

RECEIVED
CLERK OF THE COURT
STATE OF WASHINGTON
10 SEP 21 PM 2:59
BY RONALD R. CARPENTER
CLERK *[Signature]*

COA #29568-1-III

NO. 84563-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONRAD F. PIERCE,

Appellant,

v.

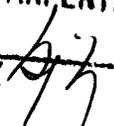
YAKIMA COUNTY, WASHINGTON, a governmental entity and
political subdivision of the State of Washington,

Respondent.

BRIEF OF RESPONDENT

Mark R. Johnsen, WSBA #11080
Of Karr Tuttle Campbell
Attorneys for Respondent
Yakima County

1201 Third Ave., Suite 2900
Seattle, WA 98101
(206) 223-1313

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
10 SEP 21 PM 2:59
BY RONALD R. CARPENTER
CLERK 

COA #29568-1-III

NO. 84563-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONRAD F. PIERCE,

Appellant,

v.

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

Respondent.

BRIEF OF RESPONDENT

Mark R. Johnsen, WSBA #11080
Of Karr Tuttle Campbell
Attorneys for Respondent
Yakima County

1201 Third Ave., Suite 2900
Seattle, WA 98101
(206) 223-1313

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	4
III. FACTUAL BACKGROUND	5
A. Factual Inaccuracies in Appellant’s Opening Brief.....	5
B. Counter-Statement of the Case.....	10
IV. ARGUMENT	16
A. The Public Duty Doctrine Defines When a County Has an Actionable Duty to a Plaintiff.	16
B. The “Failure to Enforce” Exception Does Not Apply.	19
1. The County Had No Actual Knowledge of the Hazardous Condition.	19
2. The International Residential Code Does Not Place on the County a Duty to Perform Pressure Tests, Leak Checks or Inspections for Uncapped Lines.	27
3. There Was No Statute Placing a Mandatory Enforcement Duty on the County.	35
4. Pierce’s Reliance on <i>Waite v. Whatcom County</i> is Misplaced.	38
C. There Was No “Special Relationship” Between Yakima County and Mr. Pierce.	42
D. The Public Duty Doctrine Has Been Consistently Upheld, Especially in Cases Involving Building Permits and Inspections.	47
V. CONCLUSION	50
APPENDIX: Brief of Respondent Whatcom County in <u>Waite v. Whatcom County</u> , 54 Wn. App. 682 (1989)	

TABLE OF AUTHORITIES

Page

CASES

<u>Atherton Condo. Ass'n. v. Blume Development Co.</u> , 115 Wn.2d 506, 799 P.2d 250 (1990)	19, 20, 21, 34, 40, 47, 48
<u>Babcock v. Mason County Fire Dist.</u> , 144 Wn.2d 774, 30 P.3d 1261 (2001)	49
<u>Corbit v. J.I. Case Co.</u> , 70 Wn.2d 522, 424 P.2d 290 (1967)	46
<u>Forest v. State</u> , 62 Wn. App. 363, 814 P.2d 1181 (1991)	36, 37
<u>Garibay v. State</u> , 131 Wn. App. 454, 128 P.3d 617 (2005), <u>rev. denied</u> , 158 Wn.2d 1017	26, 27, 35
<u>Halleran v. Nu West, Inc.</u> , 123 Wn. App. 701, 98 P.3d 52 (2004)	40
<u>Haslund v. Seattle</u> , 86 Wn.2d 607, 547 P.2d 1221 (1976)	17
<u>Honcoop v. State</u> , 111 Wn.2d 182, 759 P.2d 1188 (1988)	18, 19, 45, 46, 48
<u>Howe v. Douglas County</u> , 146 Wn.2d 183, 43 P.3d 1240 (2002)	48, 49, 50
<u>Meaney v. Dodd</u> , 111 Wn.2d 174, 759 P.2d 455 (1988)	43, 48
<u>Millay v. Cam</u> , 135 Wn.2d, 193, 955 P.2d 791 (1998)	30
<u>Osborne v. Mason County</u> , 157 Wn.2d 18, 134 P.3d 197 (2006)	49
<u>Pedroza v. Bryant</u> , 101 Wn.2d 226, 677 P.2d 166 (1984)	17
<u>Pepper v. J.J. Welcome Construction Co.</u> , 73 Wn. App. 523, 871 P.2d 601 (1994), <u>rev. den.</u> , 124 Wn.2d 1029 (1994)	18
<u>Phillips v. King County</u> , 136 Wn.2d 946, 968 P.2d 871 (1998)	48
<u>Ravenscroft v. Water Power Co.</u> , 87 Wn. App. 402, 914 P.2d 991 (1997), <u>aff'd</u> , 136 Wn.2d 911	37, 40, 41
<u>Smith v. City of Kelso</u> , 112 Wn. App. 277, 48 P.3d 372 (2002)	24, 25, 37, 40, 41, 47
<u>Taylor v. Stevens County</u> , 111 Wn.2d 159, 759 P.2d 447 (1988)	17, 18, 20, 28, 42, 45, 46, 47, 48
<u>Waite v. Whatcom County</u> , 54 Wn. App. 682, 775 P.2d 967 (1989)	38, 39, 40

