

COA #29568-1-III

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CONRAD F. PIERCE,

Appellant,

vs.

YAKIMA COUNTY, WASHINGTON, a governmental entity and  
political subdivision of the State of Washington,

Respondent.

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REPLY BRIEF OF APPELLANT

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ORIGINAL

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## I. INTRODUCTION

Yakima County's response focuses largely on its argument that Mr. Pierce caused his own injuries by not requesting the right permits, by not insisting the County inspect the entire piping system inside the house, by hooking up his own furnace, and by "ignoring" alleged statements of the contractor to have the interior checked. However, all of these allegations are in dispute, and none are relevant to the determination of the County's duty to enforce the codes as charged by Yakima County Ordinance No. 3-2007. While issues of fact may exist on the interaction between Mr. Pierce and his contractor, what the permitting personnel told him he needed, and the conduct of the Building Officials, it is undisputed that Mr. Pierce's connection of a minor hose from the furnace to the piping system was not a cause of the explosion and fire. These allegations of contributory fault and disputed facts do not assist the Court in interpreting the mandatory fuel gas code provisions establishing the County's duty to enforce such codes, and inspect, verify or test the safety of a propane gas system before approving it for use.

In addition to blaming Mr. Pierce or others, the County also spends the majority of its Response Brief disclaiming knowledge of the uncapped pipe, which allowed dangerous gas to escape and explode. The County is apparently challenging the Trial Court's specific findings that the evidence

established issues of fact that the County had actual knowledge of code violations sufficient to trigger the knowledge prong of the failure to enforce exception. However, Mr. Pierce appealed the Court's grant of summary judgment which was based solely on the lack of a mandatory duty to take a corrective action under the failure to enforce exception; the County did not cross-appeal the Trial Court's other findings. Irrespective of whether the County properly addresses these issues, its argument that it must have seen the uncapped pipe to trigger its liability is incorrect; the County had actual knowledge of a number of dangerous code violations, any one of which supports its liability under the failure to enforce exception.

As to the primary issue in this Appeal, the County's duty to take corrective action, the relevant code provisions establish its obligations to inspect, verify or test before finally approving the propane gas system - duties which it breached as a matter of law. As a result, the County must ignore or reinterpret the language contained in the code provisions which place responsibility on County inspectors to inspect, verify or test the gas **pipng system** before issuing approval.

The County's argument is circular and conflicting. It argues that it had no duty to inspect or test the interior piping because the permits were only for exterior piping, while at the same time arguing that the

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connection of the exterior piping and gas fuel source to the house without approval was cured **by its approval of the connection**. The County has thus admitted it approved the connection to the building, which created an operating **gas system** beyond the exterior piping. The County cannot then avoid liability by unilaterally narrowing its code obligations to exterior piping after the system exploded.

Ultimately, the County admits it had the obligation to inspect, verify or test, and approve some portions of piping, but then denies it had any duty to take corrective action if it found **a piping system** it should not have approved under the code. When the County went to Mr. Pierce's house, looked at the exterior piping which fed inherently hazardous, flammable and explosive propane gas directly into the pipe connected to his home, and slapped a final approval certificate on that gas system, it violated a number of enforcement obligations directly to Mr. Pierce, and it is that duty which gives rise to the County's liability here.

This Court should reverse the Trial Court's grant of summary judgment, and either properly interpret the code provisions to establish the County's liability as a matter of law, or remand to the Trial Court for trial on the issues of the duties the County breached.

## II. FACTS

Mr. Pierce will not restate all the relevant facts here, except to demonstrate that the facts described in Appellant's Brief were not "inaccurate," nor a "distortion" or "misrepresentation" of the record as argued by the County. (Respondent's Brief, p. 5)

For example, Mr. Pierce's evidence that the County told him that the propane system has passed the final inspection, and was ready to use, is fully supported by Mr. Pierce's testimony that he believed he had obtained necessary permits and had requested inspection for the propane system to be used to supply gas to heat his home. (CP 506-507, Pierce Aff., ¶ 3) In that context, Mr. Pierce testified that the Building Inspector:

**. . . told me that, "It looks like everything is done. You are good to go." He also told me that the propane system has passed inspection and he made it plain from his statements that because the propane gas system had passed inspection, it was ready to be used. After the statements of the building inspector and the statements of the All American Propane installers and because the building inspector had told me that the system had passed inspection and was "good to go," I believed that the system had been inspected, all permits had been obtained and complied with and that the propane gas system was ready to be used. (*Emphasis added*)**

(CP 510-511, Pierce Aff., ¶9) Mr. Pierce's deposition testimony also consistently described his contact with the Building Inspector who told

him "everything is done" and "you are good to go." (CP 801, 798-799, 973-974)

Moreover, it is undisputed that the County indeed told Mr. Pierce that the operating propane system connected to the building had passed inspection; they issued a final inspection approval, and called for no other inspections. (CP 801; 127-128; 162-163) And while Mr. Pierce may not have seen the Inspection Record Cards signed by the County Building Officials which establish that the **system** was ready to use (CP 615, 612, 613), those Cards defined the required "Final Inspection" of that mechanical system as an approval for its use, and are clear evidence of the meaning of statements and actions by the County in that context.

And while the County disputes what was legally required of its inspectors, it is undisputed that both Inspector Granstrand and Deputy Fire Marshal Rutherford admitted they did not conduct an inspection or verify testing of the entire piping system, despite plain definitions and requirements to do so under the codes and on the very Inspection Record Cards they initialed as final approval. (CP 615; 612; 613; 128-129; 140-144; 146; 159; 162; 173; 175-177; 338-339)

And as further evidence of what inspections were required based on the only two permits ever issued for propane installations by the County, it is undisputed that the language of the Fire and Mechanical

Permits provides for "gas piping," which means both interior and exterior according to the Yakima County Project Coordinator who issued them. (CP 354-376) The County Project Coordinator, Ms. Garcia, further testified that were the permits issued to Mr. Pierce limited to exterior piping, there should be no introduction of propane gas into the building and no completed operational gas "piping system," ie., no connection of the "fuel source." (IRC §R111.1; CP 287, 371-373; See also, CP 365)

The County emphasizes Mr. Pierce's connection of a flex connector from the furnace to the appliance shut off valve, but that fact does not establish any basis for the summary dismissal of Mr. Pierce's claim. First, this flex connector is not part of the piping system as defined by the code. In fact, a pressure test under IRC §G2417.1 (IRC §G2417.3.2 and .3.3; CP 306-307) requires that the "piping system" be tested in its entirety after the appliances are disconnected and isolated by closing or capping the appliance shut off valves. Second, Yakima County Code Ordinance and IRC §R105.2 exempts, in the case of gas installations, "replacement of any minor part that does not alter approval of equipment or make such equipment unsafe." The flex connector from the furnace to the piping system was purchased by Mr. Pierce at a hardware store and installed by him with the understanding that no permit was required for such minor work. Finally, the gas causing the explosion escaped in this

case from a significant defect in the "piping system," and not the flex connector; its connection is irrelevant here. (CP 633-642, Lewis Aff.)

The relevant facts here establish the County's failure to enforce, which establishes its duty to Mr. Pierce and liability for its breach.

### III. LAW

Despite the County's erroneous assertions, Washington law recognizes that a municipality can owe an individual duty to a citizen specifically related to the municipality's negligence in failing to enforce duties imposed by building codes; there is no rule precluding such liability. See Waite v. Whatcom County, 54 Wn.App. 682, 775 P.2d 967 (1989); Campbell v. Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975). The facts are simply reviewed on a case by case basis to determine the elements of the failure to enforce exception to the public duty doctrine.

**A. The County's failure to enforce the inspection and testing requirements of the fuel gas codes, and its final approval of an operational gas system establishes the County's liability to Mr. Pierce.**

The Trial Court ruled that the evidence supported a finding of at least the following violations which were apparent to Yakima County at the time of the inspection: (1) introduction of propane into the system before approval; (2) the use of propane as a testing medium on the leak test; and (3) the connection of the filled storage tank to the house without

inquiry as to the integrity of the interior piping. (CP 060) The Trial Court granted summary judgment solely because it incorrectly found that there was insufficient code language mandating corrective action after the code violations were observed.

**1. The County had statutory duties to take corrective action pursuant to its adoption of the IRC.**

The obligations of the County to take specific corrective action is well outlined in both the fuel gas codes and in Appellant's Brief, and Respondent's Brief does nothing to refute those obligations. None of the cases cited by the County address a situation similar to the one at bar, except Waite, which is directly on point, and which the County recognizes renders its position incorrect; as a result, it struggles to distinguish Waite.

In Waite, the County Official observed a furnace installed in the basement of a home in violation of the code. Here, the County observed the operating gas "fuel source" connected to the interior piping of the "building and system" without approval and without verification of inspection or testing in violation of the codes. In Waite, the inspector issued an approval of the furnace. Here, the County approved the connected system. Both situations constituted code violations, both created a danger, and in both instances the inspectors admitted the facts establishing the violations.

