

ST. ...
10 JUL 25 PM 09:41

E

COA #29568-1-III

BY RONALD R. CARPENTER

No. 84563-8

_____ ah

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONRAD F. PIERCE,

Appellant,

vs.

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

Respondent.

BRIEF OF APPELLANT

MERIWETHER D. (MIKE) WILLIAMS
WSBA No. 08255
KEVIN J. CURTIS
WSBA No. 12085
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation
601 W. Riverside, Ste. 1900
Spokane, Washington 99201
Telephone: (509)838-6131

Attorneys for Appellant

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

ST. CLERK

10 JUL 25 PM 9:41

BY RONALD R. CARPENTER

CLERK

E
h

COA #29568-1-III

No. 84563-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONRAD F. PIERCE,

Appellant,

vs.

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

Respondent.

BRIEF OF APPELLANT

MERIWETHER D. (MIKE) WILLIAMS
WSBA No. 08255
KEVIN J. CURTIS
WSBA No. 12085
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation
601 W. Riverside, Ste. 1900
Spokane, Washington 99201
Telephone: (509)838-6131

Attorneys for Appellant

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

| | <u>PAGE</u> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| I. INTRODUCTION | 1 |
| II. ASSIGNMENTS OF ERROR | 4 |
| III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR | 5 |
| IV. STATEMENT OF THE CASE | 6 |
| A. Facts. | 6 |
| B. Procedural Facts. | 17 |
| V. ARGUMENT | 20 |
| A. The trial court was incorrect in finding that no individual duty existed to Mr. Pierce based on the County's failure to enforce state fuel gas codes. | 23 |
| 1. The statutory fuel gas codes require County inspectors to enforce inspection and testing code provisions, which constitute mandatory corrective actions. | 24 |
| 2. The trial court incorrectly interpreted the statutory obligation to take corrective action. | 33 |
| B. The trial court incorrectly found that no issue of fact existed to create a special relationship duty to Mr. Pierce. | 42 |
| C. To the extent the public duty doctrine would protect Yakima County from its negligence here, that doctrine should be abandoned. | 46 |
| VI. CONCLUSION | 50 |

APPENDIX

| | |
|-----------------------------------------------------------------------------------------------------------------------|---|
| Yakima County Permit Services Inspection Record Card re Mechanical Code Permit MEC2007-00440 Ex. No. 61, CP 615 | 1 |
| Yakima County Permit Services Inspection Record Card re Fire Code Permit No. FCP2007-00276 Ex. No. 55, CP 613 | 2 |
| Yakima County Permit Services Inspection Record Card re Fire Code Permit No. FCP2007-00276 Ex. No. 54, CP 612 | 3 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGES</u> |
|---------------------------------------------------------------------------------------------------------------------------------|--------------|
| <u>Babcock v. Mason County Fire District #6,</u> 144 Wn.2d 747, 30 P.3d 1261 (2001) | 20-21,47 |
| <u>Bailey v. Town of Forks,</u> 108 Wn.2d 262, 737 P.2d 1257 (1987) | 21,34 |
| <u>Bakay v. Yarnes,</u> 2005 WL 1677966 (W.D. Wash. 2005) | 42 |
| <u>Bratton v. Welp,</u> 145 Wn.2d 572, 39 P.3d 959 (2002) | 42 |
| <u>Campbell v. Bellevue,</u> 85 Wn.2d 1, 350 P.2d 234 (1975) | passim |
| <u>Chambers-Castanes v. King County,</u> 100 Wn.2d 275, 669 P.2d 451 (1983) | 47 |
| <u>City of Wenatchee v. Owens,</u> 145 Wn.App. 196, 185 P.3d 1218 (2008) | 31 |
| <u>Commercial Waterway Dist. No. 1 of King County v.</u> <u>Permanente Cement Co.,</u> 61 Wn.2d. 509, 379 P.2d 178 (1963) | 25 |
| <u>Cummins v. Lewis County,</u> 156 Wn.2d 844, 133 P.3d 458 (2006) | 21 |
| <u>Evangelical United Brethren Church of Adna v. State,</u> 67 Wn.2d 246, 407 P.2d 440 (1965) | 48 |
| <u>Honcoop v. State,</u> 111 Wn.2d 182, 759 P.2d 1188 (1988) | 21,45 |
| <u>King v. Seattle,</u> 84 Wn.2d 239, 525 P.2d 228 (1974) | 48 |

| | |
|-----------------------------------------------------------------------------|--------|
| <u>Mason v. Kenyon Zero Storage,</u> 71 Wn.App. 5, 856 P.2d 410 (1993) | 23 |
| <u>Moore v. Wayman,</u> 85 Wn.App. 710, 934 P.2d 707 (1997) | 40 |
| <u>Mull v. Bellevue,</u> 64 Wn.App. 245, 823 P.2d 1152 (1992) | 45 |
| <u>Noakes v. City of Seattle,</u> 77 Wn.App. 694, 895 P.2d 842 (1995) | 44,46 |
| <u>Osborn v. Mason County,</u> 157 Wn.2d at 18, 134 P.3d 197 (2006) | 48 |
| <u>Smith v. Kelso,</u> 112 Wn.App. 277, 48 P.3d 372 (2002) | 39 |
| <u>Taylor v. Stevens County,</u> 111 Wn.2d 159, 759 P.2d 447 (1988) | 38,39 |
| <u>Waite v. Whatcom County,</u> 54 Wn.App. 682, 775 P.2d 967 (1989) | passim |
| <u>Williams v. Thurston County,</u> 100 Wn.App. 330, 997 P.2d 377 (2000) | 45 |
| <u>Zimbelman v. Chaussee Corp.,</u> 55 Wn.App. 278, 777 P.2d 32 (1989) | 39,40 |
| <u>STATUTES AND RULES</u> | |
| RCW 4.96.010 | 20,47 |
| RCW Ch. 19.27 | 7 |
| RCW 19.27.110 | 25 |
| RCW 19.27.020 | 6 |

| | |
|-------------------------------------------------------------------------------------------------------------------------------|--------|
| RCW 19.27.031 | 6 |
| RCW 19.27.031(5) | 7 |
| RCW 19.27.050 | 7,25 |
| <u>OTHER</u> | |
| International Mechanical Code (2006) | 7 |
| International Residential Code (2006) | passim |
| International Fuel Gas Code (IFGC) §404.16 | 13 |
| Liquefied Petroleum Gas Code (2004) (NFPA 58) | 7 |
| Mark Mclean Myers, "A Unified Approach to State and Municipal Tort Liability in Washington" 59 Wash. L. Rev. 533 (1984) | 47 |
| National Fuel Gas Code (2006) (NFPA 54) | passim |
| Yakima County Ordinance No. 3-2007 | 6 |
| 199360 | |

I. INTRODUCTION

Yakima County required Conrad Pierce to obtain permits so that a propane gas contractor could install a propane gas fuel system to heat his rented home. The County required the new installation of the mechanical gas system to pass inspections by a County Building Inspector and Deputy Fire Marshal before Mr. Pierce could use it. The County issued a final inspection approval under its permits allowing the operation and use of the propane gas system after it was connected by the contractor to the interior of Mr. Pierce's home. However, the County Inspectors admit they had not verified that code mandated inspections and testing had been done to any of the interior piping in the system to ensure that there were no dangerous uncapped gas pipes or gas leaks. When Mr. Pierce used the system for the first time after final inspection by the County, an uncapped pipe in the attic caused fugitive propane gas to escape into the home's attic. The highly flammable propane gas exploded, severely burning Mr. Pierce and destroying the home.

The applicable Washington State Building Codes prohibited connection of the propane gas fuel source to the interior of Mr. Pierce's home before necessary safety inspection and testing has been done. Numerous life safety code provisions required mandatory testing and inspection of the entire piping system, in order to ensure that the propane

system was "gas tight" and therefore safe. The codes require that County Building Officials enforce all of these essential life safety and fuel gas code provisions, and prohibit final approval for connection and use of a gas system until the mandatory safety inspection and testing has been performed and verified. The required testing and inspection was not done. The County admits that it did not enforce these mandatory fuel gas code provisions for inspection and testing. Nevertheless, the County asserted that the public duty doctrine immunized it from liability for its negligence in causing the explosion and fire, arguing that Mr. Pierce could not establish either the "failure to enforce" or the "special relationship" exceptions as a matter of law.

The trial court incorrectly found that the "failure to enforce" exception did not apply because the County was not required to take "specific corrective action" when it observed dangerous code violations. The trial court also incorrectly found that the specific interaction between Mr. Pierce and the County Inspector, who informed Mr. Pierce the system had passed final inspection and was ready to use, did not create a "special relationship" giving rise to an individual duty.

