

SUPREME COURT No. 86293-1

RECEIVED BY E-MAIL

**SUPREME COURT
OF THE STATE OF WASHINGTON**

**CEDAR RIVER WATER AND SEWER DISTRICT;
and SOOS CREEK WATER AND SEWER DISTRICT,**

Appellants,

vs.

KING COUNTY, *et al.*,

Respondent/Cross-Appellant.

**RESPONDENT AND CROSS-APPELLANT KING COUNTY'S
REPLY BRIEF IN SUPPORT OF CROSS-APPEAL**

Timothy G. Leyh, WSBA #14853
Randall T. Thomsen, WSBA #25310
Katherine S. Kennedy, WSBA #15117
Danielson Harrigan Leyh & Tollefson, LLP
999 Third Avenue, Suite 4400
Seattle, WA 98104
(206) 623-1700

William Blakney, WSBA #16734
Verna P. Bromley, WSBA #24703
King County Prosecuting Attorney – Civil Division
W400 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2388
(206) 205-6196

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ARGUMENT	4
A. The Districts Bear the Burden of Proving that the StockPot Mitigation Payment was Inappropriate	4
1. The Court cannot reverse the burden of proof based on the County’s alleged “peculiar and exclusive” knowledge	4
2. No trust or fiduciary duties warrant reversal of the normal burden of proof	6
B. The Trial Court Erred in Ruling for the Districts on their StockPot Mitigation Claim	11
1. The evidence at trial was that the County made the StockPot mitigation payment in good faith to comply with Snohomish County’s permitting requirements.....	11
2. The County’s StockPot mitigation payment was part of a good faith settlement under <i>Warburton</i>	15
3. The Districts have not suffered damages supporting the \$2 million judgment against King County.....	16
C. The Trial Court Erred in Awarding the Districts Prejudgment Interest on the StockPot Mitigation Payment.....	18

	<u>Page</u>
1. No basis exist as a matter of law for awarding prejudgment interest.....	18
2. The trial court did not properly calculate prejudgment interest based on the Districts' actual "damages"	22
D. The Trial Court Erred in Dismissing the County's Affirmative Defenses of Offset and Recoupment.....	22
III. CONCLUSION.....	25

TABLE OF AUTHORITIES

	<u>Page</u>
Table of Cases	
<u>Washington Cases</u>	
<i>Abrams v. City of Seattle</i> , 173 Wash. 495, 23 P.2d 869 (1933).....	15
<i>Architectural Woods, Inc. v. State</i> , 92 Wn.2d 521, 598 P.2d 1372 (1979).....	20
<i>In re Black v. Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004).....	4
<i>Blewett v. Abbott Labs.</i> , 86 Wn. App. 782, 938 P.2d 842 (1997).....	18
<i>Joliffe v. N. Pacific R.R. Co.</i> , 52 Wash. 433, 100 P. 977 (1909).....	5, 6
<i>Lane v. City of Seattle</i> , 164 Wn.2d 875, 194 P.3d 977 (2008).....	11, 21
<i>National Elec. Contractors Ass'n v. Employment Sec. Dep't</i> , 109 Wn. App. 213, 34 P.3d 860 (2001).....	5
<i>Northwest Indep. Forest Mfrs. v. Department of Labor & Indus.</i> , 78 Wn. App. 707, 899 P.2d 6 (1995).....	17
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003).....	11
<i>Okeson v. City of Seattle</i> , 130 Wn. App. 814, 125 P.3d 172 (2005).....	11
<i>Okeson v. City of Seattle</i> , 159 Wn.2d 436, 150 P.3d 566 (2007).....	11

	<u>Page</u>
<i>Our Lady of Lourdes Hosp. v. Franklin County</i> , 120 Wn.2d 439, 842 P.2d 956 (1993).....	19
<i>Retired Pub. Employees Council of Wash. v. Charles</i> , 148 Wn.2d 602, 62 P.3d 470 (2003).....	7, 9
<i>Seattle ex rel. Dunbar v. Dutton</i> , 147 Wash. 224, 265 P. 729 (1928).....	14
<i>Seattle First Nat'l Bank, N.A. v. Siebol</i> , 64 Wn. App. 401, 824 P.2d 1252 (1992).....	24
<i>Shum v. Department of Labor & Indus.</i> , 63 Wn. App. 405, 819 P.2d 399 (1991).....	21
<i>Smith v. Spokane County</i> , 89 Wn. App. 340, 948 P.2d 1301 (1997).....	14
<i>Union Elevator & Warehouse Co. v. Department of Transp.</i> , 171 Wn.2d 54, 248 P.3d 83 (2011).....	19
<i>Warburton v. Tacoma Sch. Dist. No. 10</i> , 55 Wn. 2d 746, 350 P.2d 161 (1960).....	15
<i>Washington St. Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.</i> , 165 Wn.2d 679, 687, 202 P.3d 924 (2009).....	20
<u>Other Jurisdictions</u>	
<i>Hanover Shoe, Inc. v. United Shoe Mach. Corp.</i> , 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968).....	18
<i>Holmes v. Beckwith</i> , 11 Conn. Supp. 215 (Conn. Super. Ct. 1942).....	7, 8

