

**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.

BRIEF OF APPELLANT

Joseph W. Scuderi
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

360-534-9183

Attorneys for Appellants Johnson

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I. Assignments of Error

Assignment of Error

The trial court erred in ruling that the Appellee and Defendant City of Olympia was entitled to Summary Judgment which resulted in the dismissal of Appellants and Plaintiffs Richard Johnson and Jeannie Johnson's claims against it.

Issue Pertaining to Assignments of Error

- A. Was it error for the Court to disregard factual declarations, such as Burke Long's testimony, regarding his expressly informing the City of Olympia of the structural problems and dangerous conditions with that home? Does a municipality have a duty to act under such circumstances?
- B. Was it error for the Court to disregard expert declarations, such as from Dr. Vince McClure, on the duty of the City of Olympia to act when informed by a citizen that a home approved by it was not structurally safe.

II. STATEMENT OF THE CASE

Appellants Richard and Jeannie Johnson seek an order from the Appellate Court reversing the Order Granting Summary Judgment in favor of Appellee City of Olympia.

Around December 2001, Danella Donlan purchased a home located at 515 Eastside Street NE, Olympia, WA ("home") for purposes of renovating it and reselling it. Ms. Donlan never lived in this home and

this was strictly a business proposition for her. Ms. Donlan hired Frank Winn and other tradespersons/contractors to renovate the home and construct a new addition on to it. Ms. Donlan was not a registered contractor when this home was renovated. The Trial Court previously ruled because Ms. Donlan hired multiple trades and was doing this project for re-sale that she was not exempt under RCW 18.27.090(12) and Ms. Donlan should have been a registered contractor in the State of Washington when she performed this work. As such, Ms. Donlan was in violation of RCW 18.27.

Frank Winn submitted some sketches to the City of Olympia's Community Planning and Development Department ("Building Department") around April 2, 2002. The initial design was rejected, but the building official assisted Mr. Winn in redesigning the new addition's structure in a manner that would presumably meet building code requirements. *See* CP 3-5 (Scuderi Declaration, Exhibit A, Excerpts of Deposition of Frank Winn, dated January 11, 2005, pg. 37-39); CP 21-22 (Scuderi Dec., Exhibit D, Interrogatory 11 Answer from Frank Winn and Winn's Discovery Verification). A permit was issued and Frank Winn

started construction. Eventually the construction was approved by the City of Olympia.

In February of 2003 the Johnsons entered into a purchase and sale agreement with Danella Donlan for the purchase of the home. The main part of the home was originally built in the early 1900s but it had a new addition attached to it. Shortly after the home was purchased, the Johnsons' insurer noted there might be a structural problem with the home's new addition and refused coverage on that basis. The City of Olympia was contacted and sent out an inspector. The home was also inspected by a structural engineer engaged by the Johnsons.

The original City of Olympia inspector came out and looked at the conditions at the Johnsons' home and declared them to be fine. That building official's supervisor, Don Cole (who was not involved in the original inspections), showed alarm at what he observed. Don Cole informed the Johnsons that the home's new addition was dangerous and that they could not occupy the new addition until emergency repairs were performed. *See* CP 101 (Richard Johnson Dec. dated December 29, 2005).

Because the structure of the home's new addition was so unstable, emergency repairs had to be performed to prevent its imminent collapse.

The new addition to the home was unsafe to occupy. *See* CP 193 (McClure Dec. May 17, 2004); CP 207 (McClure Supp. Dec. August 16, 2004); CP 60 (McClure Supp. Dec. dated December 21, 2005); CP 63 (McClure Supp. Dec. dated December 27, 2005); CP 246 (Szramek Dec. dated April 26, 2004).

The Johnsons obtained a contractor and Don Cole then personally directed that contractor in performing the emergency repairs on the Johnson home. *See* CP 101 (Richard Johnson Dec. dated December 29, 2005). The repairs were later inspected by Johnson's own structural engineers. The City later denied it ever said the structure was dangerous or ordered the Johnsons not to occupy the new addition while the emergency repairs were performed.