The trial court's ruling so narrowly defined the "corrective action" element of the failure to enforce exception that a municipal government would never be liable for its failure to enforce mandatory state building

codes. Yakima County and Washington State Building Codes did mandate "corrective action" by requiring County inspectors to enforce the code provisions mandating verification, testing and inspection to ensure there were no leaks in the gas piping system. Building officials were required to "make or cause to be made" all necessary inspections, and then either approve the installation or notify the permit holder of any non-compliance with the codes. The codes prohibited any connection of the fuel gas source to the house or use of the gas system until that testing and inspection had been verified. The inspectors could not finally approve a gas system without enforcing the testing and inspection requirements. Thus, the "corrective action" was to either enforce the testing and inspection or to withhold final approval. The building inspectors here did not make or cause to be made the necessary inspections, did not notify the resident permit holder of any non-compliance, but instead issued a final approval of the system; this constituted a failure to take corrective action mandated by the statutes. Any more narrow reading of the elements of the failure to enforce exception defies both common sense and legislatively enacted community safety code standards.

Moreover, the County Inspector's discussions with Mr. Pierce raised a jury question on the special relationship necessary to create an individual duty. The inspector told Mr. Pierce directly that all necessary

tasks had been completed, the propane system had passed final inspection, the gas piping could be covered, and, referring specifically to the propane system he was there to inspect: "It looks like everything is done. You are good to go", i.e. the permitted gas mechanical system is "completed and ready for use." (Appx. p. 1, Ex. 61, CP 615) Mr. Pierce reasonably believed those assurances that the newly installed, connected propane gas system and fuel source was operational and could be safely used. This individual contact and communication created an individual duty between the inspectors and Mr. Pierce.

Finally, interpreting the public duty doctrine in such a narrow fashion as to allow the County to escape accountability for its negligent performance of code mandated duties to Mr. Pierce illuminates the need for abandonment of the public duty doctrine.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to Yakima County finding that the public duty doctrine immunized the County for its negligence.

2. The trial court erred in denying Conrad Pierce partial summary judgment establishing Yakima County's liability for breach of duty to enforce code provisions which proximately caused Mr. Pierce's damages.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in finding that the County had no duty to take corrective action to verify, perform, or enforce the mandatory testing and inspection requirements for the propane gas system as required by residential fuel gas codes before issuing a final inspection approval?

2. Did the trial court err in finding that no special relationship existed sufficient to establish the County's duty to Mr. Pierce when the County issued a final approval for a permitted propane gas system, told him the system was "good to go" and that everything necessary had been done, and signed off on County Inspection Record Cards issuing final inspection approval confirming the propane gas system was "completed," operational and "ready for use"?

3. Did the trial court err in continuing to apply the public duty doctrine to immunize the County from liability when its inspectors failed to verify, test, or inspect a propane gas system in accordance with code provisions, and instead issued final inspection approval for use of that system which caused an explosion and fire, horribly burning Mr. Pierce?

4. Did the trial court err in denying partial summary judgment to Mr. Pierce when it was undisputed that the County failed to enforce mandatory code provisions?

IV. STATEMENT OF THE CASE

A. Facts.

Mr. Pierce rented a home located at 411 Bowers Road, Yakima County, Washington. (Pierce Dep., CP 966 - 967) The County issued Mr. Pierce a Mechanical Permit MEC 2007-00440 and Fire Code Permit FCP 2007-00276, on August 24, 2007, for installation of a liquefied petroleum (propane) above ground, 120 gallon tank and gas piping. (Exs. 57, 53, CP 896; 611)

The installation of the new tank, equipment and piping was performed by All American Propane, Inc. (AAP) on August 30, 2007, pursuant to a written Propane Gas Service Agreement. (Ex. 32, CP 608) The propane tank, pressure regulator, valves, gauge, piping and propane were installed by AAP approximately 60 feet from the home. AAP connected the newly installed piping from the pressurized tank and operational gas fuel source to the home without approval of the building official. CP 060.

The County adopted Washington State Building Codes to establish the necessary inspections and testing for a propane gas system including gas piping. RCW 19.27.020; 19.27.031 ("...there shall be in effect in all counties and cities the state building code"); Yakima County Ordinance No. 3-2007. Specifically, the County adopted the following

State mandated codes: the International Residential Code (2006) (IRC); the International Mechanical Code (2006) (IMC), except that standards for liquefied petroleum gas (propane) installations shall be the National Fuel Gas Code (2006) (NFPA 54); the Liquefied Petroleum Gas Code (2004) (NFPA 58); and the International Fire Code (2006) (IFC). Id.¹

Numerous statutory provisions exist requiring specific action to enforce these codes by County officials. The State Building Codes legislated under RCW Ch. 19.27 "shall be enforced by the counties and cities". RCW 19.27.050. Under the IRC, the Building Official is "**directed to enforce the provisions of this code**". IRC §R104.1, CP 274. The Building Official in turn designates a Building Inspector, Fire Marshall and Deputy Fire Marshall to enforce the codes. IRC §R103.3, CP 273 - 274.

The duties and powers of the Building Official set forth in the IRC require that he or she "**enforce compliance**" with the provisions of the IRC and "**shall**" inspect the "**premises**" for which permits have been issued as follows:

¹ All codes are equally applicable if there is no conflict in provisions. RCW 19.27.031(5). The IRC was utilized by the Yakima County Building Inspector and incorporates the provisions of NFPA 54 in IRC Ch. 24, "Fuel Gas". Relevant portions of the IRC Code and Official Commentary (◊) cited herein are found at CP 266 – 312. Relevant provisions of the NFPA 54 Code and Handbook (◊) cited herein are found at CP 313 – 328.

The building official shall receive applications, review construction documents and 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.

◇ This section states that the building official must receive applications, review construction documents, issue permits, conduct inspections and enforce the provisions of this 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 code must be met, and approval will be granted only when compliance is verified. (Emphasis added.)

IRC §R104.2 Code and Commentary, CP 274. Building Officials "**shall** issue all necessary notices or orders to ensure compliance with this code".

IRC §R104.3, CP 274. The official Commentary to IRC §104.3 states:

◇ Building officials are to communicate in writing the disposition of their findings regarding code compliance. If an inspection shows that the work fails to comply with the code provisions, the building official or technical officer who conducted the inspection must issue a written report noting the corrections that are needed. A copy of the report is to be provided to the permit holders or their agent.

(CP 274)

The Building Official is provided with the right of entry to buildings and structures for purposes of inspection and enforcement.

IRC §R104.6, CP 275. Building Officials are also required to make all necessary inspections:

Types of Inspections. For onsite construction, from time to time the building official, upon notification from the permit holder or his agent, **shall** make or cause to be made any necessary inspections and **shall** either approve that portion of the construction as completed or **shall** notify the permit holder or his or her agent wherein the same fails to comply with this code. (Emphasis added)

IRC §R109.1, CP 284.

No connection of a fuel source is to be made to a home until the County has conducted the necessary inspections, verified required testing, and approved the system. IRC §R111.1 provides:

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)

(CP 287)

The official Commentary to IRC §R111.1 states:

◇ 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 IRC, applicable to one and two family dwellings, establishes the obligations for inspections and testing; the IRC requires:

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 Section G2417.²

◇ 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 (Emphasis added).

IRC §G2415.16, CP 305; Ex. 271, CP 628.

The codes established several requirements for testing and inspection of propane gas systems to ensure the entire piping system is "gas tight" and safe. A "**piping system**" is specifically defined by the IRC and NFPA 54 as "all fuel piping, valves, and fittings from the outlet of the point of delivery to the outlets of the equipment shutoff valves". IRC §G2403, Ex. 274, CP 631; NFPA §3.3.98.6, Ex. 146, CP 623. Thus, the piping system here ran from the pressure regulator (point of delivery) installed on the propane tank, to the furnace shut off valve in the home.

The IRC requires:

² The IRC includes requirements that are essentially identical to NFPA 54 §8.1.1.1, 8.2.2 and 8.2.3, which require that "all piping installations shall be inspected and pressure tested" to determine compliance with code requirements requiring pressure tests, leak tests, and inspections to determine there are no open valves or uncapped pipes. See, IRC §§G2417.1, 2417.6.2, 2417.6.3, CP 306, 311; Exs. 272, 273, CP 629, 630.

Inspection, Testing and Purging

G2417.1 General. Prior to acceptance and initial operation, **all piping installations shall be inspected and pressure tested³ to determine that the materials, design, fabrication, and installation practices comply with the requirements of this code.** (CP 306)

...

G2417.6.2 Before turning gas on. Before gas is introduced into a system of new gas piping, **the entire system shall be inspected** to determine that there are no open fittings or ends and that all valves at unused outlets are closed and plugged or capped. (CP 311)

G2417.6.3 Leak check. Immediately after the gas is turned on into a new system or into a system that has been initially restored after an interruption of service, **the piping system shall be checked for leakage.** Where leakage is indicated, the gas supply shall be shut off until the necessary repairs have been made. (CP 311) (Emphasis added.)