	<u>Page</u>
<i>Illinois Brick Co. v. Illinois</i> , 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977).....	18
<i>O'Fallon Dev. Co., Inc. v. City of O'Fallon</i> , 356 N.E.2d 1293 (Ill. Ct. App. 1976)	7, 8
<i>Thompson v. Atlantic Richfield Co.</i> , 673 F. Supp. 1026 (W.D. Wash. 1987).....	6, 9
<i>Weik v. City of Wausau</i> , 128 N.W. 429 (Wis. 1910).....	8, 9

Statutes

RCW 35.58.180	21
RCW 35.58.200	14
RCW 35.58.570	17
RCW 43.09.210	3, 23
RCW 80.04.440	21

Other Authorities

King County Charter § 230.10.10.....	10
KCC 28.86.160.C.1.FP-10	10
20 AM. JUR. 2D <i>Counterclaim, Recoupment and Setoff</i> (2012)	23, 24
29 AM. JUR. 2D <i>Evidence</i> (2012).....	4
T.D. Cousens, Annotation, <i>Burden of Proof in Actions Under General Declaratory Judgment Acts</i> , 23 A.L.R.2d 1243 (2012).....	4
RESTATEMENT (THIRD) OF TRUSTS (2003).....	7

I. INTRODUCTION

The Districts' Reply is without evidentiary support and relies on inapposite cases. It provides no basis to sustain the \$2 million judgment against King County, much less the award of nearly \$1 million more for prejudgment interest.¹

The Districts argue that the Growth Management Hearings Board ("GMHB") had invalidated the Snohomish County Essential Public Facilities ("EPF") Ordinance under which King County made the \$2 million mitigation payment to StockPot. But the evidence at trial was that the GMHB, while invalidating the Ordinance on other grounds, approved the specific provisions requiring King County to "mitigate[] adverse impacts to . . . economic development," and "provide substantial assistance to displaced or impacted businesses in relocating within the county."² The GMHB remanded the Ordinance to Snohomish County to "take appropriate legislative action to achieve compliance with the GMA,"³ and the undisputed evidence at trial was that King County officials reasonably believed that Snohomish County would include the

¹ See Brief of Resp't & Cross-Appellant King County ["King County Resp't Br."] at 2-4 ("Assignments of Error").

² Tr. Ex. 70 at 17; Tr. Ex 65 at 8.

³ Tr. Ex. 70 at 20.

same conditions the GMHB had approved in a new EPF Ordinance.⁴ To comply with permit requirements the County reasonably anticipated it would face, the County proactively agreed to mitigate economic impacts of StockPot's relocation.⁵

Moreover, while the trial court held that the Water Quality Fund ("WQF") could not properly pay the \$2 million StockPot mitigation payment under the Agreements for Sewage Disposal ("the Contracts"),⁶ the Districts offered no evidence that they suffered any damages from that payment. The evidence was that the County funded the mitigation payment through bonds that future ratepayers (not the Districts) will repay. Although the Districts will pay a small amount as debt service on the bonds, they "pass on" that entire amount to ratepayers. Proof of damages is required for a contract claim, and the Districts failed to present evidence that they suffered any damages.

Even if the judgment otherwise was appropriate, the trial court erred in awarding prejudgment interest. The Districts argued (and the trial court held) that the \$2 million mitigation payment was improper because it

⁴ RP 27:2348; 24:1878-81; Findings of Fact & Conclusions of Law at 22, ¶ 85. At the time of King County's settlement with StockPot, Snohomish County had appealed the GMHB's Order and the outcome of that decision was highly uncertain. See Findings of Fact & Conclusions of Law at 22, ¶ 88.

⁵ RP 27:2348-49; 24:1878-81.

was a “governmental” expense of King County, incurred to benefit the general public. But if it was a “governmental” expense, the Districts had to establish that the County waived its sovereign immunity to allow for an award of prejudgment interest, which the Districts failed to do. Instead, the Districts argue that the doctrine of sovereign immunity does not apply because the Wastewater Treatment Division (“WTD”) operates as a “proprietary” utility. The Districts cannot have it both ways. The mitigation payment either was a “governmental” expense of the County not subject to prejudgment interest, or a “proprietary” utility expense properly charged under the Contracts.⁷

Finally, if the Districts were entitled to any judgment, the trial court erred by depriving the County of the opportunity to pursue its offset and recoupment affirmative defenses to reduce or eliminate any recovery. The County conferred unreimbursed benefits on the WQF and the Districts in excess of any amounts the Districts alleged that the County misused. Both the Local Government Accounting Act (“Accountancy Act”), RCW 43.09.210, and the doctrine of unjust enrichment entitled the County to pursue its offset and recoupment defenses at trial.

⁶ Findings of Fact & Conclusion of Law at 25, ¶ 105.