At the time the home was purchased, the new addition was supported by pier blocks on grade. *See* CP 100 (Richard Johnson Dec. dated December 29, 2005); CP 14 (Wall Dec. dated December 21, 2004, ¶ 3). Subsequent inspections confirmed the home had a host of serious and dangerous structural, mechanical, electrical, and plumbing violations, as well as numerous code violations. *See* CP 14, 18 (Wall Dec. dated December 21, 2004); CP 10 (Roche Dec. dated December 21, 2004); CP

36, 38-40 (Anderson Dec. dated December 14, 2004); CP 48 (Thornton Dec. dated December 27, 2004); CP 193 (McClure Declarations dated May 17, 2004); CP 207 (McClure Dec., August 16, 2004); CP 60-61 (McClure Dec., December 21, 2005); CP 63 (McClure Dec., December 27, 2005); CP 246 (Szramek Dec. dated April 26, 2004).

During the litigation it was discovered ¹ that a prospective buyer (previous to the Johnsons) looked at the same home but backed out of the deal before closing. *See* CP 258-59 (Laura Porter Declaration, dated January 12, 2005). Home Inspector Roy Erickson of Tri-County Home Inspection, who inspected the home around October 2002 for Laura Porter, recommended that no one occupy the new addition to the home due to structural instability. Laura Porter and her husband Burke Long confronted the seller, Danella Donlan, over these conditions. *See* CP 259 (Porter Dec.); *see also* CP 98 (Burke Long Dec. dated February 17, 2005).

Ms. Donlan got defensive when confronted by Ms. Porter and Mr. Long. Ms. Donlan only reluctantly returned the earnest money and complained that her time was being wasted and that she needed to sell the

¹ The Johnsons and their counsel found the identity of these prior prospective buyers on their own investigation, rather than by any disclosure by Danella Donlan during the litigation.

home. Ms. Donlan made no commitment to address or fix any of the problems brought to her attention.

Concerned about the condition of the home (and Donlan's lack of concern), Burke Long then contacted the City of Olympia's Building Department about the home Donlan was selling. Burke Long asked specifically for the City of Olympia building official with authority for the Donlan Home. Burke Long directly contacted that building department official. Mr. Long informed the Olympia building official that the Donlan home was dangerous and unsafe to occupy and gave the building official the name and phone number of the home inspector they had used. The City building official Mr. Burke spoke with promised him that this would be taken care of. See CP 98 (Burke Long Declaration, dated February 17, 2005, ¶ 5)[emphasis added].

Apparently, nothing was done by the City of Olympia in response to Mr. Long's communication. There is no evidence of re-inspection or any investigation by the City. Danella Donlan did not disclose the defects she had actual knowledge of to any potential buyers such as the Johnsons. The home was sold to the Johnsons around March 2003. Subsequent investigations by structural engineers Vince McClure and Mike Szramek

confirmed the home's new addition was in fact in danger of imminent collapse and was hazardous.

Given the discovery of Mr. Long and Ms. Porter by the Johnsons and their relevant testimony—the Johnsons amended their pleadings around March 2005. The City of Olympia was named as a defendant and brought into the case.

The City of Olympia brought a motion for summary judgment which went to hearing on January 20, 2006. At the summary judgment hearing, the Court ruled that although there was evidence of direct contact and communication between the City of Olympia building official and Burke Long about the dangerous condition of the Donlan Home the evidence put forward by the Johnsons was insufficient to defeat the City's motion for summary judgment. The Court ruled that the notice from Burke Long did not trigger a duty by the City of Olympia to re-inspect the Donlan Home (so the failure-to-enforce exception of the Public Duty Doctrine did not apply). Accordingly, summary judgment was granted to the City of Olympia and Appellant Johnsons case against the City of Olympia was dismissed.

III. ARGUMENT

A. The Court of Appeals Reviews Summary Judgments De Novo, as a Pure Question of Law, Without Deference to Any Element of the Decision Below.

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court. *See Failor's Pharmacy v. DSHS*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). The Court of Appeals will affirm the summary judgment only if there are no genuine issues of material fact between the parties and only if, on the undisputed facts, the moving party is entitled to judgment as a matter of law. *See Failor's Pharmacy*, 125 Wn.2d at 493. All facts and all reasonable inferences from those facts are considered in the light most favorable to the party resisting summary judgment. *Failor's Pharmacy*, 125 Wn.2d at 493. The burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact. *See Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Summary judgment is appropriate only if reasonable minds could reach but one conclusion from the evidence, and only if the conclusion thus reached entitles the moving party to a judgment in its favor. *Morris*, 83 Wn.2d at 493.

B. It Was Error For The Trial Court To Disregard The Factual Testimony Put Forward By The Johnsons In Support Of Their Claim That The City of Olympia Breached Its Duty To Enforce Regulations.