Because Waite would establish its liability, the County argues that the Court's decision was not well reasoned, and claims that Whatcom County did not properly address the mandatory enforcement prong of the failure to enforce exception in its brief. There is no question the appellant property owner in Waite addressed the public duty doctrine, the failure to enforce, and the statutory mandate placed on County Building Officials to take corrective action to enforce the codes. (Appx. A) In Waite, the appellant specifically cited the Whatcom County Municipal Ordinance 76-69 adopting the Whatcom County building codes and directing the Building Administrator to enforce all provisions of this code, and granting him the powers of a police officer. (See, Appx. A.) The appellant in Waite argued that Whatcom County deemed the violation of the code a misdemeanor and that the building inspector owed a duty established by law to take the corrective action of enforcing the Uniform Mechanical Code, which the inspector ignored by instead approving the installation.

The identical situation exists here; the County's Ordinance provides:

R105.1 The building official is hereby authorized and directed to enforce the provisions of this code. For such purposes, the building official shall have the powers of a police officer. . . .

(Appx. B) Thus, just as in Waite, which remains good law in Washington, the Building Officials here failed to take the corrective action of enforcing the codes, instead approving a gas system which violated the code, establishing the County's liability.

None of the cases the County cites are relevant to the facts or applicable law here, and merely restate the general rule that there must be a duty to take corrective action. For example, in Forrest v. State, 62 Wn.App. 363, 814 P.2d 1181 (1991), the only statutory mandate which was issued to the Corrections Department employee for supervision of parolees was to have responsibility for "preparation of progress reports", "guidance and supervision", and that they "may" arrest for parole violations. 62 Wn.App. at 369. In Forrest, the court specifically distinguished circumstances in which there exists a specific statutory directive to do something, as opposed to statutes which are replete with "mays". Similarly in Ravenscroft v. Water Power Co., 87 Wn.App. 402, 914 P.2d (1997) aff'd 136 Wn.2d 911 (1999), the court addressed generalized provisions relating to marking hazards or signs in waterways, again distinguishing statutes containing "shalls" from "mays."

However, unlike Forrest or Ravenscroft, the mandatory enforcement obligations here are instead similar to those found in both Waite and Campbell, both instances in which the court found that failure

to correct a known code violation established a basis for liability of the County under the failure to enforce exception. In fact, Smith v. Kelso, 112 Wn.App. 277, 48 P.3d 372 (2002), on which the County incorrectly relies, recognized the continued viability and sound reasoning of both Waite and Campbell, and noted the sufficiency of the corrective action required in both those instances:

In previous failure to enforce cases, the plaintiffs relied on statutes and ordinances that prohibited specific conduct and required a public official to take specific action to correct the violation. For example, Division One of this Court held that an ordinance regulating furnace installations supported liability in Waite v. Whatcom County, 54 Wn.App. 682, 688, 775 P.2d 967 (1989). **There, a county inspector failed to correct a violation of a code prohibiting installation of a propane furnace in a basement**, and the homeowner sued the county when the furnace exploded. Waite, 54 Wn.App. at 684, 775 P.2d 967.

And our Supreme Court upheld municipal liability in Campbell v. City of Bellevue, 85 Wn.2d 1, 13, 530 P.2d 234 (1975). There, an ordinance required the electrical inspector to disconnect nonconforming lighting systems. Campbell, 85 Wn.2d at 6, 13, 530 P.2d 234. When he noticed underwater wiring and lighting in a creek, the inspector left a note for the owner but did not disconnect the wiring. A boy was severely injured and his mother died as a result of the wiring. Campbell, 85 Wn.2d at 3-4...In each case, the statute or ordinance regulated public conduct, such as installing a propane furnace in a basement, installing underwater wiring, and driving while intoxicated. **And a statute or ordinance then obligated a government agency to take specific action to correct a violation of the law.** (*Emphasis added*)

Smith, 112 Wn.App. 283-284. The Smith court distinguished those cases, because in its own factual circumstance, the code provision it addressed was a section of the Uniform Building Code which required a developer to submit a soils report only if certain slope conditions were met; because there was no evidence that the code requirements were ever triggered because the slope conditions were not met, the court found nothing in the code provision requiring an enforcement action by the County.

Contrary to Smith, and the cases cited by the County, but just as in Waite, here the County inspectors failed to correct a code violation when it approved a new propane gas service installation which was in violation of multiple code provisions. And just as in Campbell, here, the corrective action outlined is not discretionary. The codes in Campbell directed that an inspector shall "sever an unlawful electrical connection" if the inspector made a finding that such severance was necessary for safety. This is part and parcel of the same authority given Yakima County Building Inspectors in IRC §R111.3 to authorize disconnection "where necessary to eliminate an immediate hazard . . . or when such utility connection has been made without the approval required," or IRC §R113.2 to authorize Stop Work Orders or Notices of Correction of violations. (CP 287-88; 290-91) The hazards present here were the failure to enforce mandatory testing or inspection obligations before approval of an operating gas fuel

source connected to a piping system and building, about which the County admits it had no information relative to its safety. (CP 127-128; 162-163; 165-167; 172-177) The County also admits the pressurized propane filled tank was connected to the interior piping when it arrived to inspect (CP 338-339); this created the operating gas system and required all the inspection and verification obligations. The County failed to correct the lack of enforcement of those provisions by not requiring they be accomplished **before** approval.

The County in its response simply disputes the inspection and approval requirements as mandating corrective duties, despite language of R 109.1, which requires that the official **shall** either approve or **shall** notify of failure to comply. The definitions of "approved" contained in the IRC Code and Commentary notes:

...When the code states an item or method "shall be approved," it does not mean that the code official is obligated to allow it. Rather, it means that the code official must determine whether the item or method is acceptable; that is, the code official must make the decision to allow or disallow.

(Appx. C, p. 5)

On September 4, 2007, the County Inspectors disregarded their obligations for inspection and enforcement, and the County likewise now ignores those obligations in its Brief; however, the corrective action

required of the County throughout the code was to conduct or verify the inspections and testing which were **mandatory** under the code. The County argues that no duty exists under the IRC Administrative Provisions by completely ignoring IRC §R104. IRC §R104.2 provides:

**Applications and Permits. The building official shall . . . issue permits for the erection and alteration of buildings and structures, inspect the premises for which such permits have been issued and enforce compliance with the provisions of this code. (emphasis added)**

*◇ This section states that the building official must...issue permits, conduct inspections and enforce the provisions of the code. She or he is to provide the services required to carry the project from application for the permit to final approval...The requirements of the codes must be met, and approval will be granted only when compliance is verified. (Emphasis added)*

(CP 274) IRC §R104.1 provides that the building official is "hereby...directed to enforce the provisions of this code," and enforcement approval is to be granted only when compliance is verified. The corrective action is to deny or refuse approval and require the mandated inspection and verification of testing. (CP 274)

The County's argument that no duty to take corrective action existed under the codes is even more strained when considered in terms of the approval requirements of IRC §R111.1 (CP 287), which prohibit connection of the active propane fuel source prior to approval, inspection and verification of testing. The County admits a violation of this section

existed and was known to the inspectors on September 4, 2007. (Respondent's Brief, p. 34) The County dismisses the known violation of this code section as a "technical infraction," and contends that it is of no legal consequence because the contractor and the owner are required to comply with the code, and it was not required to correct the violation. If the County's argument were correct, there would be no need for the issuance of any permits, the collection of permit fees, the conduct of any inspections or the enforcement of any code provision, or corrective actions as mandated by the code. The entire process the County required of its permittees, including Mr. Pierce, would be unnecessary and irrelevant if the existence of violations did not trigger the obligation by the County to correct by requiring the mandated inspections, disconnecting the piping system, and refusing to approve the system.

**2. The Trial Court properly found that County Inspectors had actual knowledge of code violations to trigger an individual duty to Mr. Pierce.**

The Trial Court ruled that the actual knowledge requirement of the failure to enforce rule had been met, but the County now reargues that absent actual knowledge of the uncapped pipe in Mr. Pierce's home, there could be no actual knowledge sufficient to establish a failure to enforce.

Mr. Pierce is not required to establish the inspectors had actual knowledge of the conditions that the inspections and tests would have

revealed had they properly inspected or verified; instead it is sufficient to establish that they knew inspections and testing that "shall" be performed pursuant to the code were not performed before approval of the system. In establishing actual knowledge, a plaintiff is not required to present proof of the subjective knowledge of the inspector. Instead, knowledge of facts constituting the statutory law violations, rather than knowledge of the statutory violation itself, is all that is required; officers charged with enforcing the statutes are presumed to know the law. Coffel v. Clallam County, 58 Wn.App. 517, 794 P.2d 513 (1990).