II. ARGUMENT

A. **The Districts Bear the Burden of Proving that the StockPot Mitigation Payment was Inappropriate.**

At trial, the only evidence was that King County's mitigation payment to StockPot was made to comply with Snohomish County's permitting requirements. Having failed to present any evidence to the contrary, the Districts now seek to reverse the burden of proof, arguing – as they unsuccessfully did at the trial court – that “King County should have had the burden of proving whether it used the sewage utility fund properly.”⁸ There is no basis for reversing the Districts' burden to prove each element of their claims by a preponderance of the evidence. *In re Black v. Black*, 153 Wn.2d 152, 180, 102 P.3d 796 (2004).⁹

1. The Court cannot reverse the burden of proof based on the County's alleged “peculiar and exclusive” knowledge.

The Districts contend that the Court should reverse the burden of

⁷ If “proprietary,” the Districts had to establish their actual damages for the breach of contract, and prejudgment interest would be calculated on that amount. As shown *infra*, they did not establish any damages to themselves, much less \$2 million in damages.

⁸ Reply Br. of Appellants/Cross-Resp'ts [“Appellants Reply”] at 1.

⁹ See also 29 AM. JUR. 2D *Evidence* § 174 (2012) (“The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who . . . naturally should be expected to bear the risk of failure of proof or persuasion.”); T.D. Cousens, Annotation, *Burden of Proof in Actions Under General Declaratory Judgment Acts*, 23 A.L.R.2d 1243, 1254 (2012) (“[T]he only principle whose application is universal in the absence of any policy or presumption to the contrary is embodied in the maxim: ‘He who affirms must prove.’”).

proof, arguing that because the County had sole possession of the WQF, it had “peculiar and exclusive knowledge” of how it was used.¹⁰ But despite extensive discovery and numerous Public Records Act requests,¹¹ the Districts still do not identify any type of “peculiar and exclusive” knowledge that only the County had about the mitigation payment to StockPot. In fact, there is none.

In their Reply (at footnote 6), the Districts rely on the cases in their opening brief regarding “access to relevant information.” Those decisions do not resemble this case in any way, and instead involve circumstances where the defendant had exclusive access to evidence on the relevant subject.¹² For example, in *National Elec. Contractors Ass'n v. Employment Sec. Dep't*, 109 Wn. App. 213, 226, 34 P.3d 860 (2001), the appellate court held that under Washington’s Unemployment Compensation Act, the employee bore the burden to establish his or her availability for work. The employer obviously would not have that information, and availability for work is an element of the employee’s claims. In *Joliffe v. N. Pacific R.R. Co.*, 52 Wash. 433, 100 P. 977 (1909),

¹⁰ Appellants Reply at 1-2.

¹¹ The Districts took 34 depositions, obtained 85 pages of interrogatory answers, 35,289 pages of documents in response to requests for production, and an additional 106,477 pages in response to Public Records Act requests.

¹² See King County Resp’t Br. at 10 & n.21.

an action against a carrier to recover for damages caused by delay in a shipment, the Court reasoned that where circumstances are “exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof”¹³

The Districts knew “how the WQF was used,” since they based their challenge to the Stockpot mitigation payment on those very uses, and argued against them at a six-week trial. As the Districts implicitly acknowledge in failing to identify any information that they allegedly lacked, the Districts had all information relevant to their claims.

2. No trust or fiduciary duties warrant reversal of the normal burden of proof.

The Districts fail to supply any “fiduciary duty” or “trust” authority that supports their effort to reverse the burden of proof with regard to the \$2 million mitigation payment. The Districts challenged that payment as a breach of the Contracts, but the County owes no fiduciary duties to its contractual customers. *See Thompson v. Atlantic Richfield Co.*, 673 F. Supp. 1026 (W.D. Wash. 1987) (“*ARCO*”) (no trust arising out of franchise contracts). There also is no basis for fiduciary or trust

¹³ *Id.* at 436 (emphasis added). In *Joliffe*, the Court queried: “[H]ow can a man who has no knowledge of railroading, no way of ascertaining the manner in which the business is conducted by the company, or of compelling the confidence of the management, tell the cause of the delay?” *Id.* at 435-36.

duties in the King County Code or Charter, or any other source.¹⁴ See *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003) (“*RPEC*”) (no fiduciary duty owed based on existence of a “special [retirement] fund, of proprietary nature,” where no statutory language “clearly illustrate[s]” legislative intent to impose such duties).¹⁵

A trust is not created simply because a fund is reserved for certain enumerated uses, particularly where the entity holding any monies undisputedly owns them, as is the case with the WTD’s ownership of the WQF. See RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. f (2003) (a trust requires a “manifestation of intent” to hold property not as an owner, but for the benefit of another).

The Districts now claim that three cases – cited for the first time on appeal – “recogniz[e] fiduciary-like obligations for the use of public funds”: *O’Fallon Dev. Co., Inc. v. City of O’Fallon*, 356 N.E.2d 1293 (Ill. Ct. App. 1976); *Holmes v. Beckwith*, 11 Conn. Supp. 215 (Conn. Super.

