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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**

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**DOUGLAS MCLEAN,**

**Appellant,**

**v.**

**TOWN OF STEILACOOM,**

**Respondent**

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**BRIEF OF RESPONDENT**

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**LAWRENCE E.. HOFFMAN**

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**Olympia, WA. 98506**

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1. *Babcock v. Mason County*, 144 Wn. 2d 774 (2001)
2. *Bailey v. Town of Forks*, 108 Wn. 2d 262 (1987)
3. *Mt. Park Homeowners v. Tydings*, 125 Wn. 2d 337 (1994)
4. *Pepper v. J.J. Welcome*, 73 Wn. App. 523 (1994)
5. *Ravenscroft v. Water Power Co.*, 87 Wn. App. 402 (1997)
6. *Ravenscroft v. Water Power Co.*, 136 Wn. 2d 911 (1998)
7. *Syrovoy v. Alpine Resources*, 122 Wn. 2d 544 (1993)
8. *Taggart v. State*, 118 Wn. 2d 195 (1992)
9. *Taylor v. Stevens County*, 111 Wn. 2d 159 (1988)

**A. ASSIGNMENT OF ERROR**

Does the contract that is alleged to exist between Appellant McLean and Respondent Town of Steilacoom rise to the level of the “special relationship” exception to the Public Duty Doctrine? Appellant McLean did not allege and provided no proof of any particular, specialized duty owed by the Town to Appellant McLean regarding the provision of storm drain utility services. Since the trial court found that the only duty owed by Respondent Town to Appellant McLean regarding storm drain utility service was the same duty that the Town owed to all other Town storm drain utility customers, the alleged contract was not an exception to the application of the Public Duty Doctrine. The trial court properly granted Respondent Town of Steilacoom’s Motions for Reconsideration and for Summary Judgment as to the breach of contract claim.

**B. STATEMENT OF THE CASE**

In January 2007, McLean purchased the home and real property located at 21 West Shore Court, Steilacoom, Washington. On or about January 20, 2007, McLean submitted an application to the Town to establish full utility service (water, sewer, electric and storm drain) to that address. From that date forward, the Town has provided

full utility services to that address and McLean has been current in his payment for those utility services.

During the period January 8 through 10 of 2009, a storm producing substantial rainfall struck Steilacoom. During that storm, a portion of McLean's property sloughed off and slid down the side of the ravine which abuts McLean's property. On January 31, 2012, Mclean filed a Summons and Complaint alleging that the Town of Steilacoom was liable for damages to his property at 21 West Shore Court for the following reasons: (1) the Town negligently designed its storm water collection system; (2) the Town negligently failed to maintain and repair its storm water collection system; (3) the Town negligently failed to exercise reasonable care to protect others against a dangerous condition; (4) the Town breached its utility services contract with Mclean by negligently maintaining its storm water collection system.

The Town of Steilacoom answered the complaint on February 7, 2012, denying all of McLean's theories of liability. On October 2, 2012, the Town of Steilacoom filed a Motion for Summary Judgment, seeking dismissal of all of McLean's claims. CP 14-34. On November 2, 2012, the Summary Judgment motion was orally argued, at the conclusion of which the trial court, the Honorable Stephanie Arend, entered an Order granting the Town's motions for dismissal of all three of McLean's

negligence claims but denying Summary Judgment on the breach of contract claim. CP 159-160.

On November 13, 2012, the Town of Steilacoom filed a Motion for Reconsideration, asking the court to review its finding that issues of fact remained regarding the existence of a contract, what statute of limitations should apply to that contract, and whether the alleged contract creates a status or relationship that places it beyond the scope of the Public Duty Doctrine. CP 165-170.

The Town of Steilacoom's Motion for Reconsideration was set for argument on December 7, 2012. Counsel for the Town of Steilacoom advised the court that new legal authority had been recently discovered that could be dispositive of the contract issue and suggested that the Motion be set over to give all counsel an opportunity to review the new authority and to provide a response to it. The Motion was reset to January 11, 2013; following argument on that date the court granted both the Town's Motion for Reconsideration and its Motion for Summary Judgment on the breach of contract issue. The Order to that effect was signed on January 18, 2013. CP 200-201.