Thus, the County's claim that it lacked actual knowledge of the interior uncapped pipe is irrelevant to the code violations it saw. The inherently dangerous condition was the existence of a propane gas system, pressurized, connected to the unknown, untested, uninspected piping system, yet certified for use by the County, although no inspection or testing of the entire piping system had been required or accomplished. In fact, Inspectors Granstrand and Rutherford admitted that failure to conduct a required test and inspection would be a dangerous situation, and plaintiff presented expert witness testimony that the lack of testing and inspection created the dangerous and unsafe condition. (CP 590-635, Mellas Aff., ¶¶13, 18; CP 545-589, Buchan Aff., ¶26; CP 144; p. 114; 174, p. 78)

The potential for danger in approving a gas system or connected fuel source despite code violations are the same as those found in Waite and Campbell. The existence of a furnace in the basement or underwater electrical lines in violation of code provisions simply create a potential for the foreseeable danger the codes were enacted to prevent. For example, no evidence in Waite suggested the inspector observed any immediate fire hazard, such as accumulation of interior gas because the furnace was there. Just as here, the allowance of a gas system to be placed in service in violation of code provisions created the potential for danger, which indeed foreseeably came to pass in Waite, Campbell as well as for Mr. Pierce.

The cases cited by the County regarding the element of actual knowledge do not apply here; and the County overstates their holdings and their significance to this case. Unlike either Atherton Condo. Apartment-Owners Assn. v. Blume Development Co., 115 Wn.2d 506, 799 P.2d 250 (1990) or Zimbleman v. Chaussee Corp., 55 Wn.App. 278, 777 P.2d 32 (1989), Mr. Pierce is not relying on constructive notice of code violations. In Zimbleman, a Building Department official reviewed proposed plans and made notations of deviations from the building code on the plan; the second inspector went to the site which was 40% complete and thereafter issued a Certificate of Occupancy without knowing whether the previously noted deficiencies had been corrected. The Zimbleman court found that

there was no evidence to establish actual knowledge of the violation because the building inspector explicitly denied any knowledge of code violations which had been noted on prior plans by a different building inspector.

Similarly, in Atherton, the court found that notes made by a building official requiring certain corrections before a development could be constructed did not constitute actual knowledge that the development had been constructed in violation of code provisions; there was no evidence the building official was on site, saw the construction, or was required to do so by any code provisions.

Mr. Pierce is not claiming constructive knowledge; Mr. Pierce does not rely on what the County inspectors **may** have learned if they went inside Mr. Pierce's home. The County officials here **had actual knowledge** of statutory violations. In fact, the County inspectors do not deny that they knew inspections and testing had not been performed on the interior piping, and admit they knew they were approving the system connecting a pressurized propane tank which was filled with propane to the interior system. The danger and defect which the County observed was the connection of an active propane system to the uninspected interior pipes, creating an operational gas system which the County approved for use. (CP 600; 590-632; 558-59; 545-589; 104-114; 86-114)

Similarly, Smith v. Kelso, 112 Wn.App. 277, 48 P.3d 372 (2002) does not apply here, and does not hold that a code requiring investigation/inspection can never constitute "actual knowledge" of a defect that the investigation could have revealed. Instead, Smith merely found that there were no investigation requirements because the conditions necessary to trigger any further action were not met, thus there was no code violation. Smith does not stand for the proposition that an inspector can close his eyes to code required inspections and issue approval when actual violations exist on site. And Garibay v. State, 131 Wn.App. 454, 128 P.3d 617 (2005), also cited by the County, simply stands for the proposition that an inspector had to have actual knowledge of facts constituting a dangerous code violation; the court's opinion does not detail the relevant code provisions or the obligations of the Department of Labor and Industries on which the plaintiff relied, and thus cannot be compared to establish the lack of County obligation here.

Here, the evidence and applicable code sections are specifically identified and required specific duties by the County. Numerous code provisions required inspection and verification of testing for very specific things by the County, including "uncapped pipes" and dangerous leaks. (See, Appellant's Brief, pp. 7-15; 29-33) The evidence is that the County

inspectors were on site and observed the violations, and the failure to actually see the uncapped pipes does not relieve it of liability.

This Court should not accept the concept that an inspector who negligently approves a dangerous propane gas system and fuel source connected to the interior of a home is not liable because he fails to verify, test or inspect the interior of the home, and thus lacks knowledge of what that required inspection would reveal. That argument ignores the safety reasons the inspection and testing requirements exist, particularly the prohibition of the connection of the gas fuel source until the entire system has been approved by the inspector. Very simply, the code's inspection requirements exist to ensure a dangerous propane system is "gas tight" before use. (CP 305, IRC §G2415.16) The County's inspectors breached these duties, proximately causing injury for which the County should be liable.

**3. The IRC places the duty to inspect and verify testing directly on its inspectors, and the County had actual knowledge of multiple code violations.**

The County denies its obligations under the codes to test, verify or inspect, which it in turn argues eliminates its actual knowledge of code violations under the failure to enforce exception. However, the duties imposed by the code, and the County's knowledge of the violations of

those duties establish actual knowledge of a code violation which triggers the failure to enforce exception.

- a. **The code requires the County to inspect a piping system to ensure it is gas tight, and the County had actual knowledge of its failure to properly inspect and verify a pressure test inspection for uncapped pipes, or a leak test of the entire system.**

The County misses the point of the IRC, and relies on two sections of the code in a vacuum to disclaim its actual knowledge of the code violations it encountered by not verifying, testing and inspecting for leaks or uncapped pipes. The County ignores and does not even address IRC §G2415.16, just as it did when it inspected Mr. Pierce's piping system:

**Testing of Piping. Before any system of piping is put in service or concealed, it shall be tested to ensure that it is gas-tight. Testing, inspection and purging of piping systems shall comply with §G2417. (*Emphasis added*)**

(CP 305). The Official Commentary to IRC §G2415.16 states:

**A pressure test is required after every installation, alteration, addition or repair to the fuel gas piping system. The location of a leak may be difficult to determine, especially if it is concealed in the building construction. If a leak is found, the leaking component must be repaired or replaced before the system is concealed or put into operation. Section G2417 specifies testing pressures based on the type of system, the design working pressure or other parameters. The testing duration is based on the total cubic feet of pipe volume, and the piping system must sustain the test pressure for**

**the duration without exhibiting any sign of leakage.**  
*(Emphasis added)*

IRC §G2415.16 (CP 305)

The County also continues to ignore the IRC Definition of "Piping System," which includes "All fuel piping, valves and fittings from the outlet of the point of delivery to the outlets of the equipment shutoff valves".<sup>1</sup> (CP 298, IRC §G2403) The Inspectors ignored this definition despite the very Yakima County Mechanical Permit Inspection Record Card (CP 615) which they signed for Final Inspection approval of this propane gas system which similarly defines the "Required Inspection" for "Gas Piping" consistent with the IRC:

**REQUIRED INSPECTIONS: Gas Piping All portions of the gas piping from the meter<sup>2</sup> to all of the appliances must be tested and inspected prior to cover by construction materials or earth. To include all portions of the system including valves, regulators, supports and materials. *(Emphasis added)***

(CP 615)

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<sup>1</sup> In this case, the Point of Delivery (See, IRC Definition, CP 298) was the outlet of the regulator mounted on the propane tank and examined by both County Inspectors on September 4, 2007. (CP 338-340; 348-350) Equipment shut off valves are located next to interior appliances and defined as "a valve located in the piping system used to isolate individual equipment for purposes such as service or replacement." Equipment means appliances utilizing gas to produce heat, etc. IRC §G2403. (Appx. C)

<sup>2</sup> The term "meter" is the same as "point of delivery" for a propane system. (CP 298) A gauge on the tank next to the regulator (point of delivery) shows the amount of pressurized propane in the tank. (CP 338; CP 510-511)

The County's argument requires the Court to conclude that the term "system of piping" in IRC §G2415.16 does not mean "piping system" as defined by the IRC, thus disclaiming any code violations of which it could have actual knowledge. This is an unreasonable, misleading and dangerous interpretation. Where an operational, pressurized propane fuel source of highly flammable, explosive and hazardous gas is connected to a "building or system" without Building Official "approval" and verification of mandated testing and inspections to a gas "piping system," the Building Inspectors observed and had actual knowledge of the connection of the fuel source and its obvious danger. Simply put, here they made no effort to verify by inspection and testing to "ensure" that the entire piping system was gas-tight under the Codes. Instead, they improperly approved the required Final Inspection under the Permits, meaning that the "mechanical system is completed and ready for use." (CP 615)

Compliance with the IRC can only occur with a pressure test of the entire piping system, as defined by the fuel gas codes, ensuring that the system is gas-tight before the propane system is "put into service" by the Building Official approving connection of the operational gas fuel source to the "building or system." (CP 287, IRC §R111.1) (CP 598-604) These are simply some of the code violations of which the County had actual

knowledge and it cannot side step those obligations by limiting its duty to pressure test to one portion of the exterior pipe.