¹⁴ The trial court properly granted summary judgment to King County, dismissing the Districts’ trust and fiduciary duty claims. See CP 18725-26; RP 3:39-40.

¹⁵ The Districts mischaracterize the *RPEC* case, arguing that it “reaffirmed that those responsible for investing public pension funds that have already been collected do have fiduciary obligations to those funds.” Appellants Reply at 4-5. In fact, the Court stated that the plaintiffs in that case “rel[ie]d on mid-twentieth century cases that have referred to retirement boards as trustees and stated that the retirement fund was a ‘special fund, of a proprietary nature.’” 148 Wn.2d at 621. The Court refused to follow those cases, stating: “This State’s case law, recent case law in particular, has refused to characterize the retirement funds as trusts.” *Id.* at 622 (emphasis added).

Ct. 1942), and *Weik v. City of Wausau*, 128 N.W. 429 (Wis. 1910).¹⁶

None of those cases is remotely analogous to this case.

In *O'Fallon*, a shopping center owner challenged the use of a municipally-owned water tower for advertising a competitor's shopping center. The shopping center owner claimed (and the court agreed) that the advertisements violated constitutional and statutory provisions barring the purely private use of public property. 356 N.E.2d at 1302-03. The unsurprising statement that "[a] municipal corporation holds its property in trust for the public," *id.* at 1298, does not support the argument that a proprietary utility holds revenues obtained under a contract "in trust."

The two remaining cases, *Holmes* and *Weik*, are even further afield. Both involved taxpayer challenges to actions taken by cities. In *Holmes*, a superior court case, the issue was whether a town was required to apply a cash surplus in its General Fund to reduce the amount of estimated expenses for the upcoming year. 11 Conn. Supp. at 221. In *Weik*, decided in 1910, the issue was whether a city violated state law by diverting funds raised to build a city hall, to other city purposes, and

¹⁶ Appellants Reply at 3 n.10.

replacing the borrowed amounts from a later tax levy. 128 N.W. at 429.¹⁷

The Districts' StockPot mitigation payment claim involves neither the private use of public property as in *O'Fallon*, nor the improper diversion of tax revenues as in *Holmes* and *Weik*. The case before the Court is based on contracts entered into at arms' length between the County and the Districts, involving wastewater charges paid to WTD in its proprietary capacity. The Districts' cases provide no basis for imposing trust, fiduciary, or "quasi-fiduciary" duties on the County.

The Districts try to distinguish this case from *ARCO*, 673 F. Supp. 1026, in which the federal court declined to find a trust. The Districts argue that the County must keep the funds at issue here in "a separate account, the WQF," unlike those in *ARCO*. But "a separate account" does not by itself compel the imposition of trust or fiduciary duties. *See RPEC*, 148 Wn.2d 602. The court in *ARCO* referred to a "separate account" as only one of four indicia of a trust; others included whether the relevant agreement contained language indicating a trust; whether plaintiffs could claim any "beneficial interest" in the funds at issue; and whether any purpose was better served through a trust rather than a contractual

¹⁷ In *Weik*, the Court noted that a statute only entitled "first class" cities to borrow money from a fund and replace it from the next tax levy. 128 N.W. at 429. Again, it was in the taxation context that the court said a fund raised for a special purpose was a "trust fund."

relationship. *Thompson*, 673 F. Supp. at 1028. The Districts did not establish any of those remaining factors.

The Districts argue that they “rely on the County Charter, the County Code, the Contracts, and well established principles of municipal utility law” for an alleged fiduciary duty owing to them from King County. None of these supports their argument, as the trial court recognized in granting King County’s summary judgment motion on the Districts’ fiduciary duty and trust claims.¹⁸ The King County Charter and Code address the uses of the wastewater system’s assets, and do not establish a trust. *See, e.g.*, King County Charter § 230.10.10 (revenues of WTD “shall never be used for any purposes other than [those enumerated]”) (emphasis added); KCC 28.86.160.C.1.FP-10 (“[t]he assets of the wastewater system are pledged to be used for the exclusive benefit of the wastewater system . . .”) (emphasis added). The Districts point to no language in the Contracts that manifests an intent to create a trust, and there is none. The Districts also refer to “well-established principles of municipal utility law,” but they do not elaborate further on that argument or cite to any authority.¹⁹

¹⁸ *See* CP 18725-26; RP 3:39-40.

¹⁹ None of the *Okeson* cases, on which the Districts have elsewhere relied, impose fiduciary duties on utilities. The line of cases generally addresses whether a city utility

The trial court correctly rejected the Districts' attempts to reverse the normal burden of proof. This Court should do the same.²⁰

B. The Trial Court Erred in Ruling for the Districts on their StockPot Mitigation Claim.

1. The evidence at trial was that the County made the StockPot mitigation payment in good faith to comply with Snohomish County's permitting requirements.