All of these corrective enforcement requirements are the "necessary inspections" which the Building Official is to "make or cause to be made" before final approval. IRC §R109.1, CP 284. The statutory duty of building officials is further underscored by the authority and obligation the Building Official to disconnect a fuel source that does not comply with the code provisions:

³ Pressure test is defined as "an operation performed to verify the gas-tight integrity of gas piping following its installation or modification." IRC §G2403, Ex. 274, CP 631; NFPA §3.3.81, Ex. 142, CP 622 (Emphasis added)

Authority to disconnect service utilities. The building official shall have the authority to authorize disconnection of utility service to the building, structure or system regulated by this code...where necessary to eliminate an immediate hazard to life or property or when such utility connection has been made without the approval required by Section R111.1 or R111.2.

IRC §R111.3, CP 288.

Again, the official Code Commentary to IRC §R111.3 establishes that the hazard exists and disconnection should occur for safety "when the utility service has been connected without the necessary approvals required by the code". (CP 288)

In accordance with code requirements, the County was contacted to inspect the newly installed propane fuel gas system at Mr. Pierce's home. On September 4, 2007, Yakima County Building Inspector Granstrand and Yakima County Deputy Fire Marshal Rutherford went to Mr. Pierce's home. Yakima County's Permit Services Inspection Record Cards mirrored the requirements of the IRC, and required the Building Official and Fire Marshal to make a **Final Inspection**, and defined it as the inspection "**To be made after the mechanical system is completed and ready for use.**" (Appx. pp. 1-3, Ex. 61, 54, 55, CP 615, 613, 612; IRC §R109.1.6, CP 285) The Mechanical Code Permit Services Inspection Record Card also provided that "Required Inspections" included:

Gas piping. All portions of the gas piping from the meter 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)

Appx. p. 1, Ex. 61, CP 615.

The County's Fire Code Permit Services Inspection Record Card similarly required inspection not only of the fuel tank, but also: "**Fuel/Hazardous Material Piping**" To be made after permit issuance. Includes pressure testing, dispensing and signage." (Appx. p. 2, Ex. 55, CP 613)

Despite these mandatory requirements for connection of a fuel gas source and for inspection and testing, Inspector Granstrand and Deputy Fire Marshal Rutherford admitted they did not enforce the code provisions, or verify or require testing or inspections. (Granstrand Dep., CP 140-142, 146, 133, 128-129, 119; Rutherford Dep., CP 173-176, 167, 162, 159; IRC §G2415.16 (International Fuel Gas Code (IFGC) §404.16), Ex. 271, CP 628)

Instead of enforcing the testing and inspection requirements, or notifying Mr. Pierce that the installation did not comply with the codes because of the lack of required tests and inspections, the inspectors initialed both Mechanical and Fire Inspection Record Cards as "Final" on

the same day, September 4, 2007. At his only visit to the permit premises, Mr. Granstrand told Mr. Pierce that the propane installation had passed inspection, the piping could be covered in the trench and "It looks like everything is done. You are good to go." (Appx. pp. 1-3, Exs. 61, 54, 55, CP 615, 613, 612; Pierce Aff., CP 505 – 521; Pierce Dep., CP 962 - 965; Granstrand Dep., CP 139) Pursuant to IRC §G2415.16 (CP 305) and the County's own Inspection Record Cards, connection of the gas fuel source to the home, final inspection approval, and permission to conceal the piping must have only one meaning: that the entire piping system has been inspected and tested to ensure that it is "gas tight" and that it is ready for use. (IRC §R111.1, CP 287; Appx. pp. 1-3, Exs. 61, 55, 54, CP 615, 613, 612 Rutherford Dep., CP 162 - 163)

After failing to correct the lack of the mandatory inspections and tests, the inspectors further failed to take the mandatory action of informing Mr. Pierce of the non-compliance and refusing to approve the system for use. They instead issued final approval of the system, told Mr. Pierce that the system had passed final inspection and was "good to go," knowing that the following dangerous code violations existed:

1. Connection of an operational propane gas fuel source and system without **prior approval and verification** by the Building Official that **all conditions for the connection and safety requirements** for the installation had been **met**

and verified by required inspections.
IRC R111.1, CP 287

2. Connection of an operational propane gas fuel source and system without **testing** to ensure the entire system of piping is **gas tight** (free of dangerous leaks). IRC G2415.16, CP 305
3. Connection of an operational propane gas fuel source and system without **compliance with IRC G2417 for testing, inspection and purging** of the gas piping system. IRC G2415.16, CP 305
4. Connection of an operational propane gas fuel source and system without a **pressure test** of the entire piping system. IRC G2417.1, et seq., CP 306-311
5. Connection of an operational propane gas fuel source and system without an **inspection** of the entire piping system for **uncapped pipes**. IRC G2417.6.2, CP 311
6. Connection of an operational propane gas fuel source and system without a **leak check or leak test** of the entire piping system. IRC G2417.6.3, CP 311

The building inspectors observed these dangerous and hazardous code violations which ultimately resulted in a flammable and explosive gas escaping through an uncapped pipe into the attic and exploding into fire. Granstrand Dep., CP 143-144; Frank Mellas Aff., CP 600; CP 596-605; Douglas C. Buchan Aff., CP 553-561.

On October 4, 2007, relying upon the approval and inspection of the propane installation by the County Inspector and Deputy Fire Marshal,

and the installation of the propane system by gas contractor AAP, Mr. Pierce opened the gas valves as shown and instructed by the AAP installers. He then attempted to start the propane furnace previously installed and used in the residence prior to Mr. Pierce's occupancy as a tenant. (Pierce Aff., CP 505–521; Pierce Dep., CP 958–960) The furnace is started by pushing a button. Unknown to Mr. Pierce, an uncapped gas pipe existed above the ceiling of the home at Bowers Road, which allowed highly flammable, explosive and hazardous propane gas to escape into the attic and down the walls of the concrete block house. Shortly after attempting to start the furnace, a fireball of gas exploded in the home, rolled over Mr. Pierce in the kitchen, and the structure burst into flames. The explosion and fire destroyed the home and caused extensive third degree burns over more than 50% of Mr. Pierce's body, including his face, ears, head, arms, back, and hands. He was transported by ambulance to Yakima Valley Memorial Hospital Emergency Room and then by air ambulance to Harborview Medical Center where he remained hospitalized until December 31, 2007.

The proximate cause of the fire and explosion on October 4, 2007, was an open, uncapped pipe in the gas piping system, downstream of the modification and installation of the connected propane fuel source, which had been given final inspection approval and certified as completed and

ready for use by the County. (Lewis Aff., CP 633-642) The County is responsible for its breach of duty to verify that inspection and testing of the propane installation was performed in accordance with the applicable residential and fuel gas codes, and its failure to correct those violations by demanding they be performed before issuing a final approval. The County's negligence was a proximate cause of the severe, permanent and disfiguring burn injuries and harm to Mr. Pierce.

B. Procedural Facts.

The public duty doctrine issues first came before the trial court on cross motions for summary judgment. Mr. Pierce established through deposition testimony of the County Inspector and Deputy Fire Marshall that the specific, mandatory code sections regarding testing and inspection of the entire gas piping system prior to connection of the operational fuel gas source to the home and prior to final inspection were admittedly neither performed nor enforced by the County.

In initially denying both Mr. Pierce's and the County's motions for summary judgment by Order dated August 19, 2009 (CP 1068-1072), the trial judge agreed that material issues of fact existed regarding exceptions to the public duty doctrine. In its Letter Opinion dated July 31, 2009 the trial court addressed the failure to enforce exception and stated:

The Plaintiff identifies the "statutory violation" as the connection of the propane tank to the interior piping. And Plaintiff further asserts the County failed to take corrective action by not requiring leak testing of the entire system, interior and exterior, before approving the installation of the propane tank and delivery system. Had the testing been done, the uncapped pipe in the attic would have been discovered and the fire avoided.

Based upon my view of the proffered evidence, I believe material facts germane to the county's liability remain unresolved. Therefore, I am denying Yakima County's Motion for Summary Judgment.

(CP 206-207)

Yakima County's Motion for Reconsideration was also denied by the trial court on September 28, 2009. (CP 410-411)

On April 12, 2010, less than two months before trial, the trial court reversed its denial of summary judgment by ruling on Yakima County's Motion for Clarification Regarding Any Disputed Factual Issues and for Declaration by the Court as to IRC Provisions. This erroneous decision was made without any new factual evidence and was based on the single, narrow legal issue of "whether the code mandated corrective action by the Building Official." CP 060. The trial court concluded:

In the present case, the Plaintiff has delineated a number of instances in which the Yakima County building officials either failed to observe violations of the International Residential Code or observed such violations, but took no action. Looking at the proffered facts in the light most favorable to the Plaintiff and without specific reference to the code sections, the evidence could support a finding that

at least the following violations were apparent at the time of the inspection: (1) introduction of propane into the system before approval; (2) the use of propane as the testing medium on the leak test; (3) and the connection of the filled storage tank to the house without inquiry as to the integrity of the interior piping. Coffel v. Clallam County, 58 Wn. App. 517, 523, 794 P.2d 513 (1990) [knowledge of facts constituting a violation is sufficient to satisfy second prong of the test], Waite v. Whatcom County, 54 Wn. App. 682, 775 P.2d 967 (1989) ["circumstantial evidence may support a finding of actual knowledge."]

