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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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44543-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TOWN OF STEILACOOM,

Respondent,

v.

DOUGLAS MCLEAN,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Respondent's motion for summary judgment because there were issues of material fact as to whether Respondent and Appellant were in privity of contract.

2. The trial court erred when it applied the public duty doctrine, a tort principal, to a contract to which the parties were in privity with one another.

Issues Pertaining to Assignment of Error:

1. Does the public duty doctrine, a tort principal, apply to a contract where the parties are in privity with one another?

(De novo)……..

2. Does a material issue of fact exist when a contract exists between parties and a breach of that contract is shown?

(De Novo)……

B. STATEMENT OF THE CASE

January 31, 2012, Plaintiff filed Summons and Complaint against the Town of Steilacoom. (CP 1-6)

February 27, 2012, Defendant filed an answer to the suit.(CP 7-11)

October 4, 2012, Defendant filed a Motion for Summary Judgment alleging: 1) Plaintiff failed to properly serve his claim for damages form upon the designated agent; 2) The applicable statute of limitations for real

property actions is 2 years; 3) The Public Duty Doctrine bars negligence claims against municipalities; 4) Plaintiff's contract claim and alleged breached was based upon an unwritten contract; and 5) The statute of limitations for an unwritten contract is 3 years. (CP 14-34)

October 23, 2012, Plaintiff filed a Response to Defendant's Motion for Summary Judgment along with declarations from Plaintiff Douglas McLean and his counsel, Nelson Fraley. (CP 73-81)

October 29, 2012, Defendants filed a Reply to Plaintiff's Response. (CP 142-150)

November 2, 2012, Defendant's Motion for Summary Judgment was orally argued and entered an Order Granting in part and Denying in part Defendant's motion. (RP November 2, 2011, CP 159-160)

November 13, 2012, Defendant filed a Note and Motion for Reconsideration to be heard on December 7, 2012. (CP 165-170)

November 26, 2012, Plaintiff's counsel filed an Objection to Defendant's Motion and Declaration. (CP 175-177)

December 5, 2012, Defendant filed a Reply to Plaintiff's Objection. (CP 182-184)

December 7, 2012, Parties argued their respective positions regarding the Motion for Reconsideration brought by Defendant. (RP December 7, 2012, CP 184-185) Defendant presented a case never cited

in any of its pleadings, claiming that Ravenscroft v. Water Power Co., 87 Wn. App. 402 (1997), was discovered on December 6, 2012, at approximately 4:30 p.m. (RP December 7, 2012, Pg. 2) Defense counsel for Steilacoom claimed that they never before cited opinion in the instant case may be dispositive of the contract issues then remaining in this matter. Id. The court granted Plaintiff's counsel an opportunity to review the case and to respond on or before January 2, 2012. The Motion for Reconsideration was rescheduled by the court for January 11, 2013, and orally granted both the Motion for Reconsideration and Defendant/Respondent's Motion for Summary Judgment. (RP January 11, 2013, Pg. 11) The trial court signed the order on January 18, 2013. (CP 200-201)

On or about January 9, 2009, it was discovered that the Town of Steilacoom breached its contract to provided storm water drainage with Mr. Douglas McLean and Ms. Karen Bell. (CP 82-103) They are the owners of the property located at 21 West Shore Court, Steilacoom, Washington. As a result of rain and the failure to maintain the drainage system, Plaintiff's real property suffered a significant slide due to the flooding issues caused by the Town's failure to maintain its drainage system as contracted. (Id., CP 178-181, Ex. C)

Prior to Plaintiff moving into his home on January 30, 2007, he established a contract for services with the Town of Steilacoom to provide him with utilities including storm water drainage. (CP 82-103) Those utilities included, and remain in effect to date, services for water, sewer, electricity, and storm water drainage. Id. In exchange for those services, Plaintiff pays to the Town service charges. Id. His services have never been discontinued or suspended for any reason. (CP 55-67) He has never been delinquent on his payment for utility services. Id. Based upon Respondent's municipal code "utility services shall be considered a contract between the Town and the applicant warranting that the applicant shall pay all fees and charges authorized by Council for the provision of utility services to the applicant." (CP 82-103, CP 104-141, Ex 4,5,6,7,8)

C. SUMMARY OF ARGUMENTS

The trial court erred when it granted Respondent's motion for summary judgment because there were genuine issues of material fact as to whether the parties had executed a contract, whether Respondent had breached the contract and whether the public duty doctrine applied to a contract.