The Districts argue that King County did not need to make the \$2 million mitigation payment to StockPot because the GMHB had invalidated the Snohomish County EPF Ordinance.²¹ But that argument glosses over the GMHB's actual finding regarding the mitigation conditions at issue here.

Although the GMHB held that, because of other provisions, the Ordinance did not comply with the GMA's requirements, and "remand[ed]

can impose certain costs on its customers, analyzing whether the expenditures constituted regulatory fees or a tax. None of the cases involved a contract or held that a utility had a "trust" relationship with its customers. See, e.g., *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) (cost of streetlights); *Okeson v. City of Seattle*, 130 Wn. App. 814, 125 P.3d 172 (2005) (cost of public art projects); *Okeson v. City of Seattle*, 159 Wn.2d 436, 150 P.3d 566 (2007) (cost of mitigating greenhouse gas emissions); *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008) (costs of fire hydrants).

²⁰ Were this Court to hold that a fiduciary duty existed, it would result in a remarkable expansion of the law. For instance, King County (because of its wastewater treatment utility) would owe a fiduciary duty to the City of Seattle (a customer) and likewise, the City of Seattle (because of its water and electric utilities) would owe a fiduciary duty to King County (a customer). Were the District's position correct, arguably every public facility or utility district would owe fiduciary or trust obligations to its customers. That untenable result is the natural consequence of the Districts' argument here.

²¹ Appellants Reply at 30 & n.71.

this ordinance to [Snohomish] County with direction to take appropriate legislative action,”²² the GMHB approved the mitigation criteria at issue:

The Board finds that the other criteria listed at SCC 30.42[D].090 and .100 are sufficiently clear that they are not impermissibly vague and over-reaching when applied to regional, state or federal EPFs.²³

These criteria included the requirements that King County officials were concerned about, which required the County to mitigate impacts to “economic development” and “provide substantial assistance to displaced or impacted businesses in relocating within Snohomish county,” as conditions to obtain the necessary Brightwater permits.²⁴ Snohomish County also had appealed the GMHB’s invalidation of the Ordinance, and the appeal’s outcome was uncertain at the time of the StockPot settlement in 2005. Both the Thurston County Superior Court and the GMHB on remand later affirmed the appropriateness of the mitigation criteria.²⁵

Former King County Executive Kurt Triplett and WTD Director

²² Tr. Ex. 70 at 20.

²³ Tr. Ex. 70 at 17 (emphasis added). The GMHB’s Order contains a typographical error; it was intended to refer to SCC 30.42D.090, as is apparent from references throughout the same subsection. SCC 30.42C.090 did not exist.

²⁴ RP 24:1878-81; Tr. Ex. 65 at 8; RP 27:2347-49.

²⁵ See CP 4124-44, 4146-70. Although issued after the final StockPot settlement, the Thurston County Superior Court decision and the GMHB decision on remand both validate the County’s belief that it had to address the EPF criteria in its settlement with StockPot. For example, the Thurston County Superior Court held that “[t]he County may

Christie True both testified that King County believed that Snohomish County would enact a new EPF Ordinance containing the same mitigation requirements, and they wanted to proactively address that likelihood. Mr. Triplett testified:

That particular element of Snohomish County requiring us to have a job relocation element was likely, of all the elements in an ordinance that we disagreed with, that one was the most likely to be kept. And so we believed that even if we prevailed and their ordinance was thrown out, a subsequent ordinance that was better written from their perspective would still include that element. So we were essentially trying to get ahead of the game and say what is the likely outcome here. The likely outcome here is we're going to be required to have some sort of job relocation element in Snohomish County's siting ordinance and permitting process.²⁶

Likewise, both Mr. Triplett and Ms. True testified that the County agreed to the mitigation condition in the StockPot settlement only because the County believed it would be required to do so to site and construct Brightwater. Mr. Triplett explained:

We saw it [job loss mitigation] as an obligation of the Wastewater Fund as part of siting Brightwater, yes. We saw that as an appropriate element because it was required by Snohomish County's ordinance, not necessarily what we would have done absent that ordinance²⁷

impose reasonable conditions on the essential public facilities and may require reasonable mitigation in their development." CP 4126.

²⁶ RP 27:2347-48 (emphasis added); *see also* RP 24:1878-81.

²⁷ RP 27:2349; *see also* RP 24:1880-81.

The County's decision to proactively address mitigation conditions that the GMHB already had approved in the prior Ordinance and Snohomish County likely would incorporate into a new EPF Ordinance was appropriate and neither arbitrary nor capricious.²⁸ *See, e.g., Seattle ex rel. Dunbar v. Dutton*, 147 Wash. 224, 234, 265 P. 729 (1928) (park commission had authority to settle claim if settlement was in good faith, even if the claim was of dubious nature).