### **C. ARGUMENT**

#### **1. Standard of Review for Summary Judgment**

When an appellate court reviews an Order for Summary Judgment, it must engage in the same inquiry as the trial court. See Syrovv v. Alpine Resources, 122 Wn. 2d 544, at 548 (1993). Summary Judgment will be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). “All facts and reasonable inferences are considered in the light most favorable to the nonmoving party”. Taggart v. State, 118 Wn. 2d 195, at 199 (1992). All questions of law are reviewed de novo. See Syrovv, id, at 548, and Mt. Park Homeowners v. Tydings, 125 Wn. 2d 337 (1994).

## 2. The Public Duty Doctrine

The Public Duty Doctrine provides that “... for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation to the public in general (that is, a duty to all is a duty to none)”. Bailey v. Town of Forks, 108 Wn. 2d 262, 265 (1987) and Taylor v. Stevens County, 111 Wn. 2d 159 (1988).

The rationale for the Public Duty Doctrine is as follows: (1) prevention of excessive governmental liability; (2) the need to avoid hindering the governmental process; and (3) to focus the duty or obligation on a particular individual rather than on a nebulous public. See the Bailey, id, at 266. When a municipal entity is sued for

performing a governmental function, there can be no liability unless the court finds an exception to the Public Duty Doctrine.

### 3. Exceptions to the Public Duty Doctrine

There are four exceptions to the Public Duty Doctrine: (1) special relationship; (2) failure to enforce; (3) the rescue doctrine; and (4) legislative intent. See *Babcock v. Mason County*, 144 Wn. 2d 774 (2001).

McLean asserts that the Public Duty Doctrine does not apply at all to breach of contract claims. The Town of Steilacoom asserts, to the contrary, that the Public Duty Doctrine should be applied to this breach of contract claim as it is at its foundation a negligence claim. The only one of the exceptions to the Public Duty Doctrine that might then apply is that of “special relationship”. A “special relationship” exists where (1) there is direct contact or privity between a public official and the injured plaintiff which sets the latter apart from the general public; and (2) there are express assurances given by a public official which (3) give rise to justifiable reliance on the part of the plaintiff. *Pepper v. J.J. Welcome*, 73 Wn. App. 523, 534 (1994). This is a narrow exception that requires a plaintiff to have relied on an assurance he specifically sought and which the government gave. *Pepper*, id, at 534-535.

### 4. McLean’s Contract With the Town of Steilacoom

McLean alleges in his complaint that because he paid a storm water utility fee he was promised that the Town would properly design, operate and maintain a storm water collection system so that no storm water would come onto or across his real property. No proof of such a promise, express or implied, was ever provided by McLean in either his complaint or in his responses to the Motions for Summary Judgment or Reconsideration. McLean alleges in his response to the Motion for Summary Judgment that a “written contract” was established by his completion of an application to start utility service and his subsequent payment of his monthly charges for those utility services.

As part of its Motion for Reconsideration, the Town provided the court with a copy of that application for utility service form as an exhibit to a Declaration of Paul Loveless. CP 171-174. That application form is not designated as a contract between the applicant and the Town, although the Steilacoom Municipal Code refers to the status created as a contract; it does not contain any specific promises, terms or conditions regarding the services to be provided, the duration of the provision of the services, and/or the cost of the services to be provided; further, it does not contain any specific promises or representations as to the level or quality of the services to be provided to an individual applicant for utility service. The only statements regarding these type of terms and

conditions are included in the Steilacoom Municipal Code in the form of ordinances approved by the Town Council for the benefit of the public (Steilacoom residents) as a whole. Finally, the application does not require the signatures of either the applicant or a Town official.

McLean does not allege in any of his pleadings the existence of any specific promises or assurances made to him by any Town official in response to a specific request made by him regarding utility service. To the contrary, Declarations by Town Administrator Paul Loveless and Town Public Works Director Mark Burlingame, submitted in support of the Town's Motion for Summary Judgment. CP 55-62 & 35-54, specifically assert that there is nothing written in McLean's utility account records that indicates any specific promises or assurances made to McLean, nor did either of them make any verbal promises or assurances to McLean regarding the storm water utility. After reviewing all of McLean's pleadings, there is no evidence that any "special relationship" existed between McLean and the Town of Steilacoom that would serve as an exception to the application of the Public Duty Doctrine.

