general fund. The “effect” of the tax that plaintiffs object to is entirely consistent with the ruling in *Okeson I*.

Plaintiffs’ reading of *Okeson I* is that it is always improper to “impose general government expenses on utility ratepayers.” Plaintiffs’ Brief at 1. But as discussed above, this is not what *Okeson I* said. Moreover, even before Ordinance 121671, utility ratepayers were already paying general government expenses, because taxes on Seattle’s utilities –

including the 10 percent tax on SPU that plaintiffs did not challenge – were a significant source of revenue for the general fund.

**6. Accepting plaintiffs’ theory would create insurmountable constitutional conflicts**

Following *Okeson I*, Seattle added a new four million dollar fire hydrant expense to the general fund. That four million dollars had to come either from new tax revenues or from cuts in expenditures on other programs. Rather than make such cuts, Seattle chose to increase revenues by raising the water utility tax.

The central fallacy of plaintiffs’ argument is demonstrated by their contention that Seattle has some legal obligation to “spread” the costs of hydrants “across the broader revenue base supporting the general fund.” Plaintiffs’ Brief at 9-10, 49. Not surprisingly, plaintiffs cite no authority requiring any such “spread” of revenue sources by a taxing authority. Nor do plaintiffs provide any guidance as to the point at which this requirement would be met. If 90 percent of the cost of hydrants was paid for by an increase in the water utility tax, would that comply with plaintiffs’ “spread” test? If the figure were 80 percent, would Seattle still be “thumbing its nose” at *Okeson*? What about 70 percent? It is readily apparent that the Court would create a constitutional conflict between the branches of government if it were to adopt plaintiffs’ theory. Accepting

plaintiffs' theory would require some form of judicial supervision over state, county and municipal taxation decisions.<sup>9</sup>

Accepting plaintiffs' theory would also require judicial supervision over how tax revenues are spent. The logical conclusion of plaintiffs' arguments is that all water utility tax monies must be "color coded" and cannot be used to pay for any water service the other departments of the City of Seattle receive from SPU (including fire hydrant service). If it is unlawful to pay for fire hydrant service with water utility tax monies then it is unlawful to pay for the basic water service provided to the city's Parks Department, Libraries, or Police Department with tax monies collected from the gross receipts of the water utility. Of course plaintiffs cite no authority for separate accounting of water utility tax monies because none exists.

**7. The non-Washington cases cited by plaintiffs do not establish the invalidity of Ordinance 121671**

The bulk of plaintiffs' briefing on the validity of the tax increase is devoted to standing (an issue that Seattle is choosing not to contest in this Court), and to the general proposition that tax increases cannot be for an unlawful purpose or have an unlawful effect. Seattle does not dispute the

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<sup>9</sup> Plaintiffs' analysis is equally applicable to the taxation actions of the state legislature, the various county councils, and the city councils of every Washington city.

latter proposition, but the out-of-state authorities cited by plaintiffs do nothing to answer the question of whether the tax increase at issue here was in any way “unlawful.”

Plaintiffs’ substantive argument regarding the validity of this tax increase is, in truth, limited to a single case. In *Mathews v. Massell*, 356 F. Supp. 291 (N.D. Ga. 1973) (discussed in Plaintiffs’ Brief at 47-48), the plaintiffs’ challenged the City of Atlanta’s use of federal funds. The court held that Atlanta’s expenditure of the funds violated the express limits of a federal statute in which specific permitted uses of the funds were enumerated. *Id.* at 299-300. The trial court correctly noted that this fact distinguishes *Mathews* from this case:

The critical difference between *Mathews* and the instant matter is that Atlanta’s expenditure of revenue sharing funds on sewer and water rate relief was specifically not listed by congress as a legitimate use of those funds. Thus, the use of those funds in that manner was unlawful. Whereas, in the instant matter, Seattle is permitted to tax SPU to raise money for its general fund, and those funds may be used without restriction to pay for any number of general governmental activities, including fire hydrant service.

RP 9 (2-13-07).

Plaintiffs’ other authorities, which are cited only in support of an unremarkable general proposition, are similarly unhelpful to their claim. In each of plaintiffs’ cases, a tax violated a state law or constitution, or a

federal law – circumstances that are absent here. None of the cases cited by the plaintiffs held a municipal utility tax of any kind unlawful as a result of its intent or effect absent a conflict of law.

