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COURT OF APPEALS

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STATE OF WASHINGTON

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**No. 34401-7-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

RICHARD JOHNSON and JEANNIE JOHNSON, husband and wife,

Appellants,

vs.

CITY OF OLYMPIA, a Washington State municipal corporation,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This case is on appeal on the issue of whether there was sufficient evidence put forward by the Appellant Johnsons to defeat the City of Olympia's motion for summary judgment. While the Johnsons argue that common law public duty doctrine should be reviewed and reconsidered by the appellate courts of this State¹, the primary issue here is whether there was sufficient evidence put forward by the Johnsons at the trial court level and the summary judgment hearing to put forward a prima facie "failure to enforce" exception and allow this matter to go to the trier of fact. The Johnsons seek to have the summary judgment reversed and this matter remanded back to the trial court.

Respondents attempt to cloud this issue by arguing the Declaration of Burke Long was misconstrued by the Appellants. It was not. The Burke Long Declaration speaks for itself. The City of Olympia building

¹ Appellants Johnson are not alone in criticizing the public duty doctrine. Justices Chambers, Ireland and Sanders challenge the public duty doctrine itself in the Babcock v. Mason County Fire District No. 6, 144 Wn.2d 774, 795-802, 30 P.3d 1261 (2001) (Justices Chambers and Ireland's concurrence) and at 144 Wn.2d at 806 (Justice Sanders' dissent).

Justice Madsen, joined by Justice Sanders and Chief Justice Alexander question in their Babcock dissent whether a proper summary judgment standard was followed in that case. See 144 Wn.2d at 802-06.

department had express notice of the “structurally unsafe” condition of the 515 Eastside home. The City of Olympia did not move to strike or refute the Burke Long Declaration. Every reasonable inference of what Burke Long discussed with the City of Olympia should be construed in favor of the Appellants Johnsons. The issue is whether a municipal building department has a duty to act or investigate when it is informed of a “structurally unsafe” condition in a residential building it recently approved for occupancy.

The Appellant and Appellee are in agreement that the failure to enforce exception recognizes an actionable duty where a public building official has actual knowledge of an inherently dangerous and hazardous condition, is under a duty to correct the problem, and fails to meet this duty. *See Taylor v. Stevens County*, 111 Wn.2d 159,171-72, 759 P.2d 447 (1988); *Zimbelman v. Chaussee Corp.*, 55 Wn.App. 278, 777 P.2d 32 (1989), review denied, 114 Wn.2d 1007, 788 P.2d 1077 (1990); and *Waite v. Whatcom Cy.*, 54 Wn.App. 682, 686, 775 P.2d 967 (1989). *See City of Olympia Opposition Brief*, pg. 12.

II. RESTATEMENT OF THE CASE

A. Standards of Review.

“[T]he burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him.” Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). “For purposes of a summary judgment procedure an appellate court is required, as was the trial court, to review materials submitted for and against a motion for summary judgment in the light most favorable to the party against whom the motion is made.” Morris, 83 Wn.2d at 495.

B. Key Undisputed Facts and Allegations.

The City of Olympia is not disputing (at least from a review of its appellate and summary judgment briefs) that the 515 Eastside Home had severe structural defects or that the new addition was in danger of imminent collapse and was unsafe at the time the Johnsons purchased it. *See* Declarations of Structural Engineers Mike Szramek (CP 245 - 246); Vince McClure (Dec. 21, 2005) ¶ 3 (CP 59-64); and Vince McClure (CP 207). The City is not disputing that it approved for occupancy the defective work in question. The City refers to Burke Long’s statements as having no corroboration, but the City has not put forward any declarations

refuting such oral communication took place. The City of Olympia did not put forward any declarations or affidavits in this case. The Burke Long Declaration, while uncorroborated, is uncontested.

C. Key Disputed Facts.

The City of Olympia argues in its “Counter-Statement of the Case” that Mr. Long would only have repeated what was stated in Roy Erickson/Tri County Home inspection report. *See* City of Olympia Opposition Response, pg. 4. This is speculation on the City of Olympia’s part, and is countered by Mr. Long’s statement:

The inspector told me that the new bedrooms should not be occupied and were in his opinion unsafe. The inspector said he would not let his family sleep in that part of the home. . .