#### 5. Privity v. Duty

McLean argues that the trial court erred in granting the Town's Motions for Reconsideration and Summary Judgment on the breach of

contract issue on the basis of the Public Duty Doctrine where he alleges (1) that he and the Town of Steilacoom are in privity of contract with one another, and (2) that the Public Duty Doctrine does not apply to contract matters. The Town of Steilacoom asserts in response that the proper statement of the issue of the applicability of the Public Duty Doctrine is whether a duty of care is owed to the plaintiff, here McLean, by the government entity, here the Town of Steilacoom, whether sounding in tort or breach of contract.

McLean's breach of contract claim is nothing more than a negligence claim labeled with a different name. To be successful on this claim, Appellant McLean would have to prove negligence on the part of the Town regarding the design, operation and maintenance of the storm water collection system. By using a contract theory McLean attempts to "bootstrap" his way above or around the Public Duty Doctrine preclusion for negligence by claiming that a duty was owed to him by the Town based on the contract that he alleges to have been created by his application for utility service and the payment of his monthly bill for utility service.

McLean has presented no evidence however, that the contract he alleges to exist creates any specialized duty owed by the Town to him

that is in any way different from the duty the Town owes to all other Town storm water utility customers.

The Court of Appeals and the Supreme Court have provided direction regarding the application of the Public Duty Doctrine to a breach of contract claim. In the two *Ravenscroft v. Water Power Co.* cases found at 87 Wn. App. 402 (1997) and 136 Wn.2d 911 (1998), the courts addressed the applicability of the Public Duty Doctrine to a breach of contract claim: “Generally, a breach of contract does not give rise to an action in tort. However, the negligent performance of a contract may create a tort claim if a duty exists independently of the performance of that contract ... Although we assume without deciding that Mr. Ravenscroft is a third party beneficiary and that he could recover for personal injuries in a breach of contract claim, we find that this claim is barred by the Public Duty Doctrine. A negligence action must be based on a duty owed by the defendant to the plaintiff. In this case, the duties imposed upon the county by the cooperative agreement are pursuant to state and municipal laws that impose duties owed to the public as a whole and not to particular individuals.” *Ravenscroft v. Water Power Co.*, 87 Wn. App. 402, 417 (1997).

In this case, the duties imposed upon the Town regarding the storm water utility are as a result of municipal ordinances adopted by the Town

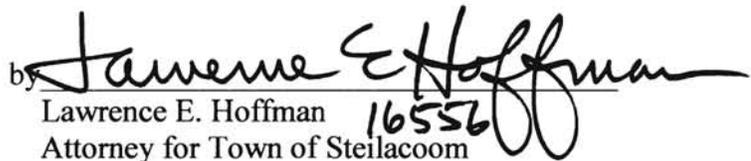
Council to apply to all Town of Steilacoom storm water utility customers and not to any particular individual.

#### **D. CONCLUSION**

There is no evidence in the record to establish any special relationship between the Town of Steilacoom and McLean regarding the Town's storm water collection utility. As a result, the only duty owed by the Town of Steilacoom to McLean is the same duty the Town owes to all other Town storm water utility customers. The Public Duty Doctrine does, therefore, apply to McLean's breach of contract claim since there is no evidence of a special relationship exception to that doctrine. The trial court properly dismissed McLean's breach of contract claim on that basis.

Respectfully submitted this 18<sup>th</sup> day of September, 2013

HOFFMAN LAW FIRM

by   
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Attorney for Town of Steilacoom

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

DOUGLAS MCLEAN

Appellant,

Vs.

TOWN OF STEILACOOM,

Respondent.

**No. 44543-3-II**

**DECLARATION OF SERVICE**

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I, LAWRENCE E. HOFFMAN, hereby declare under penalty of perjury of the laws of the State of Washington, that I am of legal age and not a party to this action made the following service of the BRIEF OF RESPONDENT;

1. On Nelson C. Fraley, Attorney for Appellant Mclean, by personally leaving a copy of the Brief at his office at 5920 – 100<sup>th</sup> Street SW, Suite 25, Lakewood, WA 98499, at 3:48 PM on September 18, 2013; and

*DECLARATION OF SERVICE*

*HOFFMAN LAW FIRM  
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2. On Steven Thorsrud, of Attorneys for Respondent, by e-mail transmission and via U.S. Mail, 1<sup>st</sup> Class, Postage paid, to his address at 800 Fifth Avenue. Suite 4141, Seattle, WA 98104 -3175.

Dated this 18<sup>th</sup> day of September, 2013

HOFFMAN LAW FIRM

s/LAWRENCE E. HOFFMAN  
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