- b. **The County cannot disclaim its actual knowledge of the code violations it observed when its inspectors saw the operating gas fuel source connected to the interior piping.**

The County also now admits two important points at pp. 34-35 of Respondent's Brief: (1) connection of the operational gas "fuel source" to the "building or system" was an infraction under IRC §R111.1, ie., a code violation, observed by the Inspectors on September 4, 2007; and (2) the Inspectors' approved the connection of the gas fuel source to the "building or system" after they saw it and implicit in their Final Inspection approval. The County cannot avoid actual knowledge of this violation by asserting it either applied only to "new construction," or was solved when it approved the connection.

IRC §R111.1 and the Official Commentary provide:

**Connection of service utilities.** No person shall make connections from a utility, source of energy, fuel or power **to any building or system** that is regulated by this code for which a permit is required, **until approved by the building official.** (*Emphasis added*)

*◇ This section addresses the connection and disconnection, either permanent or temporary, of any utilities that service a building or structure regulated by this code. The building official is authorized to control the connection for any service utility when the connection is to a building that is regulated by the code and requires a permit. Prior to*

*the connection of a utility, source of energy, fuel or power, all conditions for the connection must be met and verified by required inspections. (Emphasis added)*

(CP 287)

The County's admissions on appeal of its knowledge of the violation of IRC §R 111.1 alone requires reversal of the Trial Court's denial of Appellant's Motion for Partial Summary Judgment (CP 14-18) and the grant of Summary Judgment to the County (CP 10-13) because: where a County Inspector, as designee of the Building Official, approves connection of a gas fuel source to a building or system under IRC §R111.1, under any circumstance, that act is approval of a gas mechanical "system" as "completed," "ready to use," and to "put into service" by the limits on connection to the "building or system." There is no other purpose in the connection of a dangerous gas fuel supply to the building or system. The County approval of the connected fuel source establishes its actual knowledge of this violation.

The County's assertion that IRC §R111.1 applies only to "new construction" is belied by the terms of the code on its face. And The Official Code Commentary to IRC §R111.1 confirms that the section addresses "the connection and disconnection, either permanent or temporary, of **any utilities that service a building or structure regulated by this code.**" (CP 287-288) The County's assertion that

IRC §R111.1 does not apply is also contradicted by each of the County's expert witnesses who all acknowledge the application of IRC §R111.1 to this installation. (CP 250-254; 377-378; CP 379-381; CP 332-386). And no evidence exists that the County relied on previous testing and inspections of which it had no knowledge at the time of inspection. (CP 73-75, 173)

Moreover, the County's concept that the danger of the connection of gas to the interior of the home was mitigated because the blue shutoff valve was closed and had to be turned before fuel would enter the interior system is wrong. A simple turn of a valve does not eliminate the fact that the propane system was active and usable, and that without inspections and testing of the entire system, created a dangerous condition of which the County was aware.

The County's further claim that the right to temporarily connect utilities pursuant to IRC §R111.2 somehow relieves it of the obligations to approve this entire system before connection to the fuel source is not found in the terms of the code. As noted herein, the "temporary connection" portion of the code is for temporary electrical service during the construction process. (CP 287-288) No "temporary connection" was necessary or authorized for construction of the gas piping system. There would never be a reason to charge and connect this system with gas until it

was ready to use and had been properly inspected throughout the entire system.

- c. **The County's obligations were not limited to exterior piping, and its "Final Inspection" was similarly not limited.**

The County argues that it had no duty beyond inspecting the unreliable pressure test results that the contractor posted on the exterior line. The County's position that all inspections depend on the layperson to request the inspection of the specific portions of the pipe, and retain the appropriate permit, ignores the overall purpose and terms of the code provisions.

First, it is erroneous and a disputed fact that these Permits were for the exterior piping only. (Respondent's Brief, p. 11) Mr. Pierce requested "all necessary permits for the propane gas service installation in order to supply propane to the home for heat" from the County; he did not limit his request for permits to exterior piping only; he was told by the County that he needed a Mechanical Permit and a Fire Permit. These were the only permits the County issued for residential propane under any circumstance. (CP 505-513; 336; 358-363)

Moreover, the connection of the exterior line from the gas fuel source to the "building or system" is beyond the scope of any exterior only permit, and that connection was observed by the Inspectors. Thus, the

County's actual knowledge of the connection of an operating gas "fuel source" "put into service" by connection to the "building and system" was observation of a code violation beyond the scope of the "exterior" permits and the County's inspection. Even the County permitting personnel, who issued the permits, testified that if the permit is limited to exterior piping, there should not be an operational propane system even after inspection. (CP 357-376) And yet, the Inspectors approved an operational system supplying explosive gas, and did not alert the homeowner of any deficiencies, or additional inspection or permit requirements in violation of IRC §R109.1. (CP 284-285) Simply put, there was no purpose for this newly installed and connected propane gas system and fuel source other than to supply propane fuel to the furnace inside the home. The County knew that purpose and inspected under those permits and approved the "required" "Final Inspection" as "completed and ready for use" defined by its own Inspection Record Card. (CP 615; 510-511; 357-370)

Either the approval of the connection to the "building or system" and the interior piping was beyond the scope of the exterior permit and was a statutory violation, or the permit allowed for connection of a propane fuel source to this "building or system" which triggered the County's obligations on the interior piping. The County cannot have it

both ways, and breached its code duties to inspect, test, verify testing and enforce codes under either scenario, as a matter of law.

**d. The IRC establishes construction and installation inspection requirements for inspectors.**

The County argues that the relevant inspection and testing code are "operational" codes, not construction codes for a "build" environment. The codes at issue do not provide for anything but construction and installation requirements and practices, and make no operation distinctions. (See, Appx. C, p. 4) The codes never permit operation of the system until a pressure test of the entire system has been verified prior to connecting the fuel source. Without a doubt, §G2415.16 is a construction code, adopting IRC §G2417, also a construction code. The County admits it had an obligation to inspect and verify the pressure test of piping; that pressure test is a construction code, and there is no difference in the construction inspections and testing demanded by "installation practices" under IRC §G2417.1 et seq. for the pressure test (CP 306-311), and those also required by IRC §G 2417.6.2 and 6.3 to establish the entire system is free of leaks and uncapped pipes. (CP 311) To the extent the County agrees it had affirmative obligations to verify and inspect a pressure test on the "piping system", all other code inspection requirements similarly exist.

- e. **The County is not relieved of its actual knowledge of code violations by its assertion it could test in sections.**

While the County cites one or two sentences from IRC §G2417.1.4 on section testing, the entirety of the provision simply provides that a method of testing of the entire "piping system" may be performed in sections; read as a whole, this does not allow an active gas line to be connected to an interior gas line to create a piping system which has not been tested in its entirety. The IRC "section" testing provision states:

A piping system shall be permitted to be tested as a complete unit or in sections. Under no circumstances shall a valve in a line be used as a bulkhead between gas in one section of the piping system and test medium in an adjacent section, unless two valves are installed in series with a valved "tell tale" located between these valves. A valve shall not be subject to the test pressure unless it can be determined that the valve, including valve closing mechanism is designed to safely withstand the pressure.

(CP 306, IRC §G2417.1.4.)<sup>3</sup>

There is nothing in the terms of that code section that exempts an entire piping system from testing and inspection requirements contained in

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<sup>3</sup> Even the "section testing" was improperly done here, because IRC §G2417.1 prohibits pressure testing to be done with propane, or against a valve, instead of between a series of "tell tale" valves; the only test allegedly done by the installer here was no pressure test at all, failed to meet any minimum required pressure, and was improperly done with active, dangerous propane, and performed only between the tank on the exterior and the blue valve on the exterior of the home. (CP 306-311; 602-03; 590-635) Defendant's inspectors were aware the installer's certificate did not purport to test beyond the exterior connection valve, and these code testing deficiencies were plainly visible to the Inspectors.

the IRC and NFPA 54, and the County had actual knowledge that those had not been accomplished. Moreover, the Official Commentary makes clear this section of the IRC addresses the possibility that portions of a system will be "put in service" before the entire system is completed, which is inapplicable here. (CP 306) The only time that the gas piping system would be in "put in service" is when it was "completed and ready to use" and was actually supplying gas to an appliance, which was its function and purpose. Nothing suggests that the exterior piping could be put "in service" providing gas into the house, when the piping in the house was not "in service". (CP 287-288, IRC §R111.1; CP 285)

**B. Issues of fact exist regarding the special relationship between the County and Mr. Pierce.**

The County simply argues that Mr. Pierce "admitted" he made no "specific inquiry" and received no "express assurance." Each of the cases cited in Respondent's Brief have been addressed and distinguished in Appellant's Brief, and will not be addressed here to avoid repetition. There is no Washington law that suggests that a specific inquiry or express assurance must be in any specific form, nor for any specific duration. It remains clear that singular statements constitute sufficient assurance under the special relationship doctrine. See, Noakes v. City of Seattle, 77 Wn.App. 694, 699, 895 P.2d 842 (1995). Mr. Pierce is not basing his

assertion of a special relationship exception to the public duty doctrine on the mere issuance of a permit, but instead asks this Court to consider the context and circumstances of the contact between himself and the building inspector, and determine that under the "fact intensive inquiry" required, those facts in a light most favorable to the plaintiff creates an issue for trial. See, Bakay v. Yarnes, 2005 WL 1677966 (W.D. Wash. 2005).