However, the critical issue is not whether there were code violations which were ignored or passed over, but whether the code mandated corrective action by the Building Official. ...

...

In the Court's view, these enforcement sections of the applicable code do not create a mandatory duty to take specific action. They are thus inadequate to support application of the failure to enforce exception.

CP 060, 062.

The court also found that the communication between Mr. Pierce and County officials was insufficient to create a special relationship to establish the County's duty to Mr. Pierce. (CP 10-18)

On April 30, 2010, upon entering the Order Granting Summary Judgment to Yakima County (CP 19-22), reversing its prior rulings on both the failure to enforce and special relationship exceptions, the trial court stated:

I tried very hard in this case to glean and divine the rule of decision in regard to the exception to the public duty

doctrine, and I think I have correctly applied the law as it exists at this moment to the facts in this particular case.

And I understand it's going to be going up on appeal and that certainly is appropriate to do so. And I, I fully expect that this case will come back, because I think that the appellate courts of this state and perhaps most particularly the state Supreme Court is probably going to either make a new rule of decision or disagree with my assessment of what the rule is. So, you know, I don't want to confess my, that my, what would be the term, I would guess, that I doubt my, the validity of my ruling, I do think I'm right but I don't think I'm going to be right for that long, so.

RP 5-6.

Mr. Pierce has now appealed the grant of summary judgment dismissing his claim against the County, and the denial of his motion for partial summary judgment on liability. CP 7-18

V. ARGUMENT

Local governmental entities, whether acting in a governmental or proprietary capacity, are liable for damages arising out of their tortious conduct, to the same extent as if they were a private person or corporation. RCW 4.96.010. Thus, counties are not sovereignly immune from their negligent conduct, but are simply subject to the legal analysis of whether a duty exists; this requires a threshold determination of whether a duty of care is owed by the defendant specifically to the plaintiff, as opposed to a duty owed to the public in general. Babcock v. Mason County Fire District No. 6, 144 The public duty doctrine is simply an analytical tool

for determining whether a governmental duty is "one owed to the nebulous public or...to a particular individual". Honcoop v. State, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988).

The "original function" of the public duty doctrine was a "focusing tool" that helped determine to whom a governmental duty was owed under basic tort principles; it was not meant to create a back door expansion of sovereign immunity. Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006) (Justice Chambers concurring). The Washington Supreme Court has recognized that the basic tort principles of duty, foreseeability and pertinent public policy are applied to find exception to the public duty doctrine. Bailey v. Town of Forks, 108 Wn.2d 262, 737 P.2d 1257 (1987) ("we have almost universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff's lawsuit"). The analysis of whether liability attaches includes a determination of whether the governmental agent failed to take care "commensurate with the risk involved." Bailey, 108 Wn.2d at 261.

To establish the existence of an individual duty by a county for its breach of a governmental duty, one of the exceptions to the public duty doctrine must exist. If an exception to the public duty doctrine applies, then the municipality owes a specific duty to the plaintiff, the breach of

which is actionable. Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992). In this instance, Conrad Pierce presented evidence of two exceptions: The "failure to enforce" exception, and the "special relationship exception". The court narrowly construed these two exceptions, and failed to correctly analyze the duties owed by the County, incorrectly dismissing Mr. Pierce's case as a matter of law.

Under a correct analysis of these exceptions, Mr. Pierce either established as a matter of law the existence and breach of a duty by the County to properly verify, enforce, and test the new propane system connected to the interior of his home before issuing a final approval to allow operation of that system, or he created an issue of fact necessitating trial. The trial court erred when it failed to find a statutory duty to take corrective action contained in the County fuel gas codes sufficient to establish the failure to enforce exception, and by too narrowly interpreting the "corrective action" prong of the exception to the public duty doctrine. Moreover, the trial court erred when it failed to find an issue of fact under the special relationship exception. The trial court further erred in continuing to apply the public duty doctrine to immunize the County for its negligence.

Because this appeal stems from a grant and denial of summary judgment, this court's review is de novo, and it can independently analyze

whether issues of fact exist and whether one party is entitled to judgment as a matter of law. Mason v. Kenyon Zero Storage, 71 Wn.App. 5, 856 P.2d 410 (1993).

A. The trial court was incorrect in finding that no individual duty existed to Mr. Pierce based on the County's failure to enforce state fuel gas codes.

The failure to enforce exception establishes a county's duty to an individual where governmental agents responsible for enforcing statutory requirements possess actual knowledge of facts constituting a statutory violation, failed to take corrective action, and plaintiff is within the class the statute is intended to protect. Waite v. Whatcom County, 54 Wn.App. 682, 775 P.2d 967 (1989). The trial court correctly found that: (1) Yakima County building inspectors were agents responsible for enforcing the codes; (2) sufficient evidence existed regarding their knowledge of facts constituting statutory violations creating a dangerous condition; and (3) plaintiff was within the class the statute was intended to protect. However, the trial court incorrectly found that there was no requirement that the County take "statutory" corrective action, and thus found the exception did not apply as a matter of law. Plaintiff presented sufficient evidence of the County's duty to take corrective action under the relevant codes, and the trial court's interpretation of that element of the failure to enforce exception was improperly narrow, and should be reversed.

1. The statutory fuel gas codes require County inspectors to enforce inspection and testing code provisions, which constitute mandatory corrective actions.

The facts and law presented established that the County had a statutory duty to take the corrective actions of enforcing the mandatory testing and inspection of the entire gas piping system, and withholding final approval of the system absent such tests and inspections. Statutes and codes mandated that the County's Building Officials enforce all provisions of the Code, specifically its inspection obligations. The County had no discretion which allowed it to issue final approval before all such testing and inspection had been done. When it observed facts constituting violations, it was statutorily required to notify the resident permit holder of the non-compliance and to refuse to issue a final approval. The County had no choice but to take these corrective actions.

Unlike many statutory enactments that outline various obligations and create duties to generally be followed by all people to whom they apply, the fuel gas codes contain somewhat unique and specific direction to building officials to take the actions necessary to enforce the code provisions. While the trial court incorrectly dismissed these provisions as merely prefatory, and not statutory direction to take corrective action, that analysis would render all of these provisions meaningless, and no statute

may be construed to ignore any of the written provisions. Commercial Waterway Dist. No. 1 of King County v. Permanente Cement Co., 61 Wn.2d. 509, 524, 379 P.2d 178 (1963). Other statutory schemes require more direct statements of a duty to correct because they do not identify the governmental official charged with the obligation to enforce all provisions at the outset. Here, the building officials are so identified, and their obligation to inspect and enforce compliance with the code provisions established by statute, which sufficiently established the mandatory statutory duty to take corrective action.

As outlined in the facts, the state building, fire, and fuel gas codes require the counties and cities to enforce their provisions. RCW 19.27.050, RCW 19.27.110. Building Officials are "**directed to enforce the provisions of this code**", and must in turn designate a Building Inspector, Fire Marshall and Deputy Fire Marshall to enforce the codes. IRC §R104.1, IRC §R103.3, CP 273-274.

The Building Official is then directed to enforce specific provisions of the code; he or she "**shall**" inspect the "**premises**" for which permits have been issued and "**enforce compliance**" with the provisions of the code, and "**shall** issue all necessary notices or orders to ensure compliance with this code". IRC §R104.2, (CP 274), IRC §R104.3, CP 274.

Then, the code establishes the specific course of action the Building Official must take to enforce the code:

Types of Inspections. For onsite construction, from time to time the building official, upon notification from the permit holder or his agent, **shall** make or cause to be made any necessary inspections and **shall** either approve the portion of the construction as completed or **shall** notify the permit holder wherein the same fails to comply with this code. (Emphasis added)

IRC §R109.1, CP 284.

This code section alone identifies very specific corrective action the building inspectors were required to take at Mr. Pierce's home; they were required to make or cause to be made "any necessary inspections," of which there were many (pressure test, leak check/leak test, inspection for uncapped pipes). They were then required to either notify Mr. Pierce of the non-compliance or not approve the system. The Building Officials were thus instructed on the exact corrective action to take in the event non-compliance with code provisions was observed; they had a direct duty to Mr. Pierce to tell him the system could not be used, or that it could. The County's assertion (and the Court's ruling) that this does not constitute a statutorily required corrective action defies logic. Following the County's argument to its conclusion, the County could fail to enforce the codes, observe dangerous code violations, and finally approve a dangerous propane gas system for a resident permit holder's use, because

nothing in the statute specifically said "if you find a gaping hole, leaking propane gas, you must stop the system from being used." The court must instead read the statute reasonably to mandate enforcement, inspection, verification of testing, and establish the corrective action if violations were observed: tell Mr. Pierce the system does not comply because the necessary inspection and testing has not been performed, and withhold final approval.