The Districts argue that because the County never obtained a conditional use permit ("CUP"), the EPF Ordinance criteria were irrelevant.²⁹ But the County avoided the need to obtain a CUP only because of a settlement with Snohomish County months later – in August 2005. When the County settled with StockPot in January 2005, it was "justifiably concerned" that it would have to obtain a CUP, as the trial court found.³⁰

²⁸ The County had authority to build a wastewater plant such as Brightwater, and to meet the conditions a permitting authority could require for that facility. *See* RCW 35.58.200 (1), (2) (authority to conduct water pollution abatement activities, including maintaining and operating facilities). When a statute authorizes a county to act with regard to a particular subject, courts should not second-guess the wisdom of its particular methods. *See Smith v. Spokane County*, 89 Wn. App. 340, 359, 948 P.2d 1301 (1997) ("[W]hen a statute expressly grants the general authority to achieve a lawful objective, it implies the right to perform such acts as are reasonably necessary to achieve the objective.").

²⁹ Appellants Reply at 30.

³⁰ Findings of Fact & Conclusions of Law at 22, ¶ 85 ("The County was justifiably concerned in January 2005, when it entered into its Final Agreement with StockPot, that

2. The County's StockPot mitigation payment was part of a good faith settlement under *Warburton*.

The trial court should have approved the County's mitigation payment as an element of the settlement with StockPot under *Warburton v. Tacoma Sch. Dist. No. 10*, 55 Wn. 2d 746, 350 P.2d 161 (1960). Under *Warburton*, the Court must uphold the County's settlement in the absence of a showing of fraud or manifest abuse of discretion, where (1) the claims arose out of a subject matter on which the government entity was authorized to contract; (2) there was a bona fide dispute in fact or law; and (3) the settlement was effectuated in good faith. *Id.* at 751-52; *see also Abrams v. City of Seattle*, 173 Wash. 495, 502, 23 P.2d 869 (1933) (city's power to settle claims "does not depend on the possible ultimate decision for or against the validity of the asserted claim").

Each of the *Warburton* elements is present here. King County clearly was authorized to enter into the comprehensive settlement agreement with StockPot, resolving substantial issues relating to relocation assistance, claims for business interruption, lease disputes, real and personal property valuations, and other matters arising from the County's condemnation of StockPot's property. The Districts did not

it would need to obtain a Conditional Use Permit ("CUP") from Snohomish County in order to construct Brightwater.").

prove (and the trial court did not find) that the County acted without authority, fraudulently, or in bad faith, or manifestly abused its discretion in reaching the settlement with StockPot.

For the first time in their Reply, the Districts focus on an earlier agreement between King County and StockPot in a strained attempt to avoid *Warburton*. In that 2004 agreement, StockPot agreed to withdraw its appeal of the FEIS; King County agreed to consider StockPot a “displaced person” under the Relocation Assistance Act; and the parties agreed to meet regularly to negotiate a relocation agreement.³¹

The 2004 agreement, obviously did not address the multitude of other unresolved issues between the County and StockPot, including the most important issue in dispute: the terms under which the County would acquire the StockPot property and resolve StockPot’s various claims and statutory entitlements. The 2004 Agreement was simply an agreement to negotiate those disputed issues. Only the January 2005 agreement resolved those issues. The relevant agreement for purposes of *Warburton* is the 2005 Agreement, not the “agreement to negotiate” in 2004.

3. The Districts have not suffered damages supporting the \$2 million judgment against King County.

The Districts’ challenge to the \$2 million mitigation payment was

a contract claim, as they make clear in their Reply. A contract claim requires proof of damages. *Northwest Indep. Forest Mfrs. v. Department of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (“A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant.”) (emphasis added).

The Districts did not establish that they suffered \$2 million in damages from the mitigation payment. The County made the payment using funds originating from County bonds,³² which future ratepayers will repay almost entirely with “capacity charges.”³³ The Districts do not pay and the Contracts do not address capacity charges. Capacity charges involve only the County and future individual property owners. *See*, RCW 35.58.570 (authorizing imposition of capacity charges).

Although the Districts contend that they will pay debt service on the bonds, the undisputed evidence was that this debt service will amount to only \$525,300 — not \$2 million.³⁴ The trial court never explained how it could enter judgment for \$2 million on a contract claim in light of the

³¹ Tr. Ex. 74 at 2.

³² RP 19:1047, 1131-32.

³³ RP 19:1047, 1131-32, 1141-45; 28:2432-34, 2440-43, 2448-49.

³⁴ RP 30:2835-36; CP 19039, 19050.

undisputed evidence that the most the Districts could conceivably claim as damages was \$525,300.

Moreover, the Districts passed on the debt service charges in their entirety to their ratepayers; the Districts themselves suffered no damages at all.³⁵ The Districts try to avoid their lack of damages by citing inapposite antitrust cases. Those cases are predicated on economic theories unique to antitrust, and have nothing to do with proving damages as a required element of a contract claim.³⁶ None of the cases stand for the proposition that plaintiffs asserting contract claims can recover damages when they suffered no loss. Washington law is to the contrary.

C. The Trial Court Erred in Awarding the Districts Prejudgment Interest on the StockPot Mitigation Payment.

1. No basis exists as a matter of law for awarding prejudgment interest.

The trial court based its award on the County's use of wastewater funds for a general government purpose, but it nonetheless awarded

³⁵ RP 31:2896, 2900.