I warned this person [from the City of Olympia Community Planning and Development Department] what our home inspector had discovered and warned that person from the City of Olympia that the 515 Eastside house was structurally unsafe.

CP 98 (Burke Long Dec., ¶¶ 3-5).

Mr. Long states that he was informed by his home inspector that the bedrooms “should not be occupied” and were “unsafe” and that the inspector would not let “his family sleep in that part of the home.” Mr. Long then states “I warned this person what our home inspector had

discovered and warned that person from the City of Olympia that the 515 Eastside house was structurally unsafe.” CP 98. Mr. Long then states that in response to this communication: “The person I spoke with thanked me for letting them know about this problem and said the City of Olympia would take care of it.” CP 98.

The City of Olympia takes umbrage that Appellants Johnsons state in their appellate brief that the City promised to take care of the problem. The exact quote from Burke Long is immediately above. That quote appears to be an assertion and promise by the City of Olympia that it would in fact “take care” of the problem. That is a reasonable inference for the Appellants, as the non-moving party, to assert. Taking care of a problem does not imply ignoring the “structurally unsafe” condition.

III. REPLY ARGUMENT

A. **Appellants Johnson Have Put Forward Evidence To Establish The Prima Facie Elements Of The “Failure To Enforce” Exception To The Public Use Doctrine.**

1. **The City of Olympia Had Actual Knowledge Of An Inherently Hazardous and Dangerous Condition.**

“In a review of a summary judgment proceeding, we must decide if, viewing the evidence in the light most favorable to the Owners, there is

any evidence that building officials had actual knowledge of an inherently hazardous and dangerous condition.” Atherton Condominium Assoc. v. Blume Development Co., 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

The term “actual knowledge” is defined by *Black’s* as follows:

actual knowledge. 1. Direct and clear knowledge, as distinguished from constructive knowledge <the employer, having witnessed the accident, had actual knowledge of the worker’s injury>. –Also termed *express actual knowledge*.

2. **Knowledge of such information as would lead a reasonable person to inquire further** <under the discovery rule, the limitation period begins to run once the plaintiff has actual knowledge of the injury>. –Also termed (in the sense of 2) *implied actual knowledge*.

BLACK’S LAW DICTIONARY 876 (7th ed. 1999)[emphasis added].

Actual knowledge is distinguishable from:

constructive knowledge. Knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person <the court held that the partners had constructive knowledge of the partnership agreement even though none of them had read it>.

BLACK’S LAW DICTIONARY 876 (7th ed. 1999).

The City of Olympia had actual knowledge, through express communications from Burke Long, that the 515 Eastside house was

unsafe. *See* (CP 98). Mr. Long does not limit his communications with the City solely to the home inspection report, Long goes on to state: “I told this person what our home inspector had discovered and warned that person from the City of Olympia that the 515 Eastside house was structurally unsafe.” (CP 98).

Burke Long’s declaration shows that the City had actual knowledge that the 515 Eastside home was structurally unsafe. The dangerous bedrooms described in Mr. Long’s declaration were in the new addition to the home recently built and approved by the City. This was later confirmed by two structural/professional engineers and other expert witnesses. *See, e.g.* Declarations of Vince McClure, Dec. 21, 2005, ¶ 3 (“It is my continued opinion the home was dangerous, the new addition was in danger of imminent collapse, and the home should not have been occupied at the time it was sold by Danella Donlan to the Johnsons around March 2003.”)(CP 59-64) and Mike Szramek (CP 245 - 246).

The Appellants are not arguing (for purposes of meeting the failure to enforce exception) that the City of Olympia should have realized on its own that the designs submitted and work performed by Winn Construction were defective (because that would only be *constructive* knowledge on the City of Olympia’s part). The Appellants are arguing that once the City of

Olympia was expressly informed that the completed work at the 515 Eastside home was “structurally unsafe,” it had *actual* knowledge of a dangerous condition and a duty to act and, at a minimum, investigate the matter. Under the City’s analysis—the City avoids liability by not investigating complaints and reports of dangerous structures, which (if this is the common law) is exceedingly poor public policy.