Here, multiple code violations were observed triggering the duty to Mr. Pierce to tell him the system was in non-compliance and could not be used. First, the Code prohibits any connection of a source of fuel, in this instance propane, until a "building official" has approved the system. IRC §R111.1, CP 287. Because of the high danger, the Building Official is directed to control that connection to ensure that prior to such connection, all code required safety conditions have been met and **verified** by inspections. IRC §R111.1, official Commentary, CP 287. This code provision underscores the necessity of requiring the testing and inspection before approval. The gas fuel source cannot be connected until the inspector approves it. If approval is simply a rubber stamp with no requirements for testing or inspection on the part of the inspectors, why would the code prohibit connection before an inspector was able to review the work and approve it? The obvious answer is because the inspector has

a duty to correct any failure to perform testing and inspection requirements, and he or she cannot allow connection of a dangerous propane system for use until testing and inspection are successfully accomplished verifying a "gas tight" system.

However, here, on August 30, 2007, a gas fuel source was connected to Mr. Pierce's home without approval of the Building Official in direct violation of this code. On September 4, 2007, defendant's Building Inspector saw the connection constituting the violation of the code and failed to take any corrective action, which should have been to require and verify compliance with all of the necessary testing and inspections on the entire piping system, including the interior pipes at Mr. Pierce's home. The County inspectors admit that they saw that the propane fuel source was connected to Mr. Pierce's home on their arrival to perform inspections. They admit they did not verify or require any testing on the interior piping, although the connection created a "system" of propane gas service, triggering inspection and testing requirements from the tank to the furnace. Those inspectors had no idea where the propane was flowing to on the other side of the exterior wall. They admit they did not tell Mr. Pierce the system did not comply with the code, but instead finally approved it as operational.

The codes also required that a final inspection **shall** be made only after the permitted work is complete, and the inspection record cards being utilized by the County officials similarly required them to make the required inspections and either approve the work or notify of deficiencies which must be corrected; "Final Inspection" for this installation was defined as a **"Required Inspection" "To be made after the mechanical system is completed and ready for use"**. Appx. p. 1, Ex. 61 CP 615; IRC §R109.1.6, CP 285.

All of these corrective enforcement requirements are further underscored by the authority and obligation the Building Official to disconnect piping that does not comply with the code provisions. IRC §R111.3, CP 288. Again, the official Code Commentary to IRC §R111.3 instructs the building official that a hazard exists necessitating disconnection "when the utility service has been connected without the necessary approvals required by the code".

To enforce code compliance, the Building Official is also mandated to issue "Stop Work Orders", and Notices of Correction or Violation, which can be prosecuted. IRC §R104.3, CP 274; IRC §R114.1; IRC §R113.2., CP 290. The trial court here found sufficient evidence of issues of fact that the Building Inspector had actual knowledge of code violations that created a dangerous condition. CP 060. When such a

condition is found, the County officials had a mandatory obligation to enforce the codes, make or cause to be made inspections, disconnect piping where necessary to protect human life or property, inform the resident permit holder of the non-compliance, and withhold approval so the system could not be used. Here, the County Building Officials took no corrective action, even though on notice.

Moreover, virtually every applicable inspection and testing code provision requires that fuel gas piping and system inspections or tests "shall" be made, eliminating discretion, and mandating a specific action; these actions constitute statutorily directed corrections that must be made or cause to be made and verified before any approval of the system can be made by the building officials. Numerous applicable code provisions require testing and inspections of the **entire piping system**, from tank to appliance shut off valve, that "shall" be enforced:

- (a) Before any "piping system" is put in service or connected, it "shall" be tested to ensure that it is gas tight. IRC §G2415.16, CP 305.
- (b) All testing, inspection and purging of the gas "piping system" "shall" comply with IRC §G2417. IRC §G2415.16, CP 305.
- (c) All piping installations "shall" be inspected and pressure tested to determine that installation practices comply with the requirements of the IRC. IRC §G2417.1, CP 306.

- (d) The "piping system" "shall" withstand the required test pressure without any evidence of leakage or other defect. IRC §G2417.5, CP 310 - 311.
- (e) Where gas leakage or other defects exist, the affected portion of the "piping system" "shall" be repaired or replaced and retested. IRC §G2417.5.2, CP 311.
- (f) Appliance disconnection and valve isolation: where the "piping system" is connected to appliances or equipment, the appliances or equipment "shall" be disconnected or isolated from the piping system by closing and capping the appliance shutoff valves. IRC §G2417.3.3, IRC §G2417.3.4, CP 307 - 308.
- (g) Only an inert gas "shall" be used for a pressure test. Propane gas or other flammable gas "shall not be used." IRC §G2417.2, CP 307.
- (h) The entire propane gas "system" "shall" be inspected to determine there are no open fittings or ends and that all valves at unused outlets are closed and plugged or capped. IRC §G2417.6.2, CP 311.
- (i) Where a propane gas system has been initially restored after an interruption of service, the "piping system" "shall" be checked/tested for leakage. IRC §G2417.6.3, CP 311.

When a code provision requires that a jurisdiction "shall" take an action, it is a mandatory directive and the public entity so charged may not exercise discretion to ignore those provisions. City of Wenatchee v. Owens, 145 Wn.App. 196, 185 P.3d 1218 (2008). "Shall" is also defined by the applicable codes as required mandatory action. IRC §R202, CP 296; NFPA 54 §3.2.5. Thus, when the applicable codes provide that

inspections or testing "shall" be done, and Building Officials "shall" enforce the provisions, the inspections are mandatory; the Building Officials "shall make or cause to be made" the necessary inspections. The corrective action required under the codes is to enforce testing and inspections, inform the resident permit holder if they have not been made, and withhold final approval until they have been accomplished. IRC R109.1, CP 284.

Here, once the County was notified that the system was ready to be inspected, it failed to take the statutorily corrective action of enforcing the inspection and testing requirements and withholding final approval until such tests had been successfully accomplished and verified, or ordering the system disconnected. The County building officials encountered a new gas fuel source already connected to the interior piping of the home without approval. The officials neither made or caused to be made any testing or inspection to ensure the **system** was gas tight, leak checked, free of uncapped pipes or properly pressure tested. As a result, they did not discover the leak, nor did they take the action of disconnecting the fuel gas source, or requiring repair before approval. The inspectors did not notify the permit holder, Mr. Pierce, that the system did not comply with the code. They did not take any corrective action when they found that the fuel source was connected to the house before they had approved it. They

did not withhold final approval to Mr. Pierce to use the system. These failures to take the statutorily mandated action before approval establish the failure to enforce exception which created the individual duty to Mr. Pierce sufficient to support his claim against the County for its negligence.

2. The trial court incorrectly interpreted the statutory obligation to take corrective action.

Despite all of the provisions requiring building official enforcement of code provisions, the requirements for verification of testing and inspection, the requirements for notification to the resident permit holder of non-compliance before final approval, and the authority to disconnect piping where necessary to prevent danger, the court was "unable to find a statute which dictates a mandatory duty to take a specific action to correct the code violations". That narrow interpretation of the corrective duty requirement would virtually gut the failure to enforce exception. Proper analysis of the "corrective action" prong of the failure to enforce provision establishes that the building officials did not have a choice on whether to enforce all of the relevant provisions before issuing final approval. They were required to enforce the testing and inspection requirements, notify the resident permit holder of deficiencies, or refuse to issue an approval thereby preventing use of the system.

The failure to enforce exception must be analyzed in relation to its purpose - - whether there a basis for an individual duty between the County and the homeowners. Under the fuel and gas code, the inspectors are required to go directly to individual homes, and have statutory obligations to communicate any problems with fuel gas systems directly to the resident permit holder. The resident permit holder may not use the fuel system until the Building Official gives him or her final approval to do so. The codes create individual responsibilities between the County and individual residents and permit holders.

Moreover, the overarching concept of duty requires analysis of the risk - - duty must be determined commensurate with that risk. See, Bailey, supra. The risk here is extremely high when the governmental duty addresses the use of dangerous propane gas fuel. The state has required counties to enact the fuel gas codes in direct recognition of the high risk they present. Individual permits are required and inspectors hired to reduce the risk of unsafe gas installations. The County's duty to enforce the codes is not an over burdensome one in relation to the potential for the exact type of harm Mr. Pierce suffered.

Other courts recognize the "corrective action" prong of its failure to enforce exception does not present the insurmountable bar which the trial court here established. In fact, the trial court's interpretation of the

statutory duty is inconsistent with Waite v. Whatcom County, 54 Wn.App. 682, 775 P.2d 967 (Division I 1989), and Campbell v. Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975), as well as other cases in Washington which properly addressed the statutory corrective action prong of the failure to enforce exception. In Waite, a home occupant brought an action against the county to recover for injuries sustained in an explosion which occurred when an occupant attempted to light a propane furnace. Whatcom County conceded that the Uniform Mechanical Code, which it had adopted, prohibited the installation of propane furnaces in basements, but the County inspector approved the installation via his initials on the mechanical permit. The Waite court found that it was undisputed that the building inspector that signed off on the inspection approval of the mechanical permit was the governmental agent responsible for enforcing the statutory requirements relative to the installation of a propane fuel system under the mechanical code. In addressing the corrective action element, the Waite court found that it was "easily established," because the governmental agent was responsible for enforcing the statutory requirements. The situation here is identical to Waite. The County inspectors encountered a non-conforming propane gas system. They approved it without requiring compliance. The approval was the failure to take a statutory corrective action.