<u>Williams v. Thurston County</u> , 100 Wn. App. 330, 997 P.2d 377 (2000)	43, 44
<u>Zimbelman v. Chaussee Corp.</u> , 55 Wn. App. 278, 777 P.2d 32 (1989), <u>rev. den.</u> , 114 Wn.2d 1007 (1990)	23, 24, 43

OTHER AUTHORITIES

IRC Section 101.3	29
IRC Section 105.8	9, 28, 37
IRC Section G2417.1.1	29
IRC Section G2417.1.4	3
IRC Section G2417.6.2	8, 9, 21, 30, 31, 32, 33, 35
IRC Section G2417.6.3	8, 9, 21, 30, 31, 32, 33, 35
IRC Section R101.3	9
IRC Section R105.1	9, 22
IRC Section R105.3	28
IRC Section R109.1	9, 22, 29
IRC Section R111.1	33, 34
IRC Section R111.2	34
IRC Section R111.3	38, 41
IRC Section R113.2	38, 41

RULES

RAP 4.2(a)(3)	16
RAP 4.2(a)(4)	16

I. INTRODUCTION

The trial court properly held that the injuries Conrad Pierce suffered did not result from a breach of duty Yakima County owed to him, because neither the “failure to enforce” exception nor the “special relationship” exception to the Public Duty Doctrine applies under the undisputed facts of this case.

It is undisputed that the County had no knowledge of the dangerous condition which caused the propane explosion in Mr. Pierce’s home, i.e., the uncapped line in the attic of the house. The only permit applied for by Pierce, and the only inspection performed by the County was for installation of a new storage tank and propane line outside the house. Mr. Pierce told the County inspector that he was not making any changes inside the home, and that inside “everything is existing.” He did not apply for any permits for work inside the house, and therefore the County did not inspect anything inside the building. The County’s outside inspection occurred one month before the propane furnace was connected by Pierce.

In his deposition, Mr. Pierce acknowledged his awareness that the County inspection was limited to the exterior only, that the inspector never went in the house, and that the County had no knowledge of the uncapped gas line inside his house.

Nor did the County have notice that Mr. Pierce would ignore the instructions of his contractor, All American Propane, Inc. to have the propane furnace connected and the interior connections checked by a trained propane contractor. Instead, Pierce attempted a do-it-yourself hookup without checking the inside pipes for uncapped lines and without performing the “leak check” which the code requires of the person who puts a propane system into service.

The suggestion by Pierce’s attorneys that the International Residential Code (“IRC”) mandated that the leak check and search for loose ends be performed *by the County* is false. Pierce repeatedly misrepresents the testimony of the County inspector, whose testimony, fairly understood, was that the IRC does not require the County to “inspect” the steps required by the IRC before introducing propane fuel into a structure. Those steps are always performed by the person who puts a system into service. The local building official is never present during those tests, which occur only as gas is being introduced into the house. In this case, gas was not introduced into the home until Pierce did so a full month after the County inspected the storage tank and piping outside the house. There was no leak or defect in the exterior lines and tank which the County was asked to inspect.

In short, because the County had no knowledge of the defect in the interior piping, and had no notice that Pierce was attempting to put

his system into service and fire up his furnace without professional help, the “failure to enforce” exception to the Public Duty Doctrine cannot apply. Pierce’s argument that the County should not have approved the tank and outside pipe installation until after the interior lines had been inspected is directly refuted by IRC Section G2417.1.4, which expressly provides that testing and inspection of propane systems may be undertaken in sections.