Whether or not Burke Long’s communication constituted actual knowledge by the City that the 515 Eastside house was “structurally unsafe” is a question of fact for the jury and as such, summary judgment was inappropriate. *See Waite v. Whatcom County*, 54 Wn.App. 682, 686, 775 P.2d 967 (1989)(“the issue of knowledge is for the jury. . .”). “[C]ircumstantial evidence may also support a finding of actual knowledge.” *Waite*, 54 Wn.App. at 687. Knowledge of facts constituting the statutory violation, rather than knowledge of the statutory violation itself can meet this element. *See Coffel v. Clallam County*, 58 Wn.App 517, 523, 795 P.2d 513 (1990). When there is a material question over the reasonableness of a party’s acts, it cannot be resolved by summary judgment proceeding. *See Morris*, 83 Wn.2d at 495.

2. The City Of Olympia Was Under A Duty To Investigate The Problem.

The City of Olympia is arguing that it had the discretion to ignore

the statements made by Burke Long and in the home inspector's report. *See* City of Olympia Brief, pg. 15. While determining whether or not a duty exists is a matter of law, determining whether or not there is a duty involves an analysis of logic, common sense, justice, policy and precedent. *See Keates v. City of Vancouver*, 73 Wn.App. 257, 266, 869 P.2d 88 (1994). The City of Olympia's building department had actual knowledge, through communications of Burke Long, of an inherently hazardous and dangerous condition at the 515 Eastside home. *See Atherton Condominium*, 115 Wn.2d at 531. In response to that express notice, the City of Olympia did nothing.

The City of Olympia counter-argues that this is a case of constructive knowledge as defined by *Zimbelman* and *Atherton*. But as pointed out above, the *Black's* definition of actual knowledge also includes: "[k]nowledge of such information as would lead a reasonable person to inquire further." Unlike *Zimbelman* and *Atherton*, the City of Olympia was informed of "structurally unsafe" completed construction (a building already approved for occupancy). The Appellants are not arguing for defeating the summary judgment that the City of Olympia performed negligent plan review or inspections during construction. Burke Long told the City of Olympia that the 515 Eastside home (which had just been

approved for occupancy and was in completed form) was “structurally unsafe” and the City of Olympia still did nothing. Even if the City should not be held liable for negligent plan or construction reviews, in this case the City is trying to avoid liability for not acting when it was told a completed building it had just approved for occupancy was “structurally unsafe.”

The City of Olympia relies on Smith v. City of Kelso, to argue that it was in the City of Olympia’s discretion to act or not act on Burke Long’s communication. *See*, 112 Wn.App. 277, 286, 48 P.3d 372 (2002); *see also* City of Olympia’s Response Brief, pg. 15.²

The City of Kelso case did not involve an allegation that the building official failed to act on notice of a dangerous condition (which is the case with 515 Eastside home). Rather, the plaintiffs claims were for negligent approval/inspection for failure “to enforce ordinances requiring it to order soil and geology studies, which likely would have revealed the potential for landslides.” 112 Wn.App. at 279.

² The City of Olympia did not bring a motion to strike any portions of the declarations of Burke Long, Roy Erickson, or any other witness declaration put forward by the Johnsons. Failure to file a motion to strike waives any deficiency in the declaration of affidavit. *See Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979); *see also Burmeister v. State Farm Ins. Co.*, 92 Wn.App. 359, 365, 966 P.2d 921 (1998).

In addition UBC for unsafe and dangerous buildings (which would apply to 515 Eastside) states “[a]ll unsafe buildings, structures or appendages are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedure set for in the Dangerous Building Code or such alternative procedures as may have been or as may be adopted by this jurisdiction. . .” 1997 UBC § 102 [emphasis added].

In the City of Kelso case, this Appellate Court also noted: “the ordinance [the applicable UBC grading section] sets no requirements that the City can enforce against a developer or homeowner; a developer or homeowner cannot violate this ordinance. Because of this, the City cannot fail to enforce anything.” 112 Wn.App. at 284. The UBC provision in the City of Kelso case did not require any specific action. *See* 112 Wn.App. at 286.