The trial court recognized it had to disregard the Waite decision to reach its conclusion that a sufficient mandatory corrective action did not exist here. The trial court stated:

The court recognizes that Waite v. Whatcom County, supra, would apparently dictate a different interpretation. Throughout these proceedings, this court has struggled over the issue of Waite's application to this case as well as Waite's apparent deviation from the requirement there be a mandatory duty to take specific action to correct a statutory violation. However, Waite does not directly discuss the operative statutory language at issue, and the duty may have been conceded by the parties since focus was upon a different element of the test. For this reason, this court does not believe Waite has any application to the critical issue in this case. And general enforcement provisions of the Uniform Mechanical Code, just as the general enforcement provisions of the International Residential Code, do not create a statutory duty which would support an exception to the Public Duty Doctrine.

CP 062.

However, Waite and other cases that properly analyze the failure to enforce exception, do so in light of the underlying purpose, which is to define circumstances under which a generalized governmental duty can be said to focus on an individual plaintiff. In Campbell v. Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975), the court found an electrical inspector owed a duty to sever or disconnect the non-conforming underwater wiring system, according to "ordinance mandated administrative or operational duties". 85 Wn.2d at 7. Just as here, the relevant electrical codes on

which the jury was instructed prohibited connection of an electrical installation to electrical current until inspection and approval by the building official. Campbell, 85 Wn.2d at 5-6. An inspector "shall" sever an unlawfully made connection but only if he "finds that such a severing is essential to the maintenance and the safety and the elimination of hazards". 85 Wn.2d at 56. Thus, the County's building officials here had similar direction from the codes as they did in Campbell. §R111.3 authorizes disconnection of the propane service where necessary to eliminate hazard to life or property. If danger to life or property or connection without approval and verification of code compliance was observed, the disconnection of the propane fuel source from the building and piping system was mandated.

Thus, the trial court overly restricted the "specific enforcement" element, because it incorrectly failed to find a statutory duty to act existed. However, here, just as in Waite, the statutory corrective action was to enforce the code provisions requiring testing and inspection, inform the permit holder of non-compliance, and withhold approval if the fuel system did not comply with the Code. The Yakima County Inspectors approved a non-complying system, and just as in Waite, failed to take the corrective action of enforcing the code. That direction is sufficiently mandatory

under Washington law to meet the "corrective action" element of the failure to enforce.

The cases on which the court relied in its Letter Opinion to assert that "generalized language" in building codes do not impose a governmental duty flowing to an individual did not address the corrective action prong of the failure to enforce exception. The court in Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988) analyzed only the legislative intent exception, which Mr. Pierce does not assert. In Taylor, the plaintiff argued that the public duty rule of non-liability did not apply because the legislature enacted specific legislation for the protection of persons in plaintiff's class. 111 Wn.2d at 164. There, the court found that general language that the building codes were in existence to promote the health, safety and welfare of occupants or users of buildings was insufficient to identify a legislative intent to create an individual duty. Taylor, 111 Wn.2d at 164. The failure to enforce exception was not addressed by the court in Taylor, and it has no relevance to the necessary analysis here. Moreover, the Taylor court also did not analyze the very specific enforcement obligations the fuel gas code places on building officials. Plaintiff here does not rely on a legislative statement that building codes are meant to protect us all, but rather the specific direction to building officials to enforce all provisions of the codes, including the

direction to make or cause to be made all inspections. Taylor is simply irrelevant to the obligations placed on governmental bodies relative to the installation of dangerous fuel systems.

Smith v. Kelso, 112 Wn.App. 277, 48 P.3d 372 (2002), cited by the trial court, is also irrelevant here. In Smith, a provision of the Uniform Building Code required a city engineer to submit soils reports only if certain slope conditions were met. The court noted that unlike previous failure to enforce cases such as Waite and Campbell, the ordinance did not require that a developer or homeowner take any action, and thus, there could be no violation of the ordinance for which the City could fail to enforce. In finding the language not specific enough, the court found that the particularized design and construction standards necessary to determine slope and soils report necessity were so discretionary, that the ordinance created no duty to enforce any specific requirements. This is wholly unlike the case at bar.

Where a question of fact has been presented on whether building officials had actual knowledge of a hazardous condition in violation of building codes, the duty to act to enforce the codes is clearly established, just as the Waite court holds. In Zimbelman v. Chaussee Corp., 55 Wn.App. 278, 777 P.2d 32 (1989), a plaintiff who asserted a negligence claim against the County for failing to enforce building code provisions

failed to present sufficient evidence the officials had knowledge of the violation. However, in dicta relating to the "duty to act," the Court stated:

We disagree with the County's contention that Taylor negates any duty, absent a statutory mandate, to enforce the building code. Such an interpretation would destroy the exception permitting imposition of liability when a public official breaches the duty to correct a known, inherently dangerous condition. As articulated in Taylor, when an official charged with enforcing the UBC has actual knowledge of an "inherently dangerous and hazardous condition" the law imposes a duty to act.

Zimbelman, 55 Wn.App. at 281, n.10.

The breach of the duty to act, once actual knowledge is at issue, is simply the approval of the construction despite the dangerous code violation. See, Moore v. Wayman, 85 Wn.App. 710, 934 P.2d 707 (1997) ("Here, the critical issue is whether the County inspectors approved the house for habitation with actual knowledge that the house was in violation of the building code, such that it created an inherently dangerous and hazardous condition"). Any other interpretation would allow the unacceptable danger of an inspector ignoring a dangerous condition, but issuing final approval, without any consequence of liability for such negligence.

Proper analysis of the mandatory duty exception here establishes that Yakima County had the statutory obligation to inspect and verify testing. The building official is charged with enforcing all provisions of

the code, and those code provisions require that the building inspector make or cause to be made necessary inspections, and require that numerous inspections and tests "shall" be performed. If the system had not been inspected and tested in accordance with the code, and life or property was at risk, the system was not in compliance and the inspector was directed to tell the permit holder of the non-compliance and withhold approval so the system would not be used. In this instance, the trial court has basically concluded that an inspector could be on site at a home, witness leaking or uncapped pipes feeding propane gas into homes, and other violations, but has insufficient statutory direction to take any action, which precludes operation of the failure to enforce exception. This is not the law.

Just as in Waite and Campbell, the obligation to test, verify and inspect, along with the obligation to finally approve a system for operational use, is the statutory action necessary which creates the duty. Those are the corrective actions that were statutorily mandated. It is a misinterpretation of Washington law that would require any greater statutory obligation to take corrective action than was presented here, and the trial court improperly dismissed plaintiff's claim.

B. The trial court incorrectly found that no issue of fact existed to create a special relationship duty to Mr. Pierce.

To establish the special relationship exception to defeat the public duty doctrine, the plaintiff must show that there is some form of privity between the plaintiff and the public entity that differentiates the plaintiff from the general public; that the public entity made an express assurance to the plaintiff; and the plaintiff reasonably relied on the assurance. Bratton v. Welp, 145 Wn.2d 572, 576-77, 39 P.3d 959 (2002).

When the parties dispute the contact between the appropriate building official and the injured member of the public, issues of fact preclude summary judgment on whether a special relationship exception existed to the public duty doctrine. See, Bakay v. Yarnes, 2005 WL 1677966 (W.D. Wash. 2005) (whether a special relationship exists is a "fact intensive inquiry"; court denied County's summary judgment motion because plaintiff asserted that Animal Control Officers said plaintiffs' cats would not be killed, while the Officer denied making that statement). Yakima County asserts that Mr. Pierce has "admitted" he made no specific inquiry of whether the work he was planning was in compliance with the code and that the County inspector made no express assurances of code compliances. However, Mr. Pierce did make specific inquiry to the County Inspectors relative to use of the propane gas system which had

been installed in his home. Mr. Pierce, as instructed by AAP and Yakima County, called the County for the inspection required under his mechanical and fire permitting. (Pierce Aff., CP 510)

Those permits, as noted above, outlined the necessary inspection for the "Gas Piping" system that AAP installed, modified and returned to active service. The inspectors signed the Inspection Record Cards as "Final," which means, by Yakima County's own definition, the system is "complete and ready to be used." (Appx. pp. 1-3, Exs. 61, 55, 54, CP 615, 613, 612) Inspector Granstrand then directly told Mr. Pierce that all necessary tasks had been completed and the system was "good to go," which Mr. Pierce interpreted as an assurance that the system was operational and could be used. (Pierce Aff., CP 510) It was a reasonable inference from Mr. Granstrand's assurance, that the entire system was ready to be used, and it must be reviewed in a light most favorable to plaintiff as the non-moving party; that inference is for the trier of fact. Moreover, even Mr. Granstrand's version of what he told Mr. Pierce similarly indicated that the system was complete and ready to use. Mr. Granstrand now says he told Mr. Pierce that he could fill in the trench on the exterior piping. (Granstrand Decl., CP 1008-1009) By Yakima County's own Inspection Record Card and pursuant to the IRC, final approval and permission to cover the piping means that all parts have been

fully tested and inspected, are "gas tight" and are ready for use. Appx. p. 1, Ex. 61, CP 615; IRC §G2415.16, CP 305.