D. ARGUMENTS

I. SUMMARY JUDGMENT

1. The Standard of review.

In reviewing a summary judgment order, the appellate court conducts the same inquiry as the trial court. Parry v. Windermere, 102 Wn. App. 920, 10 P.3d 506 (2000). The court reviews questions of law de novo. Id. Summary judgment is appropriate when no genuine issue of material fact exists, thus entitling the moving party to judgment as a matter of law. Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co., 104 Wn. App. 597, 601, 17 P.3d 626 (2000), review denied, 143 Wn.2d 1023 (2001). The court must consider evidence and all reasonable inferences therefore in the light most favorable to the nonmoving party. Magula v. Benton Franklin Title Co., 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

"Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Atherton Condo. Apart.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516 (1990) (quoting CR 56(c)). "A material fact is one upon which the outcome of the litigation depends in whole or in part." Atherton, 115 Wn.2d at 516. We consider the evidence in the light most favorable to the nonmoving party. Gerken v. Mut. of Enumclaw Ins. Co., 74 Wn.App. 220, 224-25 (1994).

A defendant in a civil action is entitled to summary judgment if he can show that there is an absence or insufficiency of evidence supporting an element that is essential to the plaintiff's claim. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 (1989). "'In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Young, 112 Wn.2d at 225 (internal quotation marks omitted) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). The plaintiff may not rely on the allegations in the pleadings but must set forth specific facts showing that a genuine issue exists. Young, 112 Wn.2d at 225.

2. The public duty doctrine inapplicable.

In general, the public duty doctrine will operate to foreclose a negligence claim by plaintiffs if a duty is owed to general plaintiffs, separate from the general public, the plaintiffs may bring a claim under one of the exceptions to the public duty doctrine. Hartley v. State, 103 Wash.2d 768, 781, 698 P.2d 77 (1985). Like any other defendant, a government is not liable for negligence unless it breached a legal duty of care. Osborn v. Mason County, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). Under the public duty doctrine, a government's obligation to the

public is not a legal duty of care; instead, a government can be liable only for breaching a legal duty owed individually to the plaintiff. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001) (quoting Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)). However, the public duty doctrine is subject to four exceptions: (1) the legislative intent exception, (2) the failure to enforce exception, (3) the rescue doctrine, and (4) the special relationship exception. Babcock, 144 Wn.2d at 786. Whether, in light of the public duty doctrine and its' exceptions, a government defendant owed the plaintiff a legal duty is a question of law reviewed de novo. Vergeson v. Kitsap County, 145 Wn.App. 526, 534, 186 P.3d 1140 (2008).

A threshold negligence determination is whether a duty of care is owed to the plaintiff. Id. at 784-85, 30 P.3d 1261 (quoting Taylor v. Stevens County, 111 Wash.2d 159, 163, 759 P.2d 447 (1988)). In negligence actions against a government entity, Washington courts follow the rule that:

> to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. This basic principle of negligence law is expressed in the "public duty doctrine". Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)."

Taylor, 111 Wash.2d at 163, 759 P.2d 447 (citations omitted) (quoting J & B Dev. Co. v. King County, 100 Wash.2d 299, 303, 669 P.2d 468 (1983)).

The public duty doctrine does not serve to bar a suit in negligence against a government entity. As a result of the enactment in 1967 of RCW 4.96.010, which did away with Washington's shield of absolute sovereign immunity, local governments such may be liable for damages arising out of their tortious conduct, or the tortious conduct of its employees "to the same extent as if they were a private person or corporation." RCW 4.96.010(1); Bailey v. Town of Forks, 108 Wash.2d 262, 265, (1987). In this light, the doctrine serves as a framework for courts to use when determining when a governmental entity owes either a statutory or common law duty to a plaintiff suing in negligence. Emphasis added.

A review of the case law cited in this brief and that of Respondent's Motion for Summary Judgment and the Motion for Reconsideration shows that the Public Duty Doctrine only applies to some negligence actions. The doctrine does not apply to contract matters. More importantly, at no time prior to December 7, 2012, did Respondent present legal authority supporting the proposition that contract claims are subject to the doctrine.

Defendant, through counsel Mr. Larry Hoffman presented the opinion of Ravenscroft v. Washington Water Power Co., 87 Wn. App. 407

(1997), as standing for the proposition that the Public Duty Doctrine applies to a contract if the contract was negligently performed. Reading the appellate court decision along with the Washington Supreme Court decision affirming in part, and reversing in part reveals a much different position. See also Ravenscroft v. Washington Water Power Co., 136 Wn.2d 911 (1998). Among other causes of action, Mr. Ravenscroft asserted a claim against the County as a third-party beneficiary to a cooperative agreement between the State of Washington and the County. This agreement provided state funding for boating safety and enforcement programs in exchange for County participation in the programs. The County asked the trial court to dismiss this claim based upon the public duty doctrine. The trial court denied the motion, holding that there was a question of fact as to whether Mr. Ravenscroft was a third-party beneficiary to the contract. The Court of Appeals reversed, holding that the claim was barred by the public duty doctrine. Ravenscroft, at 406-07. A review of the decision reveals that Mr. Ravenscroft was not a party to the contract which he claimed to be a third-party beneficiary. The facts showed that the State of Washington and Spokane County entered into a cooperative agreement. Id at 409. Mr. Ravenscroft was not in privity of the contract executed between the State and Spokane County. Nonetheless, he claimed he was a third-party beneficiary of the contract.