In this case the City of Olympia had a variety of ordinances to employ against Danella Donlan (as owner-developer) or Frank Winn (as contractor) to correct and abate the defective and unsafe structural work at the 515 Eastside home. The City could have declared the 515 Eastside home a nuisance under OMC 16.10.020 and have declared the home unsafe or unfit pursuant to OMC 16.10.030 (H). City of Olympia building

officials had full authority to investigate and inspect 515 Eastside pursuant to OMC 16.10.040 (4) and (5). Following such an inspection, the City was authorized to issue a written complaint for the abatement, removal and correction of an unsafe structure and conditions at 515 Eastside pursuant to OMC 16.10.050. In this case, the City of Olympia did nothing.

In the City of Kelso case, the argument was if the government building official enforced the UBC provision requiring soils reports, it would have discovered the unstable condition on a *prospective* project (a *constructive* knowledge argument). In this case, however, the City of Olympia was expressly informed of a structurally unsafe condition at the *completed* 515 Eastside home (*actual* knowledge of a dangerous condition)—and did nothing.

The question remains whether the City of Olympia's disregard of Burke Long's communication was "unreasonably dangerous." See Keates, 73 Wn.App. at 266. "Conduct is unreasonably dangerous when the risk of harm outweighs the utility of the activity." Keates, 73 Wn.App. At 266. When a municipal building official is informed that a building recently approved for occupancy is "structurally unsafe" (given that the City is mandated to investigate and abate dangerous structures) that official has a

duty to, at a minimum, reasonably investigate such reports. “Liability will not attach unless the government agent failed to take care ‘commensurate with the risk involved.’” Campbell v. Bellevue, 85 Wn.2d at 12 [emphasis added]. When the issue involves reasonableness, summary judgment is inappropriate. *See* Morris, 83 Wn.2d at 495.

The law does not release municipalities and government officers from liability simply because discretion is allowed in the performance of their duties. In McKasson, relied upon by the City of Olympia, the court noted:

In *Livingston*, the animal control officer released a dog which he had reason to believe was dangerous and the dog attacked a child. The ordinance provided that an impounded animal shall be released “if, in the judgment of the animal control officer in charge, such animal is not dangerous or unhealthy.” Everett Municipal Code 6.04.140(E)(1).

McKasson v. State, 55 Wn.App. 18, 25, 776 P.2d 971 (1989)(citing to Livingston v. City of Everett, 50 Wn.App. 655, 751 P.2d 1199 (1988), *review denied*, 110 Wn.2d 1028 (1988)). *Operational* discretion does not shield a government official from liability. *See* Emsley v. Army Nat. Guard, 106 Wn.2d 474, 481, 722 P.2d 1299 (1986).

The governmental officer’s knowledge of an actual violation

creates a duty of care to all persons and property who come within the ambit of the risk. See Livingston, 50 Wn.App. at 659 (citing to Mason v. Bitton, 85 Wn.2d at 325-26; and, Bailey, 108 Wn.2d at 270). “When a governmental agent knows of the violation, a duty of care runs to all persons within the protected class, not merely those who have had direct contact with the governmental entity.” Moore v. Wayman, 85 Wn.App. at 723.

The fact that a statute allows a government official to exercise discretion or judgment does not make the government immune from liability. See Livingston, 50 Wn.App. at 659; see also Mason v. Bitton, 85 Wn.2d at 327-29. Discretion at an operational level, if done in negligent fashion, still subjects the government to liability. See Emsley v. Army Nat. Guard, 106 Wn.2d at 481. The judgment exercised by the City of Olympia in this case in response to Mr. Long’s communication was at an operational level. While the Johnsons did not have direct contact with City of Olympia officials before purchasing the home, they were persons who come within the ambit of the risk.

The question of whether the governmental officer’s actions are reasonable or not under the circumstances goes to the trier of fact. See Livingston, 50 Wn.App. at 659-60; see also Morris, 83 Wn.2d at 495; see

also Mason v Bitta, 85 Wn.2d at 329. Building statutes and ordinances are not just for the protection of the general public, “but more particularly for the benefit of those persons or class of persons residing within the ambit of the danger involved.” Campbell v. Bellevue, 85 Wn.2d at 13.