Irrespective of the County's assertion the conversation with Mr. Pierce was brief, the effect remains the same; no law requires that the direct contact or assurance given by the official needs to be lengthy, detailed, or given in any specific manner to create an issue of fact on the existence of a "special relationship." Telling Mr. Pierce he could operate the system was sufficient.

Opinions from expert witnesses on whether statements made by County officials are "express assurances" create issues of fact precluding summary judgment on the special relationship exception. Noakes v. City of Seattle, 77 Wn.App. 694, 699, 895 P.2d 842 (1995) (police expert affidavit opined that the single statement "we'll send someone out" created an issue of fact, and could be construed by a reasonable trier of fact as an express assurance). Here, plaintiff presents expert testimony that the inspectors' signatures as "Final Inspections" meant that the system was operational and that Mr. Granstrand's statement that the exterior piping had passed inspection directly violated the code requirements in NFPA 54 and the IRC. (Mellas Aff., CP 597-600) Similarly, Mr. Pierce's testimony that Inspector Granstrand assured him the system was "good to go" could be construed by a trier of fact as an express assurance, just as in Noakes.

Mr. Pierce does not allege that the special relationship arose from silence or implied assurances, unlike Honcoop v. State, 111 Wn.2d 182, 759 P.2d 1188 (1988) (claims dismissed because plaintiff claimed that State failed to volunteer adequate information; no evidence of any affirmative statements was submitted). And unlike Williams v. Thurston County, 100 Wn.App. 330, 997 P.2d 377 (2000), Mr. Pierce did not telephone a county inspector to be given a general response on whether the project met code approval. Instead, the inspector was on the site, and gave an express assurance that the dangerous gas fuel source and system newly connected to the building was ready to be used. In situations "where the information requested does not appear in the code, the answer is unclear, or the applicant seeks affirmation of his or her interpretation of the code," an express assurance exists. See, Mull v. Bellevue, 64 Wn.App. 245, 256, n.4, 823 P.2d 1152 (1992). Similarly, when an inspector relays information known only to him, an express assurance exists. Williams, 100 Wn.App. at 335.

Here, the County had an obligation to ensure that the entire system was ready to use inside and out, before issuing an approval. If the system did not comply, the codes required the County inspector to directly inform Mr. Pierce of that fact. As a result, Inspector Granstrand's specific

assurance to Mr. Pierce directly that the system could be used created the special relationship.

After Inspector Granstrand made his statements that the system was "good to go" and signed the inspection as "Final," Mr. Pierce turned the gas valves on and started his furnace, and the gas in the attic and walls from the uncapped pipe exploded. He has testified that he did so **because** he believed the Inspector told him the propane system was ready to be used. (Pierce Aff., CP 510 - 511) Conclusory statements by a plaintiff that he relied on express assurances are often the only way a plaintiff can express reliance; such conclusions, along with expert opinions, create an issue of fact on the reliance element. See, Noakes, 77 Wn.App. at 699-700. Here, Mr. Pierce's Affidavit, as well as the Affidavits of expert witnesses Frank Mellas and Douglas Buchan, established that issues of fact exist to create a question for the jury on whether the County created a sufficient relationship with him that it owed an individual duty which was breached, and summary judgment should not have been granted.

C. To the extent the public duty doctrine would protect Yakima County from its negligence here, that doctrine should be abandoned.

The Washington legislature specifically provided that local governmental entities, whether acting in a governmental or proprietary capacity, "shall" be liable for damages arising out of their tortious

conduct, to the same extent as if they were a private person or corporation. RCW 4.96.010. The public duty doctrine is, in essence, a form of sovereign immunity which imposes a presumption against the existence of a duty and contradicts the Legislature's express provision that municipalities are to be held liable to the same extent as private individuals.

Judges and commentators in Washington have expressed concern that the public duty doctrine operates as a judicial restoration of sovereign immunity in defiance of the legislature's waiver. See, Chambers-Castanes v. King County, 100 Wn.2d 275, 291, 669 P.2d 451 (1983) (Utter, J. concurring, urging that the doctrine detracts from traditional tort analysis); Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 30 P.3d 1261 (2001) (Chambers, J. concurring); Mark Mclean Myers, "A Unified Approach to State and Municipal Tort Liability in Washington," 59 Wash. L. Rev. 533 (1984). In response to such criticism, numerous jurisdictions have explicitly abolished the public duty doctrine, including Alaska, Arizona, Colorado, Florida, Iowa, Massachusetts, Nebraska, New Hampshire, New Mexico, Oregon, Wisconsin, and Wyoming.

Washington courts have difficulty interpreting the doctrine and are inconsistent in the analysis necessary for the imposition of tort liability against a municipality. Originally, and in accordance with the legislative

enactment, Washington courts analyzed the tort liability of municipalities based on the "discretionary act" exception to the liability rule. See, Evangelical United Brethren Church of Adna v. State, 67 Wn.2d 246, 407 P.2d 440 (1965); King v. Seattle, 84 Wn.2d 239, 525 P.2d 228 (1974). The "discretionary act" line of precedent analyzed a municipality's liability in terms of a traditional tort law analysis of duty, foreseeability, and breach. The public duty doctrine was adopted based on New York law by Campbell v. Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975), without reference to Washington's previous case law. Subsequently, courts have vacillated between the two tests, or incorrectly combined the analyses.

The public duty doctrine also now has a minimum of four exceptions, with multiple standards of proof for each; when a doctrine has been so weakened and "swallowed" by its exceptions, the basis for the rule needs to be re-analyzed. While the Washington Supreme Court has recently attempted to clarify the public duty doctrine, noting that it does not provide immunity from liability, the Court's use of the doctrine remains problematic in analyzing the duties owed to individuals by public officials. See, Osborn v. Mason County, 157 Wn.2d at 18, 27-28, 134 P.3d 197 (2006).

While the Court has declined prior opportunities to abandon the public duty doctrine, the facts presented here more fully highlight the

inequity and poor public policy fostered by the continued use of the doctrine to immunize municipal negligence. When the doctrine can be used, as it is here, to encourage dilatory conduct with respect to the enforcement of vital legislative protections, the doctrine has outlived its usefulness. The fuel gas codes are enacted to protect the lives and properties of Washington citizens. It requires that counties engage and train inspectors, and preclude the use of dangerous gas systems until the inspectors have finally approved them. However, because of the public duty doctrine as argued by the County here, those inspectors can fail to perform their obligations, observe dangerous conditions and ignore life threatening conditions, because a trial court can't find the appropriate words in a statute to place the conduct in the appropriate box to find one of the prongs in an exception to the doctrine. If instead, the analysis was whether there existed a duty to Mr. Pierce by the County and whether it was breached, courts can more fairly address the negligent conduct of the governmental entity, and ensure other such entities are not immune from liability for negligence as the legislature intended. Such an analysis would encourage the enforcement of the legislative enactments on life safety codes and further the public policy of increasing the motivation by municipalities to protect their citizens.

The County is a municipality that the legislature required be responsible for its torts. That pronouncement must outweigh any judicially created and confusing adoption of the public duty doctrine, and it should now be abandoned.

VI. CONCLUSION

Conrad Pierce requests that the Court reverse trial court's grant of summary judgment dismissing his claim and grant his motion for partial summary judgment finding Yakima County liable to Mr. Pierce, or to remand this matter for trial on all issues.

DATED this 26th day of July, 2010.



MERIWETHER D. (MIKE) WILLIAMS
WSBA No. 8255
KEVIN J. CURTIS, WSBA No. 12085
WINSTON & CASHATT, Lawyers, P.S.
Attorneys for Appellant

198839

Appendix

**Yakima County Permit Services
Inspection Record Card**

Permit: MEC2007-00440

Inspection Request Line: (509) 574-2370

Issue Date: 6/24/2007
Expiration Date: 2/20/2008

Job Site Address: 411 BOWERS RD.

Owner: CONRAD PIERCE

411 BOWERS RD YAKIMA WA 98908

Contractor:

Description of Work: Pierce/120 Gal. LP Tank (ABOVEGROUND)

| MECHANICAL | APPROVED | | NOT APPROVED | | | | Comment |
|----------------------------|----------|-------|--------------|-------|-------|-----------|------------------|
| | DATE | Insp. | DATE | Insp. | Corr. | Not Ready | |
| GAS PIPING | 9-4-07 | RJ | | | | | Underground pipe |
| FURNACE/HWT LOCATION | | | | | | | |
| VENTING | | | | | | | |
| COMBUSTION AIR | | | | | | | |
| DUCTWORK | | | | | | | |
| FIRE DAMPER(S) | | | | | | | |
| FIREPLACE/WOODSTOVE/INSERT | | | | | | | |
| KITCHEN HOOD/ BATH VENT | | | | | | | |
| FINAL | 9-9-07 | RJ | | | | | |

NOTICE:

No building shall be occupied until the Building Official has conducted a Final Inspection and approved the installation as required by Section 116 of the Uniform Mechanical Code. Violation may result in criminal and civil penalties and remedies.