Both sides can differently characterize the contact between Mr. Pierce and the County inspector, but this simply underscores that an issue exists for the jury. Here, Mr. Pierce went to the County permitting office as required, explained that he intended to have installed a gas propane system to heat his home, the gas company contractor connected the propane tank, pressurized it, and connected it to his house creating a propane system. The County was contacted to inspect the newly installed propane fuel gas system, and Inspector Granstrand and Deputy Fire Marshal Rutherford came to the site saw the propane fuel source connected to the home. Mr. Granstrand had a conversation with Mr. Pierce in which he told him that the installation had passed inspection, the piping could be covered in a trench, and "It looks like everything is done" "You are good to go". (CP 615, 613, 612; CP 505-521; CP 962-695; CP 139)

The County signed Final Inspection Cards approving the entire system for use. (CP 615, 612, 613) And whether Mr. Pierce saw the finally signed Inspection Record Cards or not, those cards are part of the context which a jury is entitled to hear to determine what Mr. Granstrand meant when he said "good to go" "everything is done" and "passed inspection." Mr. Pierce's understanding of those statements, the purpose of those statements, and the result of those statements create an issue for the jury to determine whether Mr. Pierce's belief that he was being given an express assurance that he could use his system on which he relied was reasonable or not. Mr. Pierce heard he could use the system, and relied on that assurance to use his furnace once the weather became cold. In the context that Mr. Pierce's communication existed, again confirmed by the County's own Inspection Record Cards, the "everything is done / good to go" statements and assurances can certainly be interpreted by the trier of fact as this system is appropriate for use at this time under these permits. As a result, a jury is entitled to determine whether Mr. Pierce's understanding and impressions of Mr. Granstrand's assurances considering the surrounding circumstances constituted a special relationship.

**C. It is the County's argument regarding application of the Public Duty Doctrine which demands the Doctrine's demise.**

The demise of the public duty doctrine is advocated here to the extent the County's interpretation of that doctrine is accepted by any court. The County's interpretation operates to immunize it from liability for ignoring all inspection and testing obligations, yet issuing final approval for a dangerous propane gas system in violation of codes. If indeed the public duty doctrine is applied as the County argues, then the permitting, inspection and testing procedures which the County enacted are wholly unnecessary; they would serve to address no violations of law nor eliminate danger. If the County's breach of the duties established by law which proximately cause severe injury to a homeowner cannot be pursued in a negligence cause of action, then the public duty doctrine basically provides the County with sovereign immunity and must be abrogated.

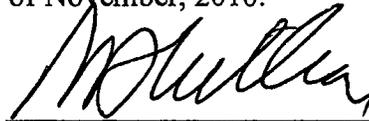
The cases cited by the County in support of the continuation of the public duty doctrine do not establish a well reasoned and clear history which evolved over the course of the last 30 years, particularly in relation to building code enforcement. Instead, those cases often demonstrate confusion among courts on application of the doctrine; the elements of the doctrine occasionally change and are misstated.

When building codes address issues such as the approval of propane gas systems, the obligations of the County are wholly unlike other zoning type violations. This is not a case in which zoning regulations dictate a setback rule or lot size. This is the County-required process for the use of dangerous propane gas fuel, and the public duty doctrine as the County seeks to apply it will preclude any duty to safely inspect or approve such a system. As a result, the doctrine must die, or be applied to encourage safe practices as it relates to a dangerous fuel gas system in a home and life safety, fire and explosion prevention codes. (Appx. C, pp. 4-5, CP 270-271)

#### IV. CONCLUSION

For the foregoing reasons, Appellant Conrad Pierce respectfully requests that this Court reverse the summary judgment dismissing his claims, and either enter partial summary judgment in his favor on liability or remand to the trial court for trial of all issues.

DATED this 12<sup>th</sup> day of November, 2010.



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# **APPENDICES**

NO. 55197-9

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SUPREME COURT IN AND FOR  
THE STATE OF WASHINGTON

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MICHAEL WAITE and JILL BERNSTEIN,  
husband and wife, and MICHAEL WAITE,  
Guardian ad Litem for BRIAN WAITE, a minor,

Plaintiffs/Appellants

vs.

WHATCOM COUNTY, a Municipal Subdivision  
of the State of Washington; BILL MORISETTE  
and CATHY MORISETTE, husband and wife;  
EDWIN H. FELLER and TONI FELLER, husband  
and wife, d/b/a FELLER HEATING & AIR CONDITIONING;  
and NORTHWEST PROPANE SALES, INC., a Washington  
Corporation,

Defendants/Appellees

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BRIEF OF APPELLANT

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### I. ASSIGNMENT OF ERRORS

Plaintiffs, Michael Waite and Jill Bernstein, husband and wife, and Brian Waite, a minor, through his Guardian ad Litem, Michael Waite, (hereinafter "Waite" or the "Waite family") assign error to the Order of the Honorable Gerald L. Knight, judge for the Superior Court of Washington for Snohomish County, granting summary judgment of dismissal of Plaintiff's claim against Defendant Whatcom County (CP 6-8, copy attached as Ex. "I").

### II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court erred in concluding that Plaintiff's Complaint for Damages should be dismissed on the ground that Whatcom County is immune from liability for the tortious conduct of its code enforcement officers.

### III. STATEMENT OF CASE

#### 1. Procedural History

This appeal was taken after final judgment (the "judgment")\* was entered on April 26, 1988 by the Honorable Gerald L. Knight, Superior Court Judge for Snohomish County. (CP 6-8). The judgment ordered that the Complaint of Plaintiffs against Whatcom County be dismissed with prejudice.

\* Pursuant to CR 54(b) the Court found that there existed no just reason for delay in the entry of the summary judgment of dismissal and that such dismissal should be found to be a final decision terminating the direct claim of Plaintiff against Whatcom County.

## 2. Statement of Facts

Liquified petroleum gas (propane) is a highly volatile and explosive gas. The gas is heavier than air. Should the gas escape into a confined area (such as a pit or a basement), then the gas will saturate the enclosed area until dissipated or ignited. (CP 29-31). For this reason, the Uniform Building Codes specifically prohibit the use of propane in below-grade installations. (CP 37, 75, 77).

Mr. and Mrs. William Morisette own a home at 1504 Marine Drive in Bellingham, Washington. In 1981, the furnace in their home malfunctioned and they contacted Feller Heating and Air Conditioning for replacement of the furnace. ("Feller" hereinafter). Feller came to the Morisette home, inspected the furnace and recommended the installation of a propane gas furnace to replace the oil burning furnace. The problem presented to Feller was that the propane gas furnace was to be located in the basement. (CP 37-38).

Feller contacted the building and codes officials for Whatcom County and spoke to a certified mechanical inspector. Feller discussed the placement of the propane gas furnace in the basement of the Waite residence, and a code enforcement officer preapproved the installation. (CP 39). Feller then installed the furnace in the basement of the Morisette residence. After installation, Feller contacted Whatcom County Buildings and Code and spoke with officer Fry, a certified mechanical inspector. Officer Fry, in

compliance with Whatcom County Ordinance 79-69 inspected and approved installation of the propane gas furnace located in the basement of the Morisette home. (CP 39-41).

Approximately two years later, in August of 1983, Mr. and Mrs. Waite and their child, Brian, leased the Morisette residence. (CP 34). Three years later, on October 12, 1986, Mr. Waite attempted to light the propane furnace. During the process, gas leaked from the furnace and saturated the basement of the Waite residence. During the attempt to light the furnace, an explosion, which literally lifted the home from its foundation, occurred. Mr. Waite suffered horrible disfiguring injuries and his wife and child have suffered severe emotional anguish. (CP 34-37).

The Waite family has brought suit against the owner of the home, the installer of the propane furnace, the supplier of the propane gas and Whatcom County. (CP 108). The dismissal of Plaintiff's Claim against Whatcom County is before this Court for review.