The Washington Supreme Court in Taylor v. Stevens Cy. recognized that a duty of care can arise when a public official gives out incorrect information to a specific inquiry. *See*, 111 Wn.2d at 171. Presumably a duty of care could also arise when a public official responsible for abating dangerous structures is specifically informed of a dangerous condition in a building and fails to take any steps to investigate or act on it.

In this case the City of Olympia expressly thanked Burke Long for “letting them know this problem and said the City of Olympia would take care of it.” CP 98 (Long Dec., ¶ 5). It is reasonable to conclude given the City’s assurances, that Burke Long assumed the problem was being taken care of. Such a communication does not imply the City would do nothing.

When a defendant bears some special relationship or connection to the dangerous person or to the potential victim, the defendant is impressed with a duty to warn foreseeable victims of the foreseeable harm. *See* Osborne v. Mason County, 157 Wn.2d 18, 29, 134 P.3d 197 (2006)(*citing*

to Mangeris v. Gordon, 94 Nev. 400, 402-03, 580 P.2d 481 (1978)). The City of Olympia had a direct connection to Frank Winn, the contractor of the 515 Eastside, home in assisting him in the design of the new addition as well as in approving the construction. The City of Olympia was informed by Burke Long, a potential buyer and family member of the disabled intended occupant³ of the 515 Eastside home that the building was in fact “structurally unsafe.” The City did nothing and did not warn anyone.

Unlike the harm in Osborne which was a risk to the public in general (invoking the maxim, a duty to all is a duty to none), the City of Olympia was made aware of a foreseeable harm involving life safety at the 515 Eastside home. As the next buyers and occupants of the 515 Eastside home, the Johnsons were foreseeable victims of the harm.

The City of Olympia is responsible under the state building code and its own municipal ordinances for investigating dangerous structures and abating them. It was also foreseeable that persons, such as the Johnsons, would ultimately end up occupying the 515 Eastside home.

The Olympia Municipal Code broadly defines unsafe and unfit structures. See OMC 16.10.020 and OMC 16.10.030 (H). The Olympia

³ See Laura Porter Dec., ¶2 (CP258).

Municipal code also demonstrates a clear intent to protect building occupants. *See Moore v. Wayman*, 85 Wn.App. at 725. “The term ‘unsafe or unfit’ requires the enumerated conditions to be of such a degree as to be dangerous or injurious to the health and safety of the **occupants** of such dwelling, structure, building, or premises. . .” OMC 16.10.030(H) [emphasis added]. In this regard Olympia’s municipal code is similar to the Seattle Housing Code that was structured to protect “occupants” of dangerous structures, as well as the general public. *See Halvorson v. Dahl*, 89 Wn.2d 673, 677, 574 P.2d 1190, 1193 (1978)(“The Seattle Housing Code is an ordinance enacted for the benefit of a specifically identified group of persons [occupants of dangerous structures] as well as, and in addition to, the general public.”). In *Halvorson*, the Washington Supreme Court found a duty for the City of Seattle to act by its disregard of dangerous structures.

The conditions of the home located at 515 Eastside (as defined by the structural engineers and other experts) met the definitions of “unsafe and unfit” as defined by the ordinance. The Olympia Municipal Code vests responsibility with the Enforcement Officer “[t]o investigate the dwelling or other property conditions in the City and to enter upon premises to make examinations when the Enforcement Officer has

reasonable grounds for believing they are unfit for human habitation or other use.” OMC 16.10.040 (B)(4).

OMC16.10.050 then expressly states that after a “preliminary investigation” the Enforcement Office may issue a written complaint for the abatement of the condition [emphasis added]. That ordinance goes on to state that the Enforcement Officer “shall” consider factors such as “structural defects,” “defects increasing the hazard of fire, accidents, or other calamities, such as parts standing or attached in such a manner as to be likely to fall and cause damage or injury,” and “substandard conditions.” OMC 16.10.050 (D)(1)(c), (d) and (j)[emphasis added]. In the event a structure is found to be dangerous and seriously dilapidated, “the Enforcement officer shall order the structure or premises demolished. . .or shall order the property immediately vacated and secured as completely as possible pending demolition.” OMC 16.10.050(D)(2)[emphasis added].