The City of Olympia, when informed by Burke Long, had actual knowledge that the home's construction violated building codes and was an inherently dangerous and hazardous condition.

After the report and home inspection, I also communicated these findings to the City of Olympia Community Planning and Development Department. I do not remember the person I spoke with, but I know I got through the receptionist to someone with authority. **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.** I also told this person that this seller was doing this work as a business. I may have also sent a copy of the home inspection report to the City of Olympia. I know for sure, however, that I gave the person I was speaking with at the City of Olympia the name and telephone number of our home inspector. The person who 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 (Declaration of Burke Long, dated February 17, 2005, ¶ 5) [emphasis added].

The City of Olympia building department did nothing, no inspection and no follow-up after the communication with Mr. Long. Because the notice by Mr. Long should have been sufficient to warrant (at

a minimum) a reinspection and inquiry by the City, the failure-to-enforce exception of the public duty doctrine should apply. It should have been left to the trier of fact to determine whether or not the City should be held liable for any damages.

1. General Rule.

Prior to 1961, Washington municipalities enjoyed total immunity from suits. *See* Shelly K. Speir, The Public Duty Doctrine and Municipal Liability for Negligent Administration of Zoning Codes, 20 Seattle U. L. Rev. 803, 804 (1997). However, following a national trend, the Washington Legislature abolished state sovereign immunity in 1961. Wash. Rev. Code Ann. (RCW) § 4.92.090 (West 1988). This law was extended to municipalities in Kelso v. City of Tacoma, 63 Wn.2d 913, 390 P.2d 2 (1964). *See* RCW § 4.96.010. Since that time, however, Washington courts have recognized that the state should not be liable for every government action. To protect governmental entities, the Court in Evangelical United Brethren Church of Adna v. State, 67 Wn.2d 246, 407 P.2d 440 (1965) carved out a “discretionary act” exception to the liability rule. *See* Speir, 20 Seattle U. L. Rev. at 803. Under the Evangelical test, the court imposed a two step process for determining governmental

liability. First, was the municipality's act discretionary or ministerial? If it was discretionary, liability was precluded. If it was ministerial, step two consisted of a standard tort analysis of duty, foreseeability, breach, and causation. *See Speir*, 20 Seattle U. L. Rev. at 803. Evangelical also recognized that the question of liability could be one of law *and* fact. *See* 67 Wn.2d at 253.

Despite the precedent set by Evangelical and other early cases, this two step analysis was altered dramatically in Campbell v. City of Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975). Without overruling Evangelical, the court simply moved past the two step tort-analysis process and instead used the New York court's "public duty doctrine" to resolve the liability issue. The court in Campbell never explained why they chose the public duty doctrine over the standard tort analysis, and although the public duty doctrine has yet to be overruled in Washington, it has been strongly criticized by judges and commentators. *See Speir*, 20 Seattle U. L. Rev. at 803; Mark McLean Myers, Comment, A Unified Approach to State and Municipal Tort Liability in Washington, 59 Wash. L. Rev. 533 (1984); Cynthia A. Sharo, Government Liability and the Public Duty

Doctrine, 32 Vill. L. Rev. 505 (1987); Kelly Kunsch, Washington Practice, Vol. 1A, 4th ed., § 60.16, p. 729-30 (1997).

Although the Washington courts have added exceptions, the public duty doctrine remains, albeit tenuously, as the general rule for government liability. The public duty doctrine states that negligent performance of a governmental or discretionary duty enacted for the benefit of the public at large imposes no liability on the part of a municipality running to individual members of the public. Campbell, 85 Wn.2d at 9-10. However, four main exceptions to this rule exist as proclaimed by Washington courts—one of which, the failure-to-enforce exception, is applicable to the case at hand. Bailey v. Town of Forks, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). The court in Bailey found that a government official with actual knowledge of a statutory violation, must take action to correct it if he has a statutory duty to do so (failure-to-enforce). *See* 108 Wn.2d at 268-69.