#### IV. ARGUMENTS

A. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING, UPON SUMMARY JUDGMENT, PLAINTIFF'S COMPLAINT FOR DAMAGES ON THE GROUND THAT WHATCOM COUNTY IS IMMUNE FROM LIABILITY FOR THE TORTIOUS CONDUCT OF ITS CODE ENFORCEMENT OFFICERS.

1. WHATCOM COUNTY SHOULD BE HELD LIABLE FOR THE TORTIOUS CONDUCT OF OFFICER FRY.

On October 1, 1889, the Constitution of the

State of Washington was ratified by the people of the State and on November 11, 1889, the President of the United States proclaimed the admission of the State of Washington into the Union. At the time Washington was admitted into the Union, it was an established rule of law that a municipal corporation, while engaged in the exercise of a governmental function, was immune from liability for negligence. Hagerman vs. Seattle, 189 Wa.694, 66 P.2d 1152 (1937). As stated in Hagerman:

The doctrine has become fixed as a matter of public policy, regardless of the reason upon which the rule is made to rest, and . . . any change therein must be sought from the legislature.

After 72 years of statehood, our legislature, pursuant to Article 2, Section 26, of the Washington State Constitution provided that the State consented to actions against it arising out of the tortious conduct of its agents, to the same extent as if it were a private corporation.

The State of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against them for damages arising out its tortious conduct to the same extent as if it were a private person or corporation. The suit or action shall be maintained in the county in which the cause of action arises. R.C.W. 4.92.090.

The legislature last addressed the issue of sovereign immunity 25 years ago, in 1963, when it amended R.C.W. 4.92.090 and further emphasized that the state "shall be liable" for its tortious

conduct.

The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

Whatcom County should be held liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. Plaintiff's claim shows that the Public Duty Doctrine does not shield Whatcom County from liability when one of its code enforcement officers failed to make any reasonable effort under the circumstances to prevent a known violation of the Uniform Mechanical Code, which violation resulted in the horrible injuries suffered by Michael Waite and his family.

(a). THROUGH APPLICATION OF GENERAL PRINCIPLES OF TORT LAW, WHATCOM COUNTY SHOULD RESPOND IN DAMAGES FOR THE INJURIES SUFFERED BY MICHAEL WAITE WHICH WERE PROXIMATELY CAUSED THROUGH THE NEGLIGENCE OF WHATCOM COUNTY.

Negligence is the failure to exercise due care which should be recognized as an unreasonable danger to others. It is the absence of such care as an ordinarily or reasonably prudent and careful person would exercise under similar circumstances. Prosser, Law of Torts, Section 31 (4th Edition, 1971). The elements of negligence are the existence of a duty, a breach whereof which must be the proximate cause of the injury; and resulting damage. Roth vs. Kay, 35 Wa. App. 1, 664 P.2d 1299 (1983). The record before this

(6). The thermal performance and design standards for housing as set forth in R.C.W. 19.27.210 through 19.27.290. This subsection shall be of no further force and effect when R.C.W. 19.27.200 through 19.27.290 as provided in R.C.W. 19.27.300.

In case of conflict among the codes enumerated in subsections (1), (2), (3, and (4) of this section, the first named code shall govern over those following.

In accordance with this mandate, Ordinance 76-69 of Whatcom County adopted the 1979 Edition of the Uniform Mechanical Code. (CP 75). Ordinance 76-69, Section 1, specifically states that the Whatcom County adoption of the Uniform Codes was enacted to "promote the health, safety and welfare of the occupants or users of buildings and structures, the general public; to require minimum performance standards and requirements for construction and construction materials consistent with acceptable standards of engineering, fire, life, safety,...." (emphasis added).

Officer Fry, an employee of Whatcom County Building and Codes, owed a duty to exercise reasonable care pursuant to Chapter 19.27 R.C.W. and Whatcom County Municipal Ordinance 76-69.

The building administrator is hereby authorized and directed to enforce all provisions of this code. For such purpose, he shall have the powers of a police officer. Whenever the term "building official" is used in this code, it shall be construed to mean the building inspector and chief code enforcement officer of Whatcom County. Whenever the term "authorized representative" is used in this code, it shall be construed

to mean the public service inspector. Ordinance 79-69, Section 3. (emphasis added).

In addition to having the authority and duty to enforce the code, Whatcom County deemed the violation of the Code a misdemeanor punishable by fine and imprisonment.

Violations of any provision of this ordinance shall be deemed a misdemeanor and each day during which such violation is continued or committed shall constitute a separate offense and upon conviction of a violation shall be punishable by fine not to exceed \$500.00 or by imprisonment in a County Jail for not more than ninety (90) days or both such fine and imprisonment. Whatcom County Ordinance No. 79-69, Section 29.

It is therefore clear that officer Fry, vested with the authority of a police officer, owed a duty established by law to enforce the Whatcom County Municipal Ordinance 79-69.

The next question is whether a specific duty existed to protect the class of persons of which Plaintiff was a member. Such a duty is owed to a reasonably foreseeable Plaintiff. In Berglund vs. Spokane County, 4 Wn.2d 309, 403 P.2d 355 (1940), our Court adopted the language from Harper on Torts, XIV, Section 7, in approving the following definition of foreseeability.

The Courts are perfectly accurate in declaring that there can be no liability where the harm is unforeseeable, if "foreseeability" refers to the general type of harm sustained. It is literally true that there is no liability for damage that falls entirely outside the general threat of harm

which made the conduct of the actor negligent. The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct, and yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.

Washington has adopted the test of foreseeability as whether the harm which the plaintiff suffered is within the ambit of danger which should be anticipated. It is entirely foreseeable that once officer Fry approved the installation of a propane gas furnace in the Waite residence, that an explosion could occur, thereby injuring the occupants of the dwelling. Thus, there did exist a specific duty, mandated by statute and Whatcom County Ordinance, to protect the class of persons of which Plaintiff was a member.

The second element of actional negligence is at least a question of fact and at best so clear that reasonable minds cannot differ on the issue of whether officer Fry failed to adhere to the standards of conduct established by law. Counsel for Plaintiff believes that there is absolutely no question in this case that officer Fry breached his duty to exercise ordinary care. The facts in this case are egregious. Liquefied petroleum gas is a highly flammable and volatile substance. To place such a device below grade is the invitation to catastrophe. The conduct of officer Fry is tantamount to the inspection and approval of a

liquified petroleum bomb in the basement of a single family residence.

The final two elements of actionable negligence are likewise established. First, there is no question that Michael Waite's disfiguring injuries were proximately caused through the propane gas explosion. In any event, causation is a factual issue to be determined by a jury, not a judge upon a motion for summary judgment. Stonemen vs. Wick Construction Company, 55 Wn.2d 639, 349 P.2d 215 (1960). Finally, it is undisputed that Michael Waite suffered horrible damages as a result of the failure of officer Fry to exercise ordinary care in the performance of his duties.

B. THE TRIAL COURT ERRED WHEN IT HELD THAT OFFICER FRY DID NOT OWE A DUTY TO MICHAEL WAITE.

The decision of the trial court to bar the claim of Michael Waite was based upon the application of the judicial doctrine known as the "Public Duty Doctrine". The analysis set forth in Honcoop, et al. vs. State, 43 Wn. App.300, 716 P.2d 963 (1986), succinctly defines the rule as:

If the duty breached by the government entity was merely the breach of an obligation to the public in general, then the cause of action would not lie for any individual injured through the breach of that duty.

As previously argued, a cause of action for negligence has been presented to this Court. The Public Duty Doctrine is not a bar to this claim.

The failure to enforce exception as discussed in Bailey vs. Town of Forks, 108 Wn.2d 262 (1987),

737 P.2d 1257; Livingston vs. Everett, 50 Wn. App. 655 (1988), 751 P.2d 1199; Campbell vs. Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1984); and Mason vs. Bitton, 85 Wn.2d 321, 534 P.2d 1360 (1975), clearly indicates that officer Fry owed a specific duty to Michael Waite.

Bailey identified three elements to the exception to the Public Duty Doctrine: (1) The government agents actual knowledge of a statutory violation; (2) the government's failure to take corrective action; and (3) the Plaintiffs being within the class the statute is intended to protect. Bailey, supra, at 268, 269. Noteworthy is the fact that there is no requirement for privity in this exception. J&B Development Company vs. King County, 100 Wn.2d 299, 669 P.2d 468 (1983).

1. OFFICER FRY HAD ACTUAL KNOWLEDGE OF THE VIOLATION OF WHATCOM COUNTY ORDINANCE 79-69.

It is undisputed that officer Fry approved the placement of liquified petroleum gas furnace in the basement of the Waite residence. There is no exception, ambiguity or question as to the interpretation of the Section 504 of the Uniform Mechanical Code.

Liquified petroleum gas/burning appliances shall not be installed in any basement or similar location, where heavier than air gas might collect. Appliances so fueled shall not be installed in an above-grade, underfloor space or basement, unless such location is provided with an approved means for removal of unburned gas. (emphasis added).