³⁶ Two of the cases, *Blewett v. Abbott Labs.*, 86 Wn. App. 782, 785-86, 938 P.2d 842 (1997), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), were horizontal price-fixing cases involving the issue of whether anti-trust claims could be made by indirect purchasers, i.e., those who purchased alleged overpriced products from entities to whom defendants had "passed on" overcharges through a chain of distribution. *Blewett*, 86 Wn. App. at 783-86 (discussing *Illinois Brick*). The third case, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), was a Sherman Act § 2 monopolization case that rejected a "passing on" defense.

prejudgment interest. The trial court failed to acknowledge the inherent contradiction in basing a judgment on the County's "sovereign" act, but awarding prejudgment interest based on WTD's "proprietary" act.

The evidence at trial was that WTD made the mitigation payment to StockPot only to build Brightwater, and it is properly chargeable to the ratepayers. WTD would have no other purpose for providing mitigation to a business in Snohomish County. But if WTD cannot properly charge the ratepayers because a general governmental function was advanced, then prejudgment interest cannot be assessed without a waiver of sovereign immunity. Under the doctrine of sovereign immunity, the "state cannot, without its consent, be held to interest on its debts." *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 455-56, 842 P.2d 956 (1993) (citations omitted); *Union Elevator & Warehouse Co. v. Department of Transp.*, 171 Wn.2d 54, 248 P.3d 83 (2011) (rejecting argument that an implied waiver of sovereign immunity could be found in that Relocation Assistance Act).

In their Reply, the Districts argue that sovereign immunity does not protect the County from an award of prejudgment interest because the

County operates WTD as a “proprietary utility.”³⁷ But the Districts’ position (and the trial court’s finding) was that the mitigation payment to StockPot was improper precisely because it was a “governmental” expense of King County for the common good — not to benefit WTD.³⁸ In seeking entry of the judgment, the Districts argued that “the County wrongfully used \$2 million from the Water Quality Fund for a general government purpose . . .”³⁹ The trial court found that the mitigation payment was “a general community-wide investment made to benefit the region’s economy as a whole, primarily benefiting the public and not ratepayers.”⁴⁰ As a consequence, the trial court required the County to

³⁷ Appellants rely on *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 529-30, 598 P.2d 1372 (1979), for the proposition that “the state impliedly consents to be liable for interest by entering into a contract.” That case involved a contract between a State agency and a contractor for a construction project. In that proprietary context, the Court reasoned that “the State must not expect more favorable treatment than is fair between men in its business relations with individuals.” 92 Wn.2d at 529. Again, if the Districts’ claim was based on alleged breach of contract, there was no basis to enter judgment for the entire \$2 million (and prejudgment interest on that amount). Rather, breach of contract damages would be either non-existent (since all debt servicing costs were passed on to ratepayers) or a fraction of that amount (the amount of servicing the debt). If the award of prejudgment interest was not based on breach of contract, there was no basis for it.

³⁸ Appellants’ Reply at 32-35.

³⁹ See Plaintiff’s Reply to King County’s Oppos. to Mot. for Award of Common Fund Att’y Fees at 2, 4 (“[T]he County took the money from the Water Quality Fund and used it for a general government purpose.”), 5 (“King County improperly used the utility fund to pay for a general government expense.”) (emphasis added) (designated as “SCP”).

⁴⁰ Finding of Fact & Conclusions of Law at 23, ¶ 91. “The principal test for determining whether a municipal act involves a sovereign or proprietary function is whether the act is for the common good or whether it is for the specific benefit or profit of the corporate entity.” *Washington St. Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 687, 202 P.3d 924 (2009).

reimburse the proprietary utility. But the trial court improperly held that the mitigation payment was a “governmental” expense while simultaneously awarding prejudgment interest because WTD acted in its “proprietary” capacity.

The Districts rely on *Lane*, 164 Wn.2d at 887-89, where the Court held that RCW 80.04.440, allowing for actions against water companies for “all loss damage or injury” resulting from an illegal act, was broad enough to encompass prejudgment interest. *Id.* But no comparable statute authorizes prejudgment interest against the County here.

The Districts also argue (in footnote 79) that sovereign immunity has been expressly waived by RCW 35.58.180, which states that “[a] metropolitan municipal corporation may sue and be sued in its corporate capacity in all courts and in all proceedings.” But that statute does not address, much less authorize, an award of prejudgment interest. *See Shum v. Department of Labor & Indus.*, 63 Wn. App. 405, 411-12, 819 P.2d 399 (1991) (no prejudgment interest when statute neither expressly nor impliedly authorized prejudgment interest on award of pension benefits).

The Districts contend that the cases on which the County relies do not apply “because none involved a proprietary utility.” But the trial court ordered the County to pay the utility, not vice versa. And the court did so because it found the mitigation payment was a “governmental” expense,

not a proprietary expense. The court erred in awarding prejudgment interest on what it held was the act of a “sovereign.”