2. Analysis.

An analysis of the case at hand will express two findings. First, using the public duty doctrine, this case clearly fits into the “failure-to-enforce” exception to the rule. Accordingly, summary judgment was

inappropriate and this matter should have gone to the trier of fact for determination. Second, the public duty doctrine has been rejected in a growing number of states and as a matter of policy Washington courts should also reject this doctrine in favor of a standard tort analysis—as expressed in earlier Washington court opinions such as Evangelical. Again, summary judgment was inappropriate and this matter should have gone forward to the trier of fact.

a. Public Duty Doctrine

The public duty doctrine provides that ordinarily the duties of government agents arising from government activities are owed to the public in general and not to any specific individual. *See Myers*, 59 Wash. L. Rev. at 537. In other words, a duty to all is a duty to no one. *Sharo*, 32 Vill. L. Rev. at 509. However, exceptions have been applied by Washington courts. The failure-to-enforce exception explained in Bailey applies when a government agent has actual knowledge of a statutory violation, but fails to take corrective action despite a statutory duty to do so. *See Bailey*, 108 Wn.2d at 268-69; *see also Moore v. Wayman*, 85 Wn.App. 710, 723-24, 934 P.2d 707 (1997).

The facts of the case at hand demonstrate both actual knowledge of non-compliance to code and a failure of the City to take corrective action. Mr. Long personally spoke to an official with the City of Olympia Community Planning and Development Department with authority on the home in question and informed him of the dangerous condition of the home. That building department official thanked Mr. Long for letting them know of this condition and said the City of Olympia would take care of it. *See* CP 98 (Declaration of Burke Long, dated February 17, 2005).

The Johnsons presented competent evidence that Olympia building department officials were informed the home was structurally unsound, thus having actual knowledge of its noncompliance to code and danger to persons, and took no action. Whether the City of Olympia should have been held liable should have gone to the trier of fact. Once the threshold of evidence (establishing that the City of Olympia building official had notice of the dangerous structural condition of the Donlan Home) it should have been up to the trier of fact to determine whether or not the City's failure to act was reasonable under the circumstances and whether the City should be held partially liable for the damages sustained by the Johnsons. Summary judgment should not have been granted to the City.

The courts have stated that “when an official charged with enforcing the UBC has actual knowledge of an ‘inherently dangerous and hazardous condition’ the law imposes a duty to act.” Zimbelman v. Chaussee Corp., 55 Wn.App. 278, 282, 777 P.2d 32 (1989) (citing to Taylor v. Stevens County, 111 Wn.2d 159, 171-72, 759 P.2d 447 (1988)).² Further, the Supreme Court has said “[w]hen a government agent knows of the violation, a duty of care runs to all persons within the protected class, not merely those who had direct contact with the government entity.” Bailey, 108 Wn.2d at 271. Thus, the City of Olympia owed a duty not only to Mr. Long, but the Johnsons, as subsequent purchasers of the dangerous structure in question, as well.

In cases involving building codes, the plaintiff must show that the code violation constituted “an inherently dangerous and hazardous condition.” Atherton Condominium Apartment-Owners Ass’n v. Blume Development Co., 115 Wn.2d 506, 531, 799 P.2d 250 (1990). The condition of the house as explained in the facts of the case at hand, and by

² The 1997 Uniform Building Code was the applicable state building code pursuant to RCW 19.27.020 at the time the addition to the home was permitted and constructed. Municipalities are not authorized to diminish the minimum requirements of the state building code. See RCW 19.27.040 and 060.

expert testimony of two licensed structural engineers and several construction professions, demonstrate the addition was “inherently dangerous” and in a “hazardous condition.” The actual dangerous condition of the home was not contested by Appellee City of Olympia.

The court in Waite v. Whatcom County found that summary judgment for the county under the public duty doctrine was erroneous when there existed questions of material fact as to whether the county official had actual knowledge of the non-compliance to code. Waite v. Whatcom County, 54 Wn.App. 682, 775 P.2d 967 (1989). The Court of Appeals reversed the order for summary judgment and allowed the case to be tried. The court held that the failure-to-enforce exception was composed of three elements: “(1) governmental agents responsible for enforcing statutory requirements (2) possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the class the statute intended to protect.” Waite, 54 Wn.App. at 685 (quoting Bailey, 108 Wn.2d at 268). These three elements are met in the present case.

Summary judgment was inappropriate in the case at hand. The court stated in Waite that whether a defendant possessed actual knowledge is a question of fact for the jury:

[T]he determination of whether the failure to enforce exception applies involves a question of fact: whether the governmental agent responsible for enforcing statutory requirements possessed actual knowledge of the statutory violation. This court has held that the issue of knowledge is for the jury in other instances where a defendant must possess knowledge of a dangerous condition before liability can be found. . . We conclude that the actual knowledge element of the failure to enforce exception is similarly a question of fact for the jury. Waite, 54 Wn.App. at 686.