Legal requirements related to inspections:

Mechanical systems for which a permit is required shall be subject to inspection by the building official and such mechanical systems shall remain accessible and exposed for inspection purposes until approved by the building official.

Approval as a result of an inspection shall not be construed to be an approval of a violation of the provisions of the mechanical code or of other ordinances of Yakima County. Inspections presuming to give authority to violate or cancel the provisions the mechanical code or of other ordinances of Yakima County shall not be valid.

It shall be the duty of the permit applicant to cause the work to remain accessible and exposed for inspection purposes. Neither the building official nor Yakima County shall be liable for any expense entailed in the removal or replacement of any material required to allow inspection.

Work requiring a permit shall not be commenced until the permit holder or agent of the permit holder shall have posted or otherwise made available an inspection record card such as to allow the building official to conveniently make the required inspections of the work. This card shall be maintained by the permit holder until final approval has been granted by the building official.

It shall be the duty of the person doing the work authorized by a permit to notify the building official that such work is ready for inspection. All requests for inspection shall be made at least one working day before such inspection is desired. Such request may be in writing or by telephone.

It shall be the duty of the person requesting any inspections required by the mechanical code to provide access and means for inspection of such work. Work shall not be done beyond the point indicated in each successive inspection without first obtaining the approval of the building official.

The building official, upon notification, shall make the requested inspections and shall either indicate that portion of the mechanical is satisfactory as completed, or shall notify the permit holder or an agent of the permit holder wherein the same fails to comply with the mechanical code. Any portions that do not comply shall be corrected and such portion shall not be covered or concealed until authorized by the building official.

There shall be a final inspection and approval of all mechanical systems when completed and ready for occupancy and use.

Required inspections:

Gas Piping

All portions of the gas piping from the meter 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.

Furnace/HWT Location

To be made after the appliance has been placed with all venting, ductwork and gas lines attached and before the gas is turned on

Venting

To be made after the appliances are installed in their permanent location and all of the appliance venting is finished.

Combustion Air

To be made after all appliances are installed in their permanent location provided with combustion air in compliance with this code or to the manufacturer's listing.

Ductwork:

To be made after all return and supply air ducts have been sized properly and installed in compliance with this code or to the manufacture

Fire Dampers:

To be made after all required fire dampers are installed and visible for inspection.

Fireplace/Woodstove/Insert

All fireplaces, woodstoves and inserts must be inspected before they can be used.

Final inspection:

To be made after the mechanical system is completed and ready for use.

Other inspections:

In addition to the called inspections specified above, the building official may make or require other inspections of any mechanical system to ascertain compliance with the provisions of the mechanical code and any other laws which are enforced by the code enforcement agency.

EXHIBIT 61
WITNESS *Onoms*
DAVID STOREY
STOREY & MILLER

YakCty-016

Yakima County's Response to Plaintiff's 1st Requests For Production
RFP #1 - Page 16

Yakima County Permit Services
Inspection Record Card

Permit: FCP2007-00276

Issue Date: 8/24/2007
 Expiration Date: 8/20/2008

Inspection Request Line: (509) 574-2370

Job Site Address: 411 BOWERS RD.
 Owner: CONRAD PIERCE
 Contractor: ALL AMERICAN PROPANE
 Description of Work: Pierce/120 Gal. LP Tank (ABOVEGROUND)
 411 BOWERS RD YAKIMA WA 98908
 617 S KEYS RD YAKIMA WA 98901

| FIRE CODE | APPROVED | | NOT APPROVED | | | Comments |
|-----------------------|----------|--------|--------------|-------|-------------------|----------|
| | DATE | Init. | DATE | Init. | Corr. Not Necessy | |
| FIRE/LIFE SAFETY | | | | | | |
| FIRE FLOW | | | | | | |
| FIRE SPRINKLER SYSTEM | | | | | | |
| FIRE ALARM SYSTEM | | | | | | |
| FUEL TANK | 9-4-07 | Per SP | | | | |
| FUEL PIPING | 9-11-07 | | | | | |
| SPRAY BOOTH/ROOM | | | | | | |
| COMMERCIAL RANGE HOOD | | | | | | |
| FINAL | 9-4-07 | Permit | | | | |

NOTICE:

No building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the Fire Marshal has issued a Certificate of Occupancy as required by YCC 13.09.060. Violation may result in criminal and civil penalties.

Legal Requirements related to Inspections:

All construction or work for which a permit is required shall be subject to inspection by the Fire Marshal and all such construction or work shall remain accessible and exposed for inspection purposes until approved.

Approval as a result of an inspection shall not be construed to be an approval of a violation or as a cancellation of the provisions of the fire code or of other ordinances of Yakima County. Inspections presumed to give such authority shall not be valid.

It shall be the duty of the permit applicant to cause the work to remain accessible and exposed for inspection purposes. Neither the Fire Marshal nor Yakima County shall be liable for any expense entailed in the removal or replacement of any material required to allow inspection.

Work requiring a permit shall not be commenced until the permit holder or agent of the permit holder shall have posted or otherwise made available an inspection record card such as to allow the building official to conveniently make the required inspections of the work. This card shall be maintained by the permit holder until final approval has been granted by the Fire Marshal.

It shall be the duty of the person doing the work authorized by a permit to notify the Fire Marshal that such work is ready for inspection. All requests for inspection shall be made at least one working day before such inspection is desired. Such request may be in writing or by telephone.

It shall be the duty of the person requesting any inspections required by the fire code to provide access and means for inspection of such work.

Work shall not be done beyond the point indicated in each successive inspection without first obtaining the approval of the Fire Marshal.

The Fire Marshal, upon notification, shall make the requested inspections and shall either indicate that portion of the construction is satisfactory as completed, or shall notify the permit holder or an agent of the permit holder wherein the same fails to comply with the fire code. Any portions that do not comply shall be corrected and such portion shall not be covered or concealed until authorized by the Fire Marshal.

There shall be a final inspection and approval of all buildings and structures when completed and ready for occupancy and use.

Required Inspections:

Fire/Life Safety

To be made after permit issuance. Includes fire extinguishers, exiting, manner of storage, and signage.

Fire Flow

To be made after permit issuance. Includes water source, hydrostatic testing and flushing of underground piping, fire hydrant location, flow testing, and system acceptance.

Fire Sprinkler System

To be made after permit issuance. Includes water source, hydrostatic testing and flushing of underground piping, hydrostatic and flow testing of overhead piping, and system acceptance.

Fire Alarm System

To be made after permit issuance. Includes testing of alarm panel, communicator, indicating devices, initiating devices, auxiliary devices, secondary power, and system acceptance.

Fuel/Hazardous Material Tank

To be made after permit issuance. Includes pressure testing, location, vehicular protection, and signage.

Fuel/Hazardous Material Piping

To be made after permit issuance. Includes pressure testing, dispensing, and signage.

Spray Booth/Spray Room

To be made after permit issuance. Includes appliance installation, ventilation, suppression system, and electrical protection.

Commercial Hood

To be made after permit issuance. Includes appliance installation, ventilation, suppression system, fuel shutoff, and trap testing.

Final

Includes access, address, signage, key box, and any fire code items not previously approved.

EXHIBIT 54
 WITNESS **STRAN**
 DAVID STOREY
 STOREY & MILLER

YakCty-009

OFFICE RECEPTIONIST, CLERK

To: Beverly R. Briggs
Cc: Mark R. Johnsen; Larry Peterson; Nancy L. Randall; Mike D. Williams; Kevin J. Curtis
Subject: RE: Electronic filing of Brief of Appellant

84563-8

Rec. 7-26-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----

From: Beverly R. Briggs [mailto:brb@winstoncashatt.com]
Sent: Monday, July 26, 2010 3:18 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Mark R. Johnsen; Larry Peterson; Nancy L. Randall; Mike D. Williams; Kevin J. Curtis
Subject: Electronic filing of Brief of Appellant

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 Brief of Appellant, including an Appendix of 3 pages. Please contact me if you have any questions. Thank you.

Meriwether D. (Mike) Williams, WSBA No. 08255 Winston & Cashatt, Lawyers, P.S.
Phone: (509) 838-6131
Email: mdw@winstoncashatt.com

Beverly R. Briggs
Paralegal, Winston & Cashatt, Lawyers
(509) 838-6131
Fax: (509) 838-1416
Email: brb@winstoncashatt.com

The preceding message and any attachments contain confidential information protected by the attorney-client privilege or other privilege. This communication is intended to be private and may not be recorded or copied without the consent of the author. If you believe this message has been sent to you in error, reply to the sender and then delete this message.