The contract was only for duration of 1 year. "The term of the agreement was from April 21, 1989 to March 31, 1990..." Ravenscroft v. Washington Water Power Co., 136 Wn.2d 911, 930 (1998). By the time Mr. Ravenscroft was injured on June 24, 1990, the cooperative agreement was concluded. Because Mr. Ravenscroft was not a party to the contract under which he claimed to be a third-party beneficiary, he had no rights under the contract between Spokane County and the State. Thus, he could only rely upon the statutory duties imposed under the law. "The statutes and regulations governing water safety, WAC 352-65, WAC 352-66, RCW 43.51.400, not the agreement, establish the duty to promote boating safety." Id at 931. Ravenscroft is wholly inapplicable to the case at bar as Plaintiff in that case was relying upon an expired contract to which he was never a party.

In the instant case, Appellant McLean alleged a breach of contract in addition to negligence claims. Plaintiff provided a dispute as to the contention that only an oral contract was created subjecting Appellant to a three (3) year statute of limitations. Based upon the evidence provided in response, the trial court found a dispute of material fact as to the existence of a written contract thereby applying a six (6) year statute of limitations under RCW 4.16.040(1). A review of the record shows from the date of filing of the Motion for Summary Judgment to the date of filing of the

Motion for Reconsideration, Defendant failed to allege that the Public Duty Doctrine applied to negligently performed contracts. It was not until December 7, 2012, that the Respondents raised this issue in the context of a breach of contract.

The facts of the instant case are distinguishable from those of Ravenscroft and therefore should not operate to preclude McLean's contract claims against the Town of Steilacoom.

According to Town of Steilacoom Municipal code 13.24.030:

> (a) Any person desiring to receive utility services from the Town shall make application therefor upon a printed form to be furnished for that purpose, which shall be signed by the applicant and filed in the town administrative offices.
> (b) The application for utility services shall be considered a contract between the Town and the applicant warranting that the applicant shall pay all fees and charges authorized by Council for the provision of utility services to the applicant.
> (c) The contract shall take effect at the time that provision of utility services is initiated.
> (d) The contract shall be binding and shall not be discontinued until all charges, fines and penalties are paid in full. (Ord. 1137 sec. 1, 1994).

According to Steilacoom's Municipal Code, a customer is a person to whom utility service is provided by the Town of Steilacoom. SMC 13.04.040(1). Under SMC 13.04.040(6) a utility is a "service for any of the following: electric, water, sewer, storm drain or solid waste."

The Town of Steilacoom does not deny that Plaintiff has paid his monthly invoice since establishing service on or about January 30, 2007. In fact, Mr. Loveless affirmatively represents that Plaintiff "pays, and has paid, a storm water utility fee, along with other utility fees, on a monthly basis." Dec. of Paul Loveless, Page, 2, lines 6-7.

A review of Plaintiff's claims show that he expressly alleges that the Town did not provide storm drain services to him as the contract and statutes or municipal codes claim. Thus, the Town of Steilacoom breached its contract with Plaintiff and that breach of the contract caused damage to Plaintiff's property.

According to SMC Chapter 13.50, entitled Storm Water Management, the Town Council found this chapter was necessary to protect property owners from water runoff, to decrease storm water-related damage, and to protect the health, safety and welfare of the inhabitants of the Town. SMC 13.50.020(3), (8) and (9). These are the services for which Plaintiff has contracted with the Town.

Based upon SMC 13.24.030, the Town represents to its customers that a written contract is established by the terms contained within its code. Moreover, the Town continues to send written reminders of the contract, which are further indicia of the written contract. See Dec. of Douglas McLean, Exhibit A, Back side of utility bill.

According to the monthly invoices received by Plaintiff, "[t]he Town of Steilacoom offers electric, water, sewer and storm drainage services..." Conversely, Plaintiff accepts the offer and performs by paying his invoice. Thus, a contract is formed.

Ex parte writings are sufficient to bring a contract within the six-year (6) statute of limitations if the writing contains all the elements of a contract. Bogle & Gates, P.L.L.C. v. Zapel, 121 Wn.App. 444 (2004). A six-year statute of limitations applies on a contract to provide maintenance of a utility. Algona v. Pacific, 35 Wn.App. 517 (1983).

Based upon the above, a written contract for the maintenance of storm water drainage utilities to be provided by the Town to Plaintiff has been established. Appellant was to pay for such services and the Respondent was to provide such service.

E. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court remand this matter to the trial court to allow Appellant to develop the material dispute of the contract claims. The state of Washington's jurisprudence does not apply the public duty doctrine to contract claims

where the parties are in privity with each other.

Dated this 19th day of August, 2013.

Respectfully submitted,

FAUBION, REEDER, FRALEY
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DECLARATION OF SERVICE

I certify under penalty of perjury that on the 19th day of August 2013, I served a copy of this BRIEF OF APPELLANT to the individuals and via the method(s) designated below:

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