Livingston, supra, are distinguishable. The County argues that code enforcement officer Fry did not have actual knowledge of a violation of Whatcom County Ordinance 79-69. Their position is that the officer charged with enforcement of the Ordinance did not have actual knowledge because he was ignorant of the law. The appeal to this Court is from an Order on Summary Judgment. There does exist a reasonable inference from the record that when officer Fry inspected and approved the installation he knew or should have known that the installation constituted a violation of Ordinance 79-69. Upon an appeal from summary judgment, these inferences should be resolved in favor of Michael Waite. Greer vs. Northwest National Insurance Company, 36 Wn. App. 330, 674 P.2d 1257 (1984).

2. WHATCOM COUNTY FAILED TO MAKE ANY REASONABLE EFFORTS TO PREVENT THE VIOLATION OF SECTION 504 OF THE UNIFORM MECHANICAL CODE.

The next element necessary to establish the failure to enforce exception to the Public Duty Doctrine is established in this case. The record demonstrates that Whatcom County failed to enforce Section 504 of the Uniform Mechanical Code. See Section A, 1(a). The record before this Court demonstrates a complete absence of care. The conduct of Whatcom County is not distinguishable from the conduct of the electrical inspector in Bailey, supra, the animal control officer in Livingston, supra, and Officer Riddle in Bailey, supra.

NO. 55197-9

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SUPREME COURT IN AND FOR  
THE STATE OF WASHINGTON

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MICHAEL WAITE and JILL BERNSTEIN,  
husband and wife, and MICHAEL WAITE,  
Guardian ad Litem for BRIAN WAITE, a minor,

Plaintiffs/Appellants

vs.

WHATCOM COUNTY, a Municipal Subdivision  
of the State of Washington; BILL MORISETTE  
and CATHY MORISETTE, husband and wife;  
EDWIN H. FELLER and TONI FELLER, husband  
and wife, d/b/a FELLER HEATING & AIR CONDITIONING;  
and NORTHWEST PROPANE SALES, INC., a Washington  
Corporation,

Defendants/Appellees

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REPLY BRIEF OF APPELLANT

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STATE OF WASHINGTON

### I. REPLY ARGUMENT

Respondent, Whatcom County, argues in its Brief that they are immune from liability because there is neither privity nor a special relationship between Whatcom County and the Waite family. Reply Brief p. 4. Respondent ignores the fact that Waite's claim is premised not upon the holding of J&B Development, but rather upon the holdings of Mason v. Bitton, 85 Wn.2d 321, 534 Pac.2d 1360 (1975), Livingston vs. Everett, 50 Wn. App. 655, 751 Pac.2d 1199 (1988), Campbell vs. Bellevue, 85 Wn.2d 1, 530 Pac.2d 234 (1984), and Bailey vs. Town of Forks, 108 Wn.2d 262, 737 Pac.2d 1257 (1987).

The issue raised by Appellant and not addressed by Whatcom County is whether Whatcom County should be held liable for injuries proximately resulting from the failure of its code enforcement officer to correct an inherently dangerous and hazardous condition.

In Taylor vs. Stevens County, Supreme Court Cause #53817-4, this Court reaffirmed the holding of Campbell, supra, by noting that as to the performance of building codes inspections, a duty shall continue to be recognized where a public official knew of an inherently dangerous and hazardous condition, was under a duty to correct the problem and failed to meet his duty. This is precisely the issue before this Court. Officer Fry was under a duty to correct an inherently dangerous and hazardous condition, to wit: the placement of a liquified petroleum furnace in the

basement of single family residence. Ordinance 76-69, Section 3, C.P. 75. Officer Fry had actual knowledge of this inherently dangerous condition when he inspected and authorized the installation. C.P. 39-41. Finally, officer Fry's failure to act was unreasonable when considering the probable harm which would be caused through a liquified petroleum gas explosion occurring in a family home. C.P. 34-37.

A summary judgment motion should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavit, 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". CR56 (c); Hontz vs. State, 105 Wn.2d 302, 311, 714 Pac.2d 1176 (1986). This Court in Bailey, supra, held that liability of a governmental agent under the failure to enforce exception necessarily involves the resolution of factual issues.

Liability will not attach unless the government agent failed to take care "commensurate with the risk involved". Forks has only the limited duty of care to act reasonably within the framework of laws governing the municipality and the economic resources available to it. In determining whether a municipalities act or failure to act was unreasonable, the trier of fact can take into account the municipalities available resources and its resource allocation policy. Thus, under the instant facts, Forks would be subject to liability only if the police officer's failure to detain Medley was unreasonable under the circumstances.

Bailey, at 270-71.

Whatcom County has not argued that the conduct of officer Fry was reasonable under the circumstances. In fact, Whatcom County ignores this issue and simply argues that without privity there may be no liability. However, there is no requirement for privity in this exception to the Public Duty Doctrine.

Like the government in Campbell vs. Bellevue, supra, and Mason vs. Bitton, supra, the animal control officers had a duty to exercise their discretion when confronted with a situation which posed a danger to a particular person or class of persons. Second, the department had reason to believe that at least one of the dogs was dangerous. Third, the child came within the class the ordinance was intended to protect. (Citations omitted).

Livingston vs. City of Everett, supra, at 1201.

Whatcom County does not dispute the fact that Ordinance 76-69 was intended to protect the users and occupants of dwellings. Michael Waite and his family were a member of that class. Whatcom County does not dispute that the placement of a liquified petroleum gas furnace in the basement of a residence is anything other than an actual violation of the building code and an inherently dangerous and hazardous condition.

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AMENDMENTS TO INTERNATIONAL RESIDENTIAL CODE

13.06.025 Amendments to Chapter 1. Section R103 Department of building safety. Section R104.1 General. Section R104.8 Liability. and Section R105.2 Work exempt from permit. Section 103, Section R104.1, Section 104.8, and Section 105.2 of the International Residential Code, 2006 Edition are hereby amended as follows:

Section R103. Creation of enforcement agency.

R103.1 Creation of enforcement agency. There is hereby established in this jurisdiction a code enforcement agency which shall be under the administrative and operational control of the building official. The building and fire safety division of the public services department shall function as the enforcement agency.

R103. 2. Deputies. In accordance with prescribed procedures and with the approval of the appointing authority, the building official may appoint a deputy building official, the related technical officers, inspectors, plans examiners and other employees as shall be authorized from time to time. Such employees shall have powers as delegated by the building official. The building official may deputize such inspectors or employees as may be necessary to carry out the functions of the code enforcement agency.

R104.1 General. The building official is hereby authorized and directed to enforce the provisions of this code. For such purposes, the building official shall have the powers of a law enforcement officer. . . .

R105.2 Work exempt from permit. Permits shall not be required for the following. Exemption from the permit requirements of this code shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of this code or any other laws or ordinances of this jurisdiction.

Gas:

- 2. Replacement of any minor part that does not alter approval of equipment or make such equipment unsafe.

# INTERNATIONAL RESIDENTIAL CODE®

FOR ONE- AND TWO-FAMILY DWELLINGS

## CODE AND COMMENTARY

### VOLUME I

# 2006

APPX. C Page 1



**ALTERATION.** Any construction or renovation to an existing structure other than repair or addition that requires a permit. Also, a change in a mechanical system that involves an extension, addition or change to the arrangement, type or purpose of the original installation that requires a permit.

- ❖ The modification of an existing structure without adding any floor area or height to the structure is an alteration. Section R105 of the code specifies that a permit for the alteration work is required before work begins. The term "alteration" also applies to mechanical work where the original installation is altered in a manner requiring a permit. The repairs described in Section R105.2.2 are not alterations because a permit is not required.

**APPLIANCE.** A device or apparatus that is manufactured and designed to utilize energy and for which this code provides specific requirements.

- ❖ An appliance is a manufactured component or assembly of components that converts one form of energy into a different form of energy to serve a specific purpose. The term "appliance" generally refers to residential and commercial equipment that is manufactured in standardized sizes or types. The term is generally not associated with industrial equipment. For the application of the code provisions, the terms "appliance" and "equipment" are mutually exclusive.

Examples of appliances include furnaces; boilers; water heaters; room heaters; refrigeration units; cooking equipment; clothes dryers; wood stoves; pool, spa and hot tub heaters; unit heaters ovens; and similar fuel-fired or electrically operated appliances. See the definition of "Equipment."

**APPROVED.** Acceptable to the building official.

- ❖ Throughout the code, the term "approved" is used to describe a specific material or method of construction, such as the approved drainage system mentioned in Section R408.5. Where "approved" is used, it means that the design, material or method of construction is acceptable to the building official. It is imperative that the building officials base their decision of approval on the result of investigations, tests or accepted principles or practices.

**FUEL-PIPING SYSTEM.** All piping, tubing, valves and fittings used to connect fuel utilization equipment to the point of fuel delivery.