A few examples will show the inapplicability of the authorities cited by plaintiffs. In *Riggs v. Long Beach Township*, 109 N.J. 601, 538 A.2d 808 (1988), waterfront property was re-zoned in order to lower the fair market value of the property prior to condemnation. The court held this was not a valid purpose, because the ordinance conflicted with authorizing legislation. *Id.*, 538 A.2d at 813. In *Culbertson v. H. Witbeck Co.*, 127 U.S. 326, 335, 8 S. Ct. 1136, 32 L. Ed. 134 (1888), tax foreclosure deeds were held to be invalid because the applicable tax levy on which the foreclosure was based was itself unlawful, because the tax included sums assessed to pay two judges an amount above their statutorily authorized salaries. And in *Union Pacific R. Co. v. Troupe*, 99 Neb. 73, 155 N.W. 230, 232-33 (1915), a school district tax levy violated state law, because it exceeded the district's financial need, and because the district failed to comply with state law governing creation of a building fund. Here, Ordinance 121671 neither exceeds its authorizing legislation nor conflicts with other statutes or laws.<sup>10</sup>

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<sup>10</sup> See also *Freeland v. Hastings*, 92 Mass. (10 Allen) 570 (1865) (Civil War-era municipal tax invalidated insofar as it assessed money to reimburse individuals who had

**8. The proper process to object to a lawfully imposed tax is through referendum, not through judicial challenge**

Seattle voters have the opportunity to take action to prevent any tax increase passed by the Council from taking effect. RCW 35.21.706. Had they so desired, the named plaintiffs could have sought repeal of the challenged tax increase through the process provided for in state law – a remedy that was specifically noted in Ordinance 121671 itself. Neither plaintiffs nor any other taxpayer chose to submit a referendum petition to overturn the tax increases. CP 2384, ¶ 6.<sup>11</sup>

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paid for substitutes to serve in their stead, a purpose for which there was no legislative authorization); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585-88, 103 S. Ct. 1365 (1983) (tax on paper and ink used by newspapers invalidated, because it violated the First Amendment to the U.S. Constitution); *Grosjean v. American Press Co.*, 297 U.S. 233, 249-51, 56 S. Ct. 444, 80 L. Ed. 660 (1936) (tax based on newspaper circulation, intended to curtail circulation of selected newspapers, was invalidated as violating First and Fourteenth Amendments to the U.S. Constitution); *State ex rel. Campbell County v. Delinquent Taxpayers of 1939*, 191 S.W.2d 153, 154-55 (Tenn. 1945) (jail tax increase exceeded statutory authority); *People ex rel. Schlaeger v. Buena Vista Bldg. Corp.*, 396 Ill. 164, 71 N.E.2d 10 (1947) (invalidating tax levy which included amounts to pay for bonds that had previously been declared to be unlawful).

<sup>11</sup> The availability of a referendum process to block the tax increase is, in effect, the mirror image of the availability of a voting procedure to remove the 6 percent statutory cap on the gross receipts tax of an electric utility that was discussed by this Court in *Okeson I.* 150 Wn.2d at 556. Neither procedure was employed.

**C. The trial court correctly held that it was not required to award interest at the statutory rate**

As noted previously, if this Court reverses the ruling of the trial court that providing fire hydrants is a governmental, rather than a proprietary utility function, Seattle will have no refund obligation and the interest rate issue raised by plaintiffs will be moot. The discussion in this section assumes that this Court will affirm the ruling of the trial court that providing fire hydrants is a governmental function.

**1. Sovereign immunity protects Seattle from liability for interest**

The general rule is that, as a matter of sovereign immunity, “the State cannot be held to interest on its debts without its consent.” *Jenkins v. Washington Dept. of Social and Health Services*, 160 Wn.2d 287, 302, 157 P.3d 388 (2007). *Accord Architectural Woods v. State*, 92 Wn.2d 521, 524, 598 P.2d 1372 (1979); *Spier v. Department of Labor & Indus.*, 176 Wash. 374, 376-77, 29 P.2d 679 (1934). The rule applies equally to the state’s political subdivisions, including cities and counties. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 456, 842 P.2d 956 (1993) (citing *Silvernail v. County of Pierce*, 80 Wn.2d 173, 492 P.2d 1024 (1972)). Sovereign immunity, including its applicability to interest, “is a matter of state policy which can be changed only by the legislature.” *Architectural Woods*, 92 Wn.2d at 526.

Plaintiffs refer to this as a “judicially created” rule that was created in Washington by this Court in 1934 in *Spier*. Plaintiffs’ Brief at 36. In fact, the doctrine of sovereign immunity has its origins in common law, and was recognized by Washington courts long before *Spier*.<sup>12</sup> While *Spier* appears to be the first published Washington decision that applied the doctrine in the context of interest, this was not a rule that this Court made up out of whole cloth in *Spier*.<sup>13</sup> Plaintiffs incorrectly refer to the general rule as a “judicially created” anachronism, when it is a common law rule that was cited by this Court earlier this year in *Jenkins*.

The trial court correctly applied the doctrine of sovereign immunity to hold that Seattle is not liable for prejudgment and postjudgment interest at the statutory rate of 12 percent. CP 2376-79. Instead, the trial court followed the same approach used by Judge

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<sup>12</sup> In *Howard v. Tacoma School Dist. No. 10*, 88 Wash. 167, 176, 152 P. 1004 (1915), this Court cited a long line of Washington cases that had applied the doctrine of sovereign immunity, and further noted these cases simply applied the common law as it had been understood since at least the time of a 1788 English case, *Russel v. Men of Devon*. *Howard*, 88 Wash. at 177.

<sup>13</sup> The applicability of sovereign immunity to interest was well-established by the time *Spier* was decided. *Spier* relied upon two United States Supreme Court cases – *United States v. North Carolina*, 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336 (1890), and *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 8 S. Ct. 1156, 32 L. Ed. 159 (1888). The rule was well-recognized in other jurisdictions at the time of the *Spier* decision. See, e.g., *Cannon v. Maxwell*, 205 N.C. 420, 171 S.E. 624, 625 (1933) (“the State never pays interest, unless she expressly engages to do so”);

Armstrong in the parallel *Okeson* streetlights case, and awarded interest based on a “prudent investor” standard. CP 2371-72, 2378-79.

**2. Seattle’s refund liability does not arise from a proprietary activity or from contract**

In an effort to circumvent the well-established rule discussed above, plaintiffs make several arguments that ignore the fact that the basis for the trial court’s decision ordering refunds was that providing water for fire protection is a governmental function, and that Seattle’s refund obligation is based on the trial court’s finding that the inclusion of fire hydrant charges in SPU water bills constituted an “illegal tax.” CP 2154, 2158-59. Seattle’s refund liability, therefore, does not arise from any proprietary utility function, nor does it arise from any contract between SPU and its ratepayers (the authorized terms of which obviously do not and cannot include an “illegal tax”).

First, plaintiffs argue that the trial court’s “fundamental mistake” was failing to distinguish between the “two kinds of refunds” that are required. Plaintiffs’ Brief at 35. According to plaintiffs, sovereign immunity may preclude interest on the general fund’s refund obligation to SPU, but does not apply to the refund from SPU to its ratepayers. *Id.* According to plaintiffs, that is because “[t]he relationship between SPU and its ratepayers is entirely proprietary in nature.” *Id.* This argument

makes absolutely no sense. Seattle's refund obligation – including both SPU's refund to ratepayers and the corresponding refund from the general fund (which now is responsible for paying for hydrants) – arise because SPU was charging its ratepayers for governmental activities, under circumstances that constituted the imposition of an illegal tax. Under no scenario is that a “proprietary” activity.

Second, plaintiffs rely heavily upon the decision of Division II of the Court of Appeals in *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004).<sup>14</sup> Plaintiffs recognize that *Carrillo* stands for nothing more than the proposition that sovereign immunity does not apply to a municipality's proprietary acts. Plaintiffs' Brief at 38-39. Because the refund obligation arises from an activity that is indisputably governmental in nature (otherwise no refund would be owed), the trial court correctly held that *Carrillo* had no applicability here:

The activity at issue here, however, supplying water for servicing fire hydrants, has been found by this court of be a governmental function. . . . The court cannot now, for the purpose of addressing the issue of pre and post-judgment

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<sup>14</sup> In *Carrillo*, the Court of Appeals held that water and sewer charges imposed by the City of Ocean Shores on the owners of undeveloped properties that were not connected to either the city's water or sewer system constituted an illegal tax. As discussed below, the *Carrillo* court's application of statutory interest to the judgment is an anomalous ruling that relies principally on old Washington decisions that are no longer good law. However, since Seattle's refund obligation does not arise from a proprietary utility activity, this Court need not consider *Carrillo*'s infirmities in order to affirm the trial court's ruling on interest.

interest, determine that the activity is proprietary in nature. (See *Okeson v. City of Seattle*, 150 Wn.2d 540, 551 (2003), “Providing streetlights cannot be a proprietary function for some purposes, but a governmental function for others.”) Thus, in the instant matter *Carrillo* provides no basis upon which the court may conclude that the general rule that the state cannot be held to interest on its debts does not apply.

CP 2377-78 (footnote omitted).

Third, plaintiffs argue that *Architectural Woods* stands for the proposition that sovereign immunity has been deemed waived for all contractual claims against the state and local government entities. (The case says no such thing, as discussed below.) According to plaintiffs, since the relationship between SPU and its customers is contractual in nature, sovereign immunity should be deemed waived with respect to the refund from SPU to ratepayers. Plaintiffs’ Brief at 40-42. However, the trial court determined that SPU owes refunds because it charged its ratepayers for an activity that was, by law, not part of any contract between SPU and ratepayers. The refund does not represent a contractual liability.

Moreover, *Architectural Woods* does not stand for the proposition that sovereign immunity has been deemed waived for all contractual claims – only those claims involving contracts that have been expressly “authorized” by the legislature through statute. This limitation is consistent with the principle that “governmental immunity is a matter of

state policy which can be changed only by the legislature.” *Architectural Woods*, 92 Wn.2d at 526. In *Architectural Woods*, which involved a contract to construct furnishings in dorms at Evergreen State College, the court held that the legislature had impliedly waived immunity for Evergreen by enacting a statute that specifically authorized the college to enter into dormitory construction contracts. *Id.* at 527. No such statutorily authorized contract is at issue here.

**3. RCW 80.04.440 does not require payment of interest at the statutory rate**

Plaintiffs argue that a waiver of sovereign immunity for interest claims against municipal water utilities should somehow be implied from RCW 80.04.440, a statute enacted in 1911 that does not mention the word “interest.”<sup>15</sup>

The problems with plaintiffs’ argument are readily apparent. The first is that, when the legislature intends to waive sovereign immunity as to liability for interest, it explicitly does so. *See, e.g.*, RCW 4.56.115 (recovery of interest in tort actions); RCW 51.32.080(6) (recovery of interest in workers’ compensation cases); RCW 82.32.060 (claims for

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<sup>15</sup> The original version of the statute is attached to this brief as Appendix A. Laws of 1911, ch. 117, § 102. Only one word in the statute has been changed since 1911 (“act” to “title”). The language from the part of this statute relied upon by plaintiffs in their brief has remained unchanged since 1911.

illegally exacted taxes). Although this Court in *Architectural Woods* held that intent to waive sovereign immunity as to interest on contract claims could be implied where the contract was one that was expressly authorized by statute, the “implied waiver” principle has not been extended to other types of claims.

Second, while it is reasonable to imply a waiver of immunity where the legislature has expressly authorized the contract on which the claim is based, it is stretching the concept of “implied waiver” beyond the breaking point to apply it nearly 100 years after the fact to a broadly worded damages statute.<sup>16</sup>

The trial court rejected plaintiffs’ arguments concerning this statute, holding that while the “all loss, damage or injury” provision in this statute may authorize an award of interest at a rate sufficient to make an injured party whole, it does not constitute an implied legislative consent for public service companies to pay interest at 12 percent:

[T]he state has set forth in RCW 80.04.440 the specific extent to which it shall be held liable in the event a public service company runs afoul of the statute. While “all loss . . . caused thereby or resulting therefrom” may be reasonably construed to include a reasonable rate of return that would have been earned by a reasonably prudent

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<sup>16</sup> Rates paid by water customers are clearly distinguishable from the sort of statutorily-approved bilateral contract addressed in *Architectural Woods*, which is individually negotiated and with an agreed-upon price and a set completion date.

investor, it is not a basis upon which to imply a waiver of immunity from liability for statutory interest.

CP 2378-79. Accordingly, based on evidence provided by the parties concerning a reasonable rate of return, the trial court ordered SPU to pay to its ratepayers “compensation for loss of use of money based on a rate of return of 1 percent per annum,” and ordered Seattle’s general fund to pay to SPU “compensation for loss of use of money based on a rate of return of 3.18 percent per annum. CP 2371-72. Plaintiffs have not appealed the interest rates used by the trial court under this “prudent investor” standard.

This was the same approach used by Judge Armstrong in the parallel *Okeson* streetlights case. Judge Armstrong, like the trial court here, rejected plaintiffs’ arguments that the statutory rate of interest applied. CP 1955. Instead she included, as part of the refund, additional damages at lower interest rates, reflecting compensation for, respectively, residential and commercial ratepayers’ loss of use of funds during the refund period. CP 1962. Judge Armstrong’s ruling on the interest rates in the *Okeson* streetlights case was not appealed.

**4. Carrillo misinterprets *Our Lady of Lourdes* and *Architectural Woods*, and does not mandate a ruling in plaintiffs’ favor**

As noted above, *Carrillo* involved a suit by residents of Ocean Shores against the city for a return of payments required by the city’s water utility for standby water service, when the plaintiff residents were

not connected to the city's water system. The Court of Appeals ruled in favor of the plaintiffs, finding that the charges were an invalid tax, and required the city to pay pre- and post-judgment interest on those refunds. 122 Wn. App. at 617.

a. **Immunity from interest is premised on being a political subdivision of the state, not on "acting on behalf of the state"**

*Carrillo* is a curious decision regarding interest on judgments in a number of respects. First, it found that pre- and post-judgment interest could be avoided by a political subdivision of the state, such as a city, only if it were specifically acting on behalf of the state: "But here, the City has not shown that it was engaged in an activity on behalf of the state as required by *Kelso* . . ." *Carrillo*, 122 Wn. App. at 616 (citing *Kelso v. City of Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964)). This analysis simply misstates Washington law. Sovereign immunity, as this Court has declared, is based on a local governmental entity's status as a political subdivision of the state. See *Our Lady of Lourdes*, 120 Wn.2d at 456 ("[c]ounties, like cities, are political subdivisions of the State to which the rule [of sovereign immunity] applies"). How the *Carrillo* court could have relied on *Kelso* – a case decided nearly 30 years before *Our Lady of*

*Lourdes* – to devise a sovereign immunity rule that is flatly inconsistent with *Our Lady of Lourdes* is curious indeed.<sup>17</sup>

It should be noted that even if the *Carrillo* court’s statement of the sovereign immunity rule were correct, Seattle is immune from an award of interest because it is acting on behalf of the state when it sets utility rates. The issue presented here is whether Seattle has an obligation to pay interest based on its actions in improperly setting water rates by including the cost of hydrants in rates to Seattle’s retail water customers. Rate-setting by a municipal utility is not independent of the state; it is a legislative act that the state delegates to the legislative body of the city, to act on the state’s behalf. *Earle M. Jorgensen Co. v. City of Seattle*, 99 Wn.2d 861, 665 P.2d 1328 (1983). “The Seattle City Council is an elected body but it still serves as the agent of the Legislature in setting electrical rates.” *Jorgensen*, 99 Wn.2d at 869 (emphasis added).

**b. *Carrillo* relies on older decisions from this Court that are no longer good law**

Not only did *Carrillo* rely on *Kelso* to employ an analysis inconsistent with this Court’s approach in *Our Lady of Lourdes*, but it

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<sup>17</sup> The *Carrillo* also curiously dismissed *Silvernail*, *supra*, a leading case cited in *Our Lady of Lourdes*, with a “*but see*” footnote. *Carrillo*, 122 Wn. App. at 616 n.14. In *Silvernail*, this Court held that a 1967 statute extending the state’s abandonment of sovereign immunity for tort actions did not mean that immunity from interest on damage awards was likewise abandoned.

cited to older decisions of this Court that had since been overruled. The

*Carrillo* court stated:

Moreover, long-standing case law supports the trial court's interest ruling. *Doric Co. v. King County*, 59 Wn.2d 741, 370 P.2d 254 (1962), an illegal tax refund case, summarily affirmed the grant of interest on the judgment.

*Carrillo*, 122 Wn. App. at 616. The *Carrillo* court is certainly correct that *Doric* is a summary opinion. It is a two-page ruling referencing two previous cases, one from 1919 and one from 1926. Seventeen years after *Doric*, however, this Court reinstated a different rule: "By our present ruling, we reinstate the rule of *Spier* that the state cannot be held to interest on its debts." *Architectural Woods*, 92 Wn.2d at 526 (emphasis added).

**c. Judge Armstrong rejected the *Carrillo* analysis in *Okeson***

In the *Okeson* streetlights case, Judge Armstrong likewise rejected plaintiffs' argument that anticipated *Carrillo* (which at the time of her initial ruling had not yet been decided), and declined to apply two older cases relied upon in *Carrillo*, finding them inconsistent with this Court's approach in *Our Lady of Lourdes*. CP 1956-57. When the *Carrillo* case was issued in July 2004, plaintiffs attempted to convince Judge Armstrong in a motion for reconsideration that she should adopt Division II's logic, but she declined. CP 1962.

## V. CONCLUSION

Seattle voluntarily applied this Court's *Okeson I* decision to fire hydrants before plaintiffs filed this case. To comply with the new requirement that fire hydrants be treated as a general fund expense, Seattle increased the rate of water utility taxes (for which there is no statutory cap). Those tax receipts are commingled with other general fund monies and used to pay for streetlights, fire hydrants, water supply in City buildings, and other general fund purposes. These are perfectly appropriate uses of tax monies, and plaintiffs have provided no support for the proposition that utility taxes must be "color coded," and segregated from being applied to general government utility expenses.

Further, plaintiffs' arguments concerning interest conflict with the trial court's underlying legal ruling that including the cost of fire hydrants in water rates constituted an "illegal tax." Seattle's refund obligation is based on a ruling that the monies were extracted as an illegal tax; as such, the refunds cannot arise from SPU's proprietary activity, as plaintiffs argue.

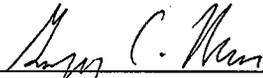
Accordingly, the rulings of the trial court granting summary judgment dismissing plaintiffs' claim regarding Seattle's increase in the water utility tax, and rejecting plaintiffs' argument that interest must be awarded at the statutory rate of 12 percent, should be affirmed.

Finally, the Court should summarily reject plaintiffs' argument that, even if Burien and Lake Forest Park prevail, Seattle must nevertheless refund money that had been legally charged. That argument elevates form over substance to an absurd level. It was Seattle that acted first to change the way it treated fire hydrant expenses in light of *Okeson I*, and that it was Seattle – along with plaintiffs – that prevailed on the underlying issue that fire hydrants are a general government expense. Seattle cannot appeal an issue on which it prevailed.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of December, 2007.

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# Appendix A

# SESSION LAWS

OF THE

# STATE OF WASHINGTON

TWELFTH SESSION

Convened January 9; Adjourned March 9

1911

COMPILED IN CHAPTERS WITH MARGINAL NOTES

-BY-

I. M. HOWELL

SECRETARY OF STATE

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All fines and penalties recovered by the state under this act shall be paid into the treasury of the state.

SEC. 99. *Orders and Rules Conclusive.*

Orders  
and rules  
conclusive.

In all actions between private parties and public service companies involving any rule or order of the commission, and in all actions for the recovery of penalties provided for in this act, or for the enforcement of the orders or rules issued and promulgated by the commission, the said orders and rules shall be conclusive unless set aside or annulled in a review as in this act provided.

SEC. 100. *Findings Prima Facie Correct.*

Burden on  
company, to  
establish.

Whenever the commission has issued or promulgated any order or rule, in any writ of review brought by a public service company to determine the reasonableness of such order or rule, the findings of fact made by the commission shall be *prima facie* correct, and the burden shall be upon said public service company to establish the order or rule to be unreasonable or unlawful.

SEC. 101. *Commission Shall Enforce Laws.*

Enforce  
laws.

It shall be the duty of the commission to enforce the provisions of this act and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal.

SEC. 102. *Companies Liable for Damages.*

Liable for  
damages.

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, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this act or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was wilful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or

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injury may be brought in any court of competent jurisdiction by any person or corporation.

SEC. 103. *Commission to Furnish Copy of Rates, Etc.*  
—*Fees.*

Upon application of any person the commission shall furnish certified copies of any classification, rate, rule, regulation or order established by such commission, and the printed copies published by authority of the commission, or any certified copy of any such classification, rate, rule, regulation or order, with seal affixed, shall be admissible in evidence in any action or proceeding, and shall be sufficient to establish the fact that the charge, rate, rule, order or classification therein contained is the official act of the commission. When copies of any classification, rate, rule, regulation or order not contained in the printed reports, or copies of papers, accounts or records of public service companies filed with the commission shall be demanded from the commission for proper use, the commission shall charge a reasonable compensation therefor. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such person or corporation.

Rates, fees  
supplied by  
commission.

SEC. 104. *Effect of Act—Release of Damages.*

This act shall not have the effect to release or waive any right of action by the state or any person for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state; and all penalties accruing under this act shall be cumulative of each other, and a suit for the recovery of one penalty shall not be a bar to the recovery of any other: *Provided*, That no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting live stock by railway from liability of a common carrier, or carrier of live stock, which would exist had no contract, receipt, rule or regulation been made or entered.

Effect  
of act.

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