The trial court also correctly held that the “special relationship” exception to the Public Duty Doctrine did not apply because the essential elements of that exception were not present. There was no inquiry by Mr. Pierce as to Code compliance. Nor was there any “express assurance” of Code compliance by the County. Finally, as Mr. Pierce admitted in his deposition, he understood that the only inspection performed by the County was for the exterior installation, and he did not change his behavior based on the County’s approval of the installation of the tank and gas line outside the house.

Pierce’s suggestion that the Public Duty Doctrine should be eliminated as a part of Washington common law signals his recognition that the doctrine precludes liability on the part of Yakima County in this case. The Public Duty Doctrine is one of the most clearly established principles in the field of tort law, and has been consistently applied by the Washington Supreme Court and the Washington Court of Appeals

over the past 30 years. The Public Duty Doctrine generally precludes liability against cities and counties in the context of building permits and approvals, because the duties of local governments in such circumstances are owed to the public generally, and not to an individual owner or permit applicant. Washington caselaw provides that it is the responsibility of the owner and builder to ensure compliance with codes.

The evidence in this case does not support application of any of the narrow exceptions to the Public Duty Doctrine, and therefore the general rule of nonliability was appropriately applied by the trial court, and summary judgment was properly granted. This Court should affirm.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issues pertaining to Pierce's assignments of error may best be stated as follows:

A. Whether the trial court properly found the "failure to enforce" exception to the Public Duty Doctrine inapplicable, where the County inspector had no actual knowledge of a code violation and had no knowledge of the dangerous defect inside Pierce's home, and where the applicable code does not mandate a specific enforcement action in view of the conditions which the inspector observed.

B. Whether the trial court properly held the "special relationship" exception to the Public Duty Doctrine was inapplicable, where the plaintiff made no specific inquiry of the County regarding

code compliance, and where the County inspector made no express assurance of code compliance.

C. Whether the trial court's summary judgment order should be affirmed, because it is consistent with all Supreme Court decisions since at least 1988 applying the Public Duty Doctrine as a defense to government liability in building permit cases.

III. FACTUAL BACKGROUND

A. Factual Inaccuracies in Appellant's Opening Brief.

Pierce's recitation of facts contains repeated assertions and allegations that distort and misrepresent the record and that are contrary to the undisputed facts. Yakima County feels compelled to point out some of the more significant misstatements in Pierce's brief, below.

On multiple occasions in the Brief of Appellant, it is asserted that the County told Pierce "that the system had passed final inspection and was ready to use," (p. 2, lines 16-17); and "that all necessary tasks had been completed, the propane system has passed final inspection" (pp. 3-4); "that everything necessary had been done," and that the approval confirmed "the propane gas system was 'completed, operational and ready for use'" (p. 5, lines 8-11). These statements are untrue. As Mr. Pierce acknowledged in his sworn deposition testimony, the only inspection requested by Pierce was of a storage tank and gas piping outside the house. Mr. Pierce knew that the only permit he applied for was for the exterior installation, and that the County's statement ("you

can cover,” or “you are good to go”) pertained only to that exterior installation. (CP 972-974).

Mr. Pierce confirmed in his deposition that the only substantive discussion between Pierce and Inspector Granstrand was Pierce’s request that the inspection of the storage tank and outside pipe be completed so that Pierce could fill the trench where the new piping would be buried, and Granstrand’s statement that “you can go ahead and fill” (the trench) or “you’re good to go”:

Q. So he looked at the tank, he removed the tag, he looked at that line that was in the trench, made some comments about separation from the other lines, other than the propane gas line, correct?

A. Yes, sir.

Q. He said, “Okay. Looks good. You are good to go,” more or less?

A. Yes, sir.

Q. And you do not recall any other conversation with him other than that?

A. I do not.

Q. Okay. He did not go inside the house, correct?

A. No, sir, he did not.

* * *

Q. But you knew, when he said that, that he had not inspected any pipes inside the house, correct?

A. Yes, sir.

Q. And he had not inspected any appliances inside the house, correct?

A. Correct.

Q. So you knew when he said, "You are good to go," it was based on what he had seen outside, correct?

A. Yes.

(CP 974; 975-976).