- ❖ As used in this code, this term includes the tubing and pipe used to convey fuel gas from the point of delivery to the appliance.

# INTERNATIONAL RESIDENTIAL CODE®

FOR ONE- AND TWO-FAMILY DWELLINGS

## CODE AND COMMENTARY

### VOLUME II

# 2006

APPX. C Page 3



## Part VI — Fuel Gas

# Chapter 24: Fuel Gas

The code text of this chapter is excerpted from the 2006 edition of the *International Fuel Gas Code*® and has been modified where necessary to make the text conform to the scope of application of the *International Residential Code for One- and Two-Family Dwellings*®. The section numbers appearing in parentheses after each section number represent the location of the corresponding text in the *International Fuel Gas Code*.

### General Comments

This chapter covers all installations of gas piping, gas appliance installation and gas appliance venting systems. It is extracted from the *International Fuel Gas Code*® (IFGC®) and is identical in intent. This chapter contains its own gas-specific coverage of combustion air, clearance reduction methods, chimneys and vents, and appliance installation. The dual section numbering system allows this text to be cross-referenced with the IFGC. Chapters 12, 13, 14 and 20 also contain requirements applicable to gas appliance installations.

The IFGC itself is segregated by section number into two categories: code and standard. In that document,

code sections are identified as IFGC; standards sections are identified as IFGS. The IFGS is a copyrighted work of the American Gas Association.

The commentary text of this chapter is produced and copyrighted by the International Code Council®.

### Purpose

Chapter 24 intends to protect occupants and their property from fire, explosion and health hazards that could result from the improper installation of gas piping systems, gas appliances and appliance venting systems.

### SECTION G2401 (101) GENERAL

**G2401.1 (101.2) Application.** This chapter covers those fuel-gas piping systems, fuel-gas utilization equipment and related accessories, venting systems and combustion air configurations most commonly encountered in the construction of one- and two-family dwellings and structures regulated by this code.

Coverage of piping systems shall extend from the point of delivery to the outlet of the equipment shutoff valves (see "Point of delivery"). Piping systems requirements shall include design, materials, components, fabrication, assembly, installation, testing, inspection, operation and maintenance. Requirements for gas utilization equipment and related accessories shall include installation, combustion and ventilation air and venting and connections to piping systems.

The omission from this chapter of any material or method of installation provided for in the *International Fuel Gas Code* shall not be construed as prohibiting the use of such material or method of installation. Fuel-gas piping systems, fuel-gas utilization equipment and related accessories, venting systems and combustion air configurations not specifically covered in these chapters shall comply with the applicable provisions of the *International Fuel Gas Code*.

Gaseous hydrogen systems shall be regulated by Chapter 7 of the *International Fuel Gas Code*.

This chapter shall not apply to the following:

1. Liquefied natural gas (LNG) installations.
2. Temporary LP-gas piping for buildings under construction or renovation that is not to become part of the permanent piping system.
3. Except as provided in Section G2412.1.1, gas piping, meters, gas pressure regulators, and other appurtenances used by the serving gas supplier in the distribution of gas, other than undiluted LP-gas.
4. Portable LP-gas equipment of all types that is not connected to a fixed fuel piping system.
5. Portable fuel cell appliances that are neither connected to a fixed piping system nor interconnected to a power grid.
6. Installation of hydrogen gas, LP-gas and compressed natural gas (CNG) systems on vehicles.

❖ This section describes the types of fuel gas systems to which the code is intended to apply and specifically lists those systems to which the code does not apply. The applicability of the code spans from the initial design of fuel gas systems, through the installation and construction phases, and into the maintenance of operating systems. Chapter 24 of the *International Residential Code*® (IRC®) covers fuel gas systems and is a duplication of the applicable IFGC text. The provisions of IRC Chapter 24 and the IFGC are identical.

**ALTERATION.** A change in a system that involves an extension, addition or change to the arrangement, type or purpose of the original installation.

- ❖ An alteration is any modification or change made to an existing installation. For example, increasing the size of piping for a portion of the system to accommodate different appliances would be an alteration.

**APPLIANCE (EQUIPMENT).** Any apparatus or equipment that utilizes gas as a fuel or raw material to produce light, heat, power, refrigeration or air conditioning.

- ❖ An appliance is a manufactured component or assembly of components that converts one source of energy into a different form of energy to serve a specific purpose. The term "appliance" generally refers to residential- and commercial-type utilization equipment that is manufactured in standardized sizes or types. The term "appliance" is generally not associated with industrial-type equipment. For the application of the code provisions, the terms "appliance" and "equipment" are interchangeable.

Examples of appliances regulated by this code include furnaces; boilers; water heaters; room heaters; decorative gas log sets; cooking equipment; clothes dryers; pool, spa and hot tub heaters; unit heaters; ovens and similar gas-fired equipment.

**APPROVED.** Acceptable to the code official or other authority having jurisdiction.

- ❖ As related to the process of acceptance of fuel gas related installations, including materials, equipment and construction systems, this definition identifies where ultimate authority rests. Whenever this term is used, it means that only the enforcing authority can accept a specific installation or component as complying with the code. Research reports prepared and published by the International Code Council may be used by code officials to aid in their review and approval of the material or method described in the report. Publishing a report does not indicate automatic "approval" for the material or method described in the report. When the code states that an item or method "shall be approved," it does not mean that the code official is obligated to allow it. Rather, it means that the code official must determine whether the item or method is acceptable; that is, the code official must make the decision to allow or disallow.

**EQUIPMENT.** See "Appliance."

- ❖ See the commentaries for "Appliance (equipment)"; "Appliance, Fan-assisted combustion"; "Appliance, Automatically Controlled"; "Appliance Type"; "Appliance, unvented" and "Appliance, vented."

**FUEL GAS.** A natural gas, manufactured gas, liquefied petroleum gas or mixtures of these gases.

- ❖ The nature of fuel gases makes proper design, installation and selection of materials and devices necessary to minimize the possibility of fire or explosion. Bringing fuel gases into a building is in itself a risk. The provisions of the code are intended to reduce that risk to a level comparable to that associated with other energy sources such as electricity.

The two most commonly used fuel gases are natural gas and liquefied petroleum gas (LP-gas or LPG). These fuel gases have the following characteristics or properties.

**Natural gas:** The principal constituent of natural gas is methane ( $\text{CH}_4$ ). It can also contain small quantities of nitrogen, carbon dioxide, hydrogen sulfide, water vapor, other hydrocarbons (such as ethane and propane) and various trace elements. Natural gas is colorless, tasteless and odorless; however, an odorant is added to the gas so that it can be readily detected. Natural gas is lighter than air (specific gravity of 0.60 typical) and has the tendency to rise when escaping to the atmosphere.

Natural gas has a rather narrow flammability range (approximately 3 to 15 percent volume in air) above and below which the gas-to-air mixture ratio will be too rich or too lean to support combustion. The heating value of natural gas is approximately 1,050 Btu per cubic foot (39 MJ/m<sup>3</sup>).

**LP-gas:** Liquefied petroleum gases include commercial propane and commercial butane. LP-gas vapors are heavier than air (specific gravity of 1.52 typical) and tend to accumulate in low areas and near the floor. The ranges of flammability for LP-gases are narrower than those of natural gas (approximately 2 to 10 percent volume in air). Like natural gas, LP-gases are odorized to make them detectable. The heating value of propane is approximately 2,500 Btu per cubic foot (93 MJ/m<sup>3</sup>) of gas. The heating value of butane is approximately 3,300 Btu per cubic foot (123 MJ/m<sup>3</sup>) of gas.

**FUEL GAS UTILIZATION EQUIPMENT.** See "Appliance."

- ❖ See the commentary for "Appliance (equipment)."

**GAS PIPING.** An installation of pipe, valves or fittings installed on a premises or in a building and utilized to convey fuel gas.

- ❖ Gas piping includes all the components, fittings and piping needed to deliver the fuel gas from the point of delivery to the appliance or equipment connection. The point of delivery may be a regulator or meter that is typically installed by the gas utility. The point of delivery may be located at the user's property line, immediately outside the structure or in some instances in the structure.

**GAS UTILIZATION EQUIPMENT.** An appliance that utilizes gas as a fuel or raw material or both.

- ❖ See the commentary for "Appliance (equipment)."

**HOUSE PIPING.** See "Piping system."

- ❖ House piping is the distribution piping downstream of the point of delivery. House piping is an antiquated term.

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84563-8

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Supreme Court No. 84563-8  
Case Name: Conrad Pierce v. Yakima County, Washington

Pursuant to RAP 10, attached for filing in PDF format is the Reply Brief of Appellant, including an Appendices of 25 pages. A Motion to allow an overlenght brief will be emailed momentarily. Please contact me if you have any questions. Thank you.

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