While the Enforcement Officer also is granted authority to take other alternative action under OMC 16.10.050(E)—just like the finding in the Livingston case noted above it does not have unfettered discretion. Whether the City’s actions are reasonable or not under the circumstances is an issue for the trier of fact to determine. *See Moore v. Wayman*, 85

Wn.App. at 723; *see also* Morris, 83 Wn.2d at 495.

Appellants Johnson argue that the City of Olympia had, at a minimum, a duty to investigate further when it was expressly informed that the home at 515 Eastside was “structurally unsafe.” CP 98 (Long Dec., ¶ 5). Dr. McClure, who has performed structural plan and building code reviews for the City of Olympia, stated that the standard of care for a building inspector informed of an unsafe condition is to inquire further. *See* McClure Dec., December 27, 2005, ¶1 (CP 59 - 64). In this matter it is undisputed that the City of Olympia did nothing after being expressly informed of the condition of the home, allowing the dangerous conditions to go un-investigated and unabated.

B. Dr. McClure’s Opinions Go To Standard Of Care, Not Legal Opinions, And Should Be Deemed Admissible.

No witness is permitted to express a opinion that is a conclusion of law. Nevertheless, expert witnesses, if properly qualified, are routinely permitted to testify on standards of care. *See* White v. Kent Medical Center, 61 Wn.App. 163, 171, 810 P.2d 4 (1991). For establishing negligence in certain professions, such as medical malpractice cases, expert testimony is often absolutely necessary to establish a standard of care. *See* Young v. Key Pharmaceuticals, 112 Wn.2d 216, 228, 770 P.2d

182 (1989). Dr. McClure's testimony in this matter is analogous to medical standard of care testimony.

Vince McClure is a licenced structural and professional engineer (civil) in the State of Washington. Dr. McClure is a professor of civil engineering and Dean of the School of Engineering at St. Martins University, in Lacey. Dr. McClure has a Ph.D. in structural engineering and has several decades of experience owning and operating a professional engineering firm in Olympia, Washington. *See* CP 59 - 64.

Dr. McClure has also assisted on structural building department code reviews for municipal jurisdictions, *including* the City of Olympia's Community Planning and Development Department. (*See* CP59 - 64). As such, Dr. McClure has sufficient training, education, and professional experience pursuant to ER 702 to testify regarding the standard of care of a building department official in Washington State and the City of Olympia. "[I]n summary judgment proceedings, courts will generally indulge in some leniency with respect to affidavits presented by the nonmovant." Morris, 83 Wn.2d at 496; *see also* Meadows v. Grant's Auto Brokers, 71 Wn.2d 874, 879, 431 P.2d 216 (1967).

The Court's determination whether or not there is a duty involves an analysis of logic, common sense, justice, policy and precedent. *See*

Keates v. City of Vancouver, 73 Wn.App. at 266.

For example, in the case of Tarasoff v. Regents of University of California, “when a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.” 17 Cal.3d 425, 431, 551 P.2d 334 (1976). The question in this case is whether the trial court should have considered the professional standard of care of a municipal building inspector to act when informed that a building recently approved for occupancy was “structurally unsafe.” The City of Olympia argues it did not have any duty under those circumstances, even to investigate.

Dr. McClure’s testimony⁴ is as a structural and professional engineer who inspected the 515 Eastside home and confirmed it was in fact “structurally unsafe” as stated by Burke Long and Roy Erickson (Burke Long and Laura Porter’s home inspector). Dr. McClure also testifies as a professional who has in the past performed structural analysis and code reviews for the City of Olympia’s building department. As such, Dr. McClure has personal knowledge on the standard of care for municipal

⁴ Structural engineer Mike Szramek also confirmed this. See CP 246 (Szramek Dec. April 26, 2004).

building inspectors. Dr. McClure's testimony is helpful to the Court in determining the duty of the City of Olympia had in this case.⁵

C. **The City of Olympia's Motion for Sanctions Should Be Denied.**

The City of Olympia states that sanctions are warranted for misstatements of facts, not providing reasoned arguments, and no citing of "controlling or persuasive authorities" *See* City of Olympia's Response Brief, pg. 24.