In an effort to confuse the Court and to suggest that the County advised Pierce that the entire mechanical system was "completed and ready for use," Pierce lifts language from the County's internal Inspection Record Card -- *which Pierce never saw* (CP 483-484) -- and which County officials understood applied only to those items for which the permit had been issued (in this case, the tank and gas pipes outside the house). (CP 1009).

The repeated misstatements in the Brief of Appellant are obviously intended to give the Court the mistaken impression that the County's inspection responsibilities involved more than inspection of the tank and lines outside the house, and/or that the County somehow advised Mr. Pierce that its inspection included the interior piping. In reality, Mr. Pierce was present throughout Mr. Granstrand's September 4 inspection, and testified unequivocally that he knew the inspection concerned only the recent outside installations, for which he had applied for a permit. (CP 973-976).

One month later, Mr. Pierce decided to undertake a “do-it-yourself” installation with regard to his interior propane hookup (ignoring the instructions by All American Propane that the hookup be performed by a professional contractor). The County had no knowledge of and certainly did not approve Pierce’s unilateral and negligent interior installation.

The Brief of Appellant also states on multiple occasions that “the County admits that it did not enforce these mandatory fuel gas code provisions for inspection and testing.” (Page 2, lines 6-7; page 13, lines 12-13). Plaintiff seeks to give the misleading impression that the County inspectors admitted that they did not perform some task which they were obligated to perform.

In reality, leak checks and inspections for open valves and uncapped lines required by IRC §§G2417.6.2 and G2417.6.3 are always performed by the person putting the system into service, and not by local government. Pierce makes the erroneous assertion that the language of these code sections that a piping system “shall be inspected” and “shall be checked for leakage” before gas is introduced, somehow places a mandatory duty on *local government* to ensure a proper inspection and leak check, even where, as in this case, the local government had no notice and was not present when the gas was turned on. The Court should carefully note that the IRC says no such thing. Rather, the IRC

places responsibility for compliance with such Code sections on the person performing the procedure in question. IRC 105.8S.

The basic permit and inspection requirements of the IRC as they bear on the Building Official both focus on addition of physical things to the “built environment.” IRC § R101.3. The Court should note, for example, that IRC § R105.1 requires permits for work that changes the built environment by installation or removal of physical things. Typically no such permits are required, however, with respect to the *operation* of those physical things (i.e., putting systems into operation). (CP 277).

Similarly, Section R109.1, which relates to inspections by a Building Official refers to inspections of *installation* or *construction*. Significantly, there is no suggestion in the IRC that the Building Official has a role in the *operation* of systems after the installation or construction is approved. (CP 284).

In this case, Mr. Pierce attempted to place his propane system in the house into operation but failed to comply with the IRC regulations insofar as he did not inspect the interior pipes for open valves or uncapped lines, and he did not perform a leak check before he tried to fire up the furnace. In his brief, Pierce tries to transform the unremarkable fact that Yakima County (like other jurisdictions) does not perform or verify the G2417.6.2 inspection or the G2417.6.3 leak check

into a basis for liability. In fact, the IRC imposes no duty on Yakima County to perform those tests or to verify that they are performed.

Furthermore, because Pierce did not notify the County that he had decided to install the heater and place the gas piping system into service by himself, the County was not even aware that gas was being introduced into the house, and could not have “ensured” that Pierce did it safely.

B. Counter-Statement of the Case.

On October 4, 2007, without professional help and without following applicable requirements of the IRC, Conrad Pierce attempted to connect and operate a propane gas system in his rented house. In so doing he caused the propane gas explosion and fire in the house and suffered serious injuries. The explosion was caused by a hidden defect in the interior gas piping, i.e., an uncapped pipe above the ceiling which had been left by a prior occupant. (CP 1039). Pierce sued the owners of the house (Adam and Kristin Johnson) and the installer of the propane fuel tank and lines outside the house (All American Propane). Pierce also sued Yakima County, which one month before the explosion, inspected the propane tank and pipe outside the house. Pierce’s theory against the County is that the County should not have approved the installation of the tank and pipe outside the house without having full knowledge of the condition of the piping system inside the house.

Approximately six months before the accident, Mr. Pierce entered into a Purchase and Sale Agreement with the Johnsons, which provided that he would purchase the house at 411 Bowers Road in Yakima County. Included in the Purchase and Sale Agreement was a provision that Pierce would lease or purchase propane and a propane tank, and the Johnsons would provide propane supply lines to serve the home. The parties agreed that Mr. Pierce could occupy the home as a renter prior to closing on a purchase of the home. (CP 1040-1041).