The court in Waite further recognized that “[i]t is often difficult to supply direct evidence of actual knowledge. . . nevertheless, circumstantial evidence may support a finding of actual knowledge.” Waite, 54 Wn.App. at 686-87. The inquiry here is what knowledge the City building department official had in regards to the non-compliance of the Johnson residence. The Johnsons put forward testimony by Mr. Long that he informed the city of the dangerous structure. Mr. Long’s declaration is sufficient to allow this matter to go to the trier of fact.

Courts in both Washington and other states have found actual knowledge to be present in cases with fact patterns similar to this one. Although the facts of Campbell fall into both the first and second exceptions of the public duty doctrine, the court in Campbell cites the case of Runkel v. City of New York in their decision to find municipal liability for the non-action of the city electrical inspector. The Court of Appeals for the State of New York found that Runkel fit into the first exception of failure-to-enforce. In Runkel, the court found municipal liability for non-action regarding a building that was not to code and was in danger of imminent collapse. In this case, a city inspector found the building to be “in imminent danger of collapse and recommended that it be made secure or demolished at once.” Runkel v. City of New York, 282 A.D. 173, 175, 123 N.Y.S.2d 485 (1953). However, the city took no action and less than two months later it collapsed causing injuries to plaintiffs. The court found that “the city in permitting it to be maintained, may be said to have violated a mandatory duty imposed upon them by statute to abate it.” Runkel, 282 A.D. at 177. Likewise, the facts of the case at hand show that the City of Olympia had actual knowledge of non-compliance to code, the

danger of the house to others, and a duty to act under the State Building Code and its own municipal code, and yet took no action.

Another case involving the failure-to-enforce exception to the public duty doctrine is Marshall-Putnam Farm Bureau, Inc. v. Shaver, 12 Ill.App.3d 402, 299 N.E.2d 10 (1973). In this case, plaintiffs complained of a building next door that was structurally unsound. The City took no action to remedy the situation in either forcing the owner to comply with code, or by tearing the building down. The building later collapsed causing damage to the plaintiffs' building. The City was found liable for damages as the Court found they had actual knowledge and yet failed to enforce compliance as required by statute.

Similar to the facts of the present case, Mr. Long complained to the City of Olympia regarding the structurally unsound home and its defects. The City, through a Community and Planning and Development building official with stated authority, responded affirmatively to Mr. Long that the City would respond to his notification of a dangerous building and take care of it. In fact, the City of Olympia took no action. Because the City had actual knowledge and failed to enforce the code as their statutory duty requires, the failure-to-enforce exception applies and the City is potentially liable for damages. Zimbelman, 55 Wn.App. at 282.

Although the Court in Moore v. Wayman did not find municipal liability for a negligent building inspection, the facts of Moore can be distinguished from the case at hand. 85 Wn.App. at 713. In Moore, the building inspectors found non-compliance to code during construction. They made note of it, relied upon the contractor to make the necessary corrections, but neglected to follow through once construction was completed. The Court ruled that because they only had constructive knowledge of non-compliance in construction, no liability could be found. Emphasizing this rule, the court stated, “absent evidence of actual knowledge by building inspectors of violations that continue after notice of the violations to the builders, there is not sufficient evidence of a failure to enforce that would act as an exception to the public duty doctrine.” Moore, 85 Wn.App at 713.

The City of Olympia had already issued an occupancy permit when informed the Donlan house was not safe, and yet, failed to do any inquiry or investigation and as a result failed to enforce the code. Unlike the building inspectors in Moore, the City of Olympia had actual knowledge of a dangerous condition and failed to act. *See Moore*, 85 Wn.App. at 723-24. “In determining whether a municipality’s act or failure to act was unreasonable, the trier of fact can take into account the municipality’s

available resources and its resource allocation.” Moore, 85 Wn.App at 723. It is up to the trier of fact to determine whether or not the City of Olympia’s failure to act was reasonable given the circumstances.

b. Washington Courts Should Reject the Public Duty Doctrine

Notwithstanding the case at hand fitting within the failure-to-enforce exception of the public duty doctrine, the Court of Appeals should take notice of recent national trends to reject the public duty doctrine. Ficek v. Morken, 685 N.W.2d 98, 104 (2004). A growing number of states have rejected the public duty doctrine in favor of a traditional tort law analysis. *See* Sharo, 32 Vill. L. Rev. at 508. States rejecting the public duty doctrine include nearby Western states Alaska, Oregon, Arizona, New Mexico, Colorado, and Wyoming. *See* Speir, 10 Seattle U. L. Rev. at 825.