The City's argument is hyperbole. The declarations of Burke Long (CP 97-98), Laura Porter (CP 258-284), Home and Washington State licensed Pest Inspector Roy Erickson (CP 65-96), Structural Engineer Vince McClure (CP 59-64), Structural Engineer Mike Szramek (CP 245-257), and the other expert and fact witnesses who submitted declarations in this matter speak for themselves.

Appellants Johnson put forward competent evidence in the form of a declaration from Burke Long (made pursuant to 9A.72.085) that a responsible citizen contacted the City of Olympia's Community Planning

⁵ The City of Olympia did not bring a motion to strike Dr. McClure's Declaration at the trial court level. *See Burmeister*, 92 Wn.App. at 365. "Failure to make such a motion [to strike] waives deficiency in the affidavit if any exists." Lamon v. McDonnell Douglas Corp., 91 Wn.2d at 352.

and Development Department and informed a person with authority that 515 Eastside home (that the Department had recently approved for occupancy) was found by that citizen's home inspector to be "structurally unsafe." The 515 Eastside home's *new* construction was in fact in danger of imminent collapse and structurally unsafe when approved for occupancy and when the Johnsons shortly thereafter purchased the home.

The City did not move to strike the declarations of Burke Long, Vince McClure, or any others fact and expert witness declarations put forward by the Johnsons at the trial court level. If the City of Olympia deemed these declarations inadmissible, it had the burden of bringing a motion to strike them at the trial court level. *See Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d at 352. It did not do so and as such any objection to them is waived. The City did not put forward any declarations from any witnesses as part of its motion for summary judgment.

When Burke Long contacted the City, the City of Olympia did nothing. There is no case in Washington State on point for this particular fact pattern as it pertains to the public use doctrine and the failure to enforce exception.

As for the other points raised by the City of Olympia, authorities

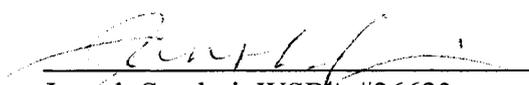
were cited and reasoned arguments made by the Appellants at the trial court level (CP 151 - 158) and now at the appellate level. Given the unique facts in this case involving express notice of a structurally unsafe building, the fact that this particular fact pattern has not been addressed by any appellate decision in this state, and the vigorous on-going debate on the public use doctrine in the courts of this state and in other jurisdictions-- this is not a frivolous appeal. The City of Olympia's motion for sanctions should be denied.

IV. CONCLUSION

In this case, the City of Olympia had express notice of a "structurally unsafe" building that it had just approved for occupancy, should have, at least, investigated the matter, and failed to do so. Whether the City's actions were reasonable under the circumstances should go to the trier of fact for determination. The summary judgment should be reversed and this matter should be remanded back to the trial court.

Respectfully Submitted this 15th day of September, 2006.

CUSHMAN LAW OFFICES, P.S.


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Attorney for Plaintiffs and Appellants
Richard and Jeannie Johnson

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CERTIFICATE OF SERVICE

Art Weatherly certifies and declares as follows:

BY _____
DEPUTY

1. I am a legal assistant for the attorney for the Appellants herein. I am above the age of 18 and am otherwise competent to testify in the courts of the State of Washington. I make this Declaration from my own personal knowledge.

2. On September 18, 2006, I caused to be filed and served on the following and in the method indicated, the Reply Brief of Appellant:

Court of Appeals
Division II
949 Market Street
Tacoma, WA 98402

_____ U.S. Mail, Postage Prepaid
XXX Legal Messenger
_____ Overnight Mail
_____ Facsimile

Dale Kamerrer
Law, Lyman, Daniel,
Kamerrer & Bogdanovich
P.O. Box 11880
Olympia, WA 98508

_____ U.S. Mail, Postage Prepaid
XXX Legal Messenger
_____ Overnight Mail
_____ Facsimile

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed this 18 day of September, 2006 in Olympia, Washington.



Art Weatherly