On August 24, 2007, Mr. Pierce went to the Yakima County Permit Services Center and applied for and received permits to allow installation of a liquid propane storage tank and piping outside the house. (CP 213-215, 972). Pierce never applied for, and never received, any permit to install any part of the system inside the house. To the contrary, he told the County that with respect to the furnace and interior piping “everything is existing.” (CP 972-973).

On or about August 30, 2007, All American Propane installed an above-ground 120 gallon propane storage tank at a proper distance from the house. On that same date, a call was made to Yakima County requesting an inspection of the tank and its fuel line, which was in a trench leading from the tank to the home.

On Tuesday, September 4, 2007, in Conrad Pierce’s presence, Yakima County inspector Richard Granstrand inspected the installation

of the propane tank and piping outside the house. Significantly, neither Granstrand nor any other County employee was asked to inspect any indoor piping or appliances. Indeed, the furnace had not yet been connected to the interior piping on September 4. (CP 976-977). There was no substantive discussion between Conrad Pierce and Mr. Granstrand, other than Pierce's request that the tank and outside fuel line be inspected and approved so that the line could be covered with soil. (CP 973-974; CP 982). When Mr. Granstrand inspected the tank and piping outside the house on September 4, propane gas had not been introduced into the house. Indeed, the valve on the tank and an exterior shutoff valve were closed after All American Propane installed the tank and pressure tested the pipe, and the exterior piping was purged. (CP 979). Mr. Granstrand approved All American's installation of the tank and piping outside the house, which was all the work covered by the permits Mr. Pierce had requested and received.

Several weeks after the installation of the tank and piping outside the house, Mr. Pierce worked alone inside the house to connect the furnace to the piping system. He had been told by the All-American Propane installers that he needed to have any interior work performed and tested by a licensed installer. (CP 978-979). Nonetheless, Mr. Pierce decided to do the work on his own. On the day of the accident, October 4, Mr. Pierce installed a new section of flexible piping

between a valve near the interior wall and the furnace in the house. (CP 977). He then opened exterior and interior valves and attempted to ignite the furnace. Pierce was aware that the propane furnace had been disconnected some time before he occupied the house. However, because he chose to operate the system himself rather than getting qualified professional help, and because he did not comply with the IRC procedures for putting the system into operation, Pierce failed to discover an uncapped fuel line in the attic of the house.

Mr. Pierce did not notify All-American Propane or Yakima County of the indoor piping work he was performing; he did not seek a permit for the work he decided to perform; and he did not ask for any help from All-American or anyone else. (CP 977). Instead, shortly after connecting the furnace to the piping, he opened the valves, introduced propane into the system and attempted to ignite the furnace. (CP 977, 1044). Propane gas flowed out of the uncapped propane line into the attic and eventually into the living space, where it exploded.

As noted above, Mr. Pierce sued the homeowners, alleging that the house they leased to him contained a dangerous hidden defect. (CP 1031). Pierce also sued All American Propane, contending that the installer of the tank and exterior line had been negligent. (CP 1045-1047). Mr. Pierce also sued Yakima County alleging that, because he had obtained permits for, and requested inspection of the tank and piping

installation outside the house, the County owed him a personal duty to ensure that the propane gas system *inside* the house was ready for “safe use and operation.”

In effect, Mr. Pierce contends that the County’s inspection and approval of the propane tank and piping installation outside the house somehow constituted a guarantee to him that, without experienced professional help, he could safely connect and fire up the heater inside the house. Pierce made these assertions despite admitting that he had only applied for permits to have All-American install the tank and fuel line outside the house, and despite his admission that he knew the County’s inspection and approval applied only to the exterior installation for which he had obtained a permit. (CP 973-976).

Yakima County moved for summary judgment, based on the Public Duty Doctrine. (CP 984). The County noted that there was nothing negligent about the County’s inspection, and the County’s actions were not a proximate cause of the plaintiff’s injuries. The only crucial defect in the system was inside the house, in the attic. Yakima County was not asked to perform any inspection inside the house. Indeed, the County was never notified that Pierce would be connecting the furnace and starting up the system himself. But even if the plaintiff could overcome the negligence and causation hurdles, County liability was foreclosed by application of the Public Duty Doctrine.