Several arguments support the abolition of the public duty doctrine in Washington. First, the doctrine has already been weakened through the constant creation of exceptions. Speir, 10 Seattle U. L. Rev. at 825.

Second, “though unwilling to admit it, the Washington Supreme Court has applied tort law analyses to cases it insisted rest on exceptions to the public duty doctrine.” Speir, 10 Seattle U. L. Rev. at 825. *See generally* Campbell, 85 Wash.2d 1, 530 P.2d 234 (1975).

Third, the public duty doctrine is a limited form of sovereign immunity which contradicts Washington law that expressly provides that municipalities are to be held liable to the same extent as private individuals. *See* RCW § § 4.92.090, 4.96.010; *see also* Speir, 10 Seattle U. L. Rev. at 825-26; Myers, 59 Wash. L. Rev. at 540; Sharo, 32 Vill. L. Rev. At 523-24.

Fourth, if construed in this manner, the public duty doctrine protects officials when they decline to act, but does not protect them when they do act. *See* Michael Tardif and Rob McKenna, Washington State's 45-Year Experiment in Government Liability, 29 Seattle U. L. Rev. 1 (2005); Miotke v. City of Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984). This is poor public policy because it actually encourages inaction, instead of action.

Further, North Dakota became one of the latest states to abolish the public duty doctrine. In Ficek v. Morken, the Court stated numerous reasons why the public duty doctrine should be rejected and why the national trend has turned against the doctrine. *See* Ficek, 685 N.W.2d at 104-06; Sharo, 32 Vill. L. Rev. at 507-08.

First, the major criticism of the public duty doctrine is the harsh effect on plaintiffs who would be entitled to recover were it not for the defendants' status as a public entity. Ficek, 685 N.W.2d at 104.

Second, the public duty doctrine "creates needless confusion in the law and results in uneven and inequitable results in practice." Ficek, 685 N.W.2d at 105 (*quoting* Leake v. Cain, 720 P.2d at 159 (Colo. 1986)).

Third, it resurrects the now outlawed sovereign immunity. *See* Ficek, 685 N.W.2d at 105.

Fourth, the courts have reasoned, "the underlying purposes of the public duty rule are better served by the application of conventional tort principles and the protection afforded by statutes governing sovereign immunity than by a rule that precludes a finding of an actionable duty on the basis of the defendant's status as a public entity." Ficek, 685 N.W.2d at 105 (*quoting* Leake, 720 P.2d at 158).

Fifth, and foremost, courts have ruled that the public duty doctrine is completely incompatible with tort claims acts mandating that claims against public defendants be determined in accordance with rules of law applicable to private persons. *See* Ficek, N.W.2d at 106.

If the courts fear unleashing a flood of new litigation against municipalities—it could restrict liability to cases of gross negligence. A recent North Carolina case with similar facts as the case at hand illustrates this. In Thompson v. Waters, 351 N.C. 462, 463, 526 S.E.2d 650 (2000), plaintiffs entered into an agreement with the defendant to construct a private residence. The defendant did so and the county’s building inspectors certified the work. However, “within two weeks of the completion of the home, plaintiffs began experiencing substantial structural defects including stress fractures, cracks, settling of foundations, and shifting of walls.” Thompson, 526 S.E.2d at 651.

The court concluded that the public duty doctrine did not apply, and found the defendant liable for gross negligence in their inspection of the plaintiffs’ home. Other courts around the country have also rejected the public duty doctrine and used standard tort analyses in cases where building inspectors were negligent in their duties. *See* Brown v. Syson, 135 Ariz. 567, 663 P.2d 251 (1983); Hawes v. Germantown Mutual Insurance Company, 103 Wis.2d 524, 309 N.W.2d 356 (1981); Frick v. City of New Orleans, Department of Safety and Permits, 629 So.2d 1304 (1993).

The case at hand presents facts where, under a summary judgment standard, the City of Olympia building officials, could be held grossly negligent in their inspection of the addition to the home. Even after being informed of the structural defects, the City did nothing to enforce the code as is required of them by statute.