2. The trial court did not properly calculate prejudgment interest based on the Districts’ actual “damages.”

The trial court also erred by not basing the award of prejudgment interest on actual damages shown at trial. Because the trial court entered judgment based on a breach of the Contracts,⁴¹ the court should have based prejudgment interest on the “damages” the Districts established stemming from that breach. As discussed *supra*, the Districts suffered no damages because they “passed through” all StockPot costs to ratepayers. The most that the Districts could conceivably claim as damages is \$525,300, *i.e.*, the bond financing costs of the \$2 million payment that current ratepayers will pay from wastewater revenues. If the Districts had proven damages of \$525,300, the most that could have been assessed in prejudgment interest would have been \$246,272 – not the \$937,644 interest the trial court imposed.⁴²

D. The Trial Court Erred in Dismissing the County’s Affirmative Defenses of Offset and Recoupment.

In their Reply, the Districts feign ignorance about the scope of

⁴¹ See Findings of Fact & Conclusions of Law at 25, ¶ 105.

⁴² The court based prejudgment interest on the amount of \$2 million at 12% interest from August 18, 2007 to the judgment date of July 14, 2011. Had the court used \$525,300,

King County's offset/recoupment defenses. The County seeks (and always has sought) to offset against any recovery by the Districts, the value of services that the County has provided to WTD and the Districts, but for which the Districts have not paid. The Accountancy Act, RCW 43.09.210, compels this result by requiring a government entity to pay "true and full value" for services from another department.

The Districts argue that a defendant can offset only "the defendant's own claim against the plaintiff growing out of the same transaction." 20 AM. JUR. 2D *Counterclaim, Recoupment and Setoff* § 5 (2012) (emphasis added). The Districts then narrowly define the "transaction" between the County and the Districts as involving only the StockPot mitigation payment. To the contrary, the relevant "transaction" is the contractual relationship between the Districts and King County with regard to the challenged utility costs. Based on that relationship, the County provided services and support to WTD, including substantial benefits in the form of LTGO guarantees for which the County was not fully compensated. The County is entitled to receive the "true and full value" for those services by offsetting their value against any affirmative award in the Districts' favor.

interest would have been \$246,272 (i.e., \$525,300 x .12/365 days x 1,426 days).

The trial court improperly dismissed the County's offset and recoupment defenses, incorrectly assuming that because the County cannot maintain a direct claim under the Accountancy Act, it cannot offset the value of services that the County provided. But recoupment is a defense, not a claim for affirmative relief.⁴³ *Seattle First Nat'l Bank, N.A. v. Siebol*, 64 Wn. App. 401, 407, 824 P.2d 1252 (1992) (recoupment available as a defense even if barred as an affirmative cause of action); *see also Lane*, 164 Wn.2d at 889 (Accountancy Act requires Lake Forest Park to reimburse Seattle for share of hydrant costs).

The doctrine of unjust enrichment also authorizes the County to offset the benefits it provided from any affirmative relief granted to the Districts. It is fundamentally unjust to bar the County from offsetting the full value of the services and benefits it provided to WTD and the Districts. The Districts argue that WTD and its ratepayers did not benefit from the \$2 million StockPot mitigation payment, but that payment was made only so that Brightwater could be built – which clearly benefited Appellants. The Districts also ignore other services that WTD and the

⁴³ 20 AM. JUR. 2D *Counterclaim, Recoupment and Setoff* § 5 (citations omitted) (“[R]ecoupment is a doctrine of an intrinsically defensive nature. . . . As a defense, recoupment cannot be used to obtain affirmative relief. Moreover, recoupment applies only by way of reduction, mitigation, or abatement of damages claimed by the plaintiff and is not an independent action.”).

Districts received from the County, such as the LTGO guarantees or “below-cost” centralized County services.⁴⁴ The trial court’s refusal to allow the County to litigate its affirmative defenses was error.

III. CONCLUSION

This Court should (1) reverse the ruling requiring that King County reimburse the WTD the \$2 million paid to StockPot Soups; (2) reverse the Order requiring the payment of prejudgment interest on that sum; and (3) permit King County to recoup and offset against any recovery by the Districts, the amount of benefits the County conferred on them.

DATED this 13th day of July, 2012.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By



Timothy G. Leyh, WSBA #14853
Randall T. Thomsen, WSBA #25310
Katherine Kennedy, WSBA #15117
Special Deputy Prosecuting Attorneys for
Defendant King County

KING COUNTY PROSECUTING ATTORNEY CIVIL
DIVISION

William Blakney, WSBA #16734
Verna P. Bromley, WSBA #24703
Senior Deputy Prosecuting Attorneys for
Defendant King County

⁴⁴ See, e.g., Findings of Fact & Conclusions of Law at 35, ¶ 152; RP 29:2624-25, 2635; RP 30:2791-94. Had the County been entitled to raise the affirmative defenses, it would have offered additional evidence at trial.