The trial court initially denied the County's motion, indicating that factual issues remained as to whether the "failure to enforce" exception to the Public Duty Doctrine applied. Several months later, after the other defendants in the case had settled with Pierce, Yakima County filed a Motion for Clarification, asking the Court to identify any remaining factual issues bearing on the County's liability. (CP 393). Yakima County asserted that there were in fact no genuine issues of material fact bearing on the "failure to enforce" exception, and that therefore the Court should determine whether that exception applied as a matter of law. The County argued that the "failure to enforce" exception could not apply, because the County inspector had no actual knowledge of an inherently dangerous code violation, and also because there was no statutory mandate that the inspector take any specific enforcement action when faced with what the inspector observed. The County listed twenty (20) undisputed facts which were germane to the potential application of the "failure to enforce" exception to the Public Duty Doctrine. (CP 395-397).

In his response to the County's motion, Pierce did not contest any of the facts Yakima County had submitted to the Court as undisputed. Pierce nonetheless asked the Court to deny the County's motion. The trial court granted Yakima County's motion for clarification and held that there were no issues of material fact bearing

on the “failure to enforce” exception to the Public Duty Doctrine. (CP 059-063). The Court subsequently entered an order of summary judgment dismissing Pierce’s claims against Yakima County, including any claim based on the “special relationship” exception. (CP 010-013).

Pierce sought direct review before the Supreme Court under RAP 4.2(a)(3) and (a)(4). Yakima County submits that there is no reason for direct review, and requests that the Court of Appeals affirm the trial court’s summary judgment orders.

IV. ARGUMENT

A. The Public Duty Doctrine Defines When a County Has an Actionable Duty to a Plaintiff.

Mr. Pierce alleges that Yakima County breached a duty of care by approving the installation of a propane tank and gas line outside the house at 411 Bowers Road. Pierce asserts that the County owed him a duty to investigate the condition of the propane gas piping inside the house without having any reason to suspect any defect, without any request to enter the house and inspect the system, and without any knowledge that any interior piping changes were to be undertaken. Pierce asserts the County should be liable for injuries that arose from a hidden defect in the attic, and from Pierce’s unilateral decision to perform a “do-it-yourself” propane furnace installation, in defiance of All American Propane’s directive that the installation and testing be performed by a qualified propane contractor.

Yakima County denies that it was negligent. It had no knowledge of defects in the piping inside the house. Since Pierce did not advise the County of interior piping changes and did not request an inspection inside the house, the County cannot be responsible for the uncapped line. But the crucial threshold determination is whether, under the circumstances of this case, Yakima County owed an actionable duty of care to Mr. Pierce. Summary judgment was properly granted because Yakima County owed no duty to Pierce to ensure that he would comply with the requirements for safe operation of a propane system.

The existence of such a duty is a question of law for the court to determine. Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). The concept of duty is a reflection of all the considerations of public policy which lead the court, as a matter of law, to conclude that a plaintiff's interests will be entitled to legal protection against the defendant's conduct. Haslund v. Seattle, 86 Wn.2d 607, 611, 547 P.2d 1221 (1976). In this case, Yakima County owed no duty to Mr. Pierce.

Under Washington law, the Public Duty Doctrine generally provides that a local government owes no duty to an individual for damages arising from an alleged failure by the government to enforce the provisions of building codes. Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988); Pepper v. J.J. Welcome Construction Co., 73 Wn. App. 523, 531, 871 P.2d 601 (1994), rev. den., 124 Wn.2d

1029 (1994). The public duty doctrine mandated summary judgment in favor of Yakima County.

Simply stated, a governmental entity such as Yakima County cannot be held liable in tort unless it has breached a duty owed to the particular injured person, as distinct from breaching a duty owed to the public in general. Honcoop v. State, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). This rule generally precludes governmental liability for claims alleging failure of the government to properly regulate or inspect private construction:

These cases recognize that building codes, the issuance of building permits and building inspections are devices used to secure to local government the consistent compliance with zoning and other land use regulations and code provisions governing design and structure of buildings. [Citations omitted]. As such, the duty to issue building permits, and conduct inspections is to protect the health and safety of the general public. Accordingly, we continue to adhere to the traditional public duty rule that building codes impose duties that are owed to the public at large.

Taylor v. Stevens County, *supra* at 164-65.