Rejecting the public duty doctrine does not mean that the government will be held liable in every case of negligence. The court in Frick explained how such cases should be decided:

The public duty doctrine involves the intellectually questionable concept that when a governmental body owes a duty to everyone, the result is a duty to no one. *See Stone & Rinker, Governmental Liability for Negligent Inspections, 57 Tul. L. Rev. 328 (1982).* The immunity for governmental bodies conferred by this doctrine was properly rejected by this court as a categorical rule in Stewart v. Schneider, 386 So.2d 1351 (La.1980). On the other hand, the Stewart decision did not hold (and we do not here hold) that a governmental body will be liable any time a person's injury could have been prevented by a public official's proper performance of an inspection or similar function. The existence of a duty and the scope of liability resulting from a breach of that duty must be decided according to the facts and circumstances of the particular case. We therefore conclude that governmental imposition of certain duties, the breach of which may result in liability for

damages to those injured by a risk contemplated by that duty. Frick, 629 So.2d at 1307.

Using a standard tort analysis of duty, breach, causation, and damages, the City is liable in the case at hand (or at the very least there is sufficient evidence to allow this to go to a trier of fact). The City has a duty to perform inspections of the home to assure the building is to code. The City also has a statutory duty to enforce compliance to that code. The City was grossly negligent in their inspection of the home and failed to enforce the code once they had actual knowledge of non-compliance.

Proponents of the public duty doctrine cite three main justifications for it. Each of them are unpersuasive. First, the doctrine is used to preserve the public treasury and spare innocent taxpayers the cost of a government agent's negligence. However, this fear is unfounded since government is able to protect its resources by carrying liability insurance or by imposing limits on damage awards by the government. Further, the Washington legislature has declared that the government should be treated just like a private individual. *See* RCW §§ 4.92.090; 4.96.010. "Since a private defendant's ability to pay is not considered when determining private tort liability, the government's ability to pay should also not be

considered when determining its tort liability.” Myers, 59 Wash. L. Rev. at 541.

The second argument by proponents of the public duty doctrine is that “unlimited liability would inhibit the government from undertaking public programs carrying a high risk of tort liability.” Myers, 59 Wash. L. Rev. at 542. However, the government should include the cost of potential tort liability when considering whether the benefits of the government program outweigh its total costs.

The third argument for the doctrine is that, “when combined with the special relationship exception rule, it determines whether a duty is actually owed to an individual claimant rather than to the public at large.” Id. at 542. This can be more effectively accomplished, however, by the standard tort analysis, including that of foreseeability. The public duty doctrine simply creates “another barrier for individual claimants to overcome and thereby lessens governmental liability for its negligent acts.” Id. at 542. As can be seen, the justifications for the public duty doctrine are not compelling and contrary to the legislative intent.

C. **It Was Error For The Trial Court To Disregard Johnsons' Expert Testimony.**

Richard and Jeannie Johnson's expert Dr. Vince McClure put the factual basis of the City of Olympia's Motion for Summary Judgment at issue:

The City of Olympia should have acted when it was informed by Burke Long that the structure was unsafe. A concerned citizen informing the City of Olympia officials of such a problem, such as what Mr. Long did, is more than sufficient to warrant further an immediate investigation. At a minimum the City of Olympia building officials should have contacted Burke Long and Laura Porter's inspector Roy Erickson and should have arranged for re-inspection of the home (along with Danella Donlan and Frank Winn). This would not have been at all burdensome for the City of Olympia to do. The City must reasonably act when it is informed of safety concerns. Given the egregious defects with that home, the certificate of occupancy should have never been issued in the first place and should have been withdrawn when the mistake was brought to the attention of government officials.

I know the standard of care that professional engineers and building inspectors must meet in this community. In my opinion the officials at the City of Olympia, including the engineering professionals and the inspectors, did not even remotely approach performing their duties up to the standard of care expected of such professionals in this community. Their

breaches resulted in a serious life hazard going completely unaddressed.

CP 63 (McClure Supp. Dec., December 27, 2005, ¶).

“All 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 procedures set forth in the Dangerous Building Code or such alternate procedures as may have been or may be adopted by this jurisdiction.” CP 157 (Uniform Building Code, Section 102, Unsafe Buildings or Structures) [emphasis added].

The purpose of the State Building Code (in this case it was the 1997 Uniform Building Code) is “[t]o require **minimum** performance standards and requirements for construction and construction materials, consistent with accepted standards of engineering, fire, and life safety.” RCW 19.27.020 [emphasis added]. The purpose of the Olympia housing code is to create “minimum standards to safeguard life or limb, health, property, and public welfare by regulating and controlling the use and occupancy, location and maintenance of all residential buildings and structures within this jurisdiction.” CP 157 (Olympia Municipal Code 16.10.010). There are criminal and civil penalties for persons responsible for dangerous structures. *See* CP 157 (O.M.C. 16.10.030 and 040). There

is also a specified procedure for abating dangerous structures. *See* CP 157 (O.M.C. 16.10.050).

The Rules of Evidence state that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ER 702. In addition, Evidence Rule 702(4) further states, “[i]n certain kinds of cases, the court may require specific, specialized knowledge because of the nature of the claims or defenses. In cases involving medical opinions, for example, the courts traditionally require the opinion of a physician, or at least a witness with medical training.”

Likewise, the case at hand includes factual issues that require technical and specialized knowledge of the nature of the claims. The factual issue of whether the City’s failure to act was reasonable or not, requires expert testimony as to the building codes, standards and procedures of the Olympia Building Department, and construction and engineering skills to aid the trier of fact in determining the issues. Similar to cases involving medical opinions, this case requires specialized

knowledge of construction procedures, building department standards, and engineering principles.

In this case, Dr. McClure's testimony is based on his own observations and professional experience in accordance with ER 702. Dr. McClure has performed structural code compliance reviews for local governments, including the City of Olympia Community Planning and Development Department. As such, he has personal knowledge of the duty of building inspectors. In addition, "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. Experts are allowed to express opinions on ultimate issues.

In the case at hand, the Olympia Building Department did nothing when it was informed by Burke Long that the home in question was unsafe and structurally unsound. As noted above, Dr. McClure states that the City had a duty to act. *See generally Campbell*, 85 Wn.2d at 13. These are issues that need to go to the trier of fact to determine whether or not the City's failure to act was reasonable or not under the circumstances. *See Bailey*, 108 Wn.2d at 271. The fact that at least one of the building officials specifically assisted the contractor Frank Winn in designing the

new addition may also be a factor in why the City of Olympia failed to act after receiving notice from Burke Long that the structure was unsafe. *See* CP 107-09, 125-27 (Joseph Scuderi Dec., December 30, 2005, Exhibits A & D); *see also* CP 100-01 (Richard Johnson Dec., ¶¶ 4 - 5). As a result of these factual issues, summary judgment was inappropriate in the present case.

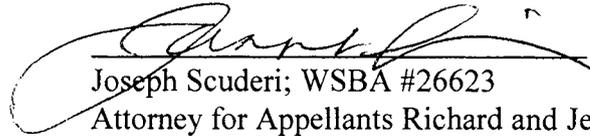
IV. CONCLUSION

Richard and Jeannie Johnson seek to have the Appellate Court reverse the Trial Court's Order Granting Summary Judgment in Favor of the City of Olympia. This matter should be remanded to the Trial Court so the disputed factual issues, including the finding of actual knowledge by the City and the opinion of an expert witness, can be raised and tested at a trial on the merits. The level and amount of actual knowledge the City possessed as to the non-compliance to code of the Donlan home is a question of material fact. Likewise, the opinions by expert witness Vince McClure, Ph.D, P.E., of whether or not the City's failure to act was reasonable or not under the circumstances should have been sufficient to

put facts regarding duty of care in dispute to defeat this summary judgment motion and allow the matter to be determined by the trier of fact.

Respectfully Submitted this 28th day of July, 2006.

CUSHMAN LAW OFFICES, P.S.

A handwritten signature in black ink, appearing to read "Joseph Scuderi", is written over a horizontal line.

Joseph Scuderi; WSBA #26623
Attorney for Appellants Richard and Jeannie
Johnson

NO. 34401-7-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

RICHARD JOHNSON and JEANNIE JOHNSON, husband and wife,

Appellants,

v.

CITY OF OLYMPIA, a Washington State municipal corporation,

Respondent.

CERTIFICATE OF SERVICE

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BY _____
DEPUTY

Lisa Cushman states and declares as follows:

1. I am a legal assistant for the attorney for the appellants herein. I am above the age of eighteen 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 July 31, 2006, I caused to be served the Brief of Appellant by the method indicated below, and addressed to the following:

Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

____ U.S. Mail, Postage Prepaid
 Legal Messenger
____ Overnight Mail
____ Facsimile

Dale W. Kamerrer
2674 RW Johnson Blvd
Tumwater, WA 98502

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

Jack W. Haneman
Haneman, Bateman & Jones
2120 State Avenue NE, Suite 101
Olympia, WA 98506

U.S. Mail, Postage Prepaid
 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 3rd day of July, 2006, in Olympia, Washington.



Lisa Cushman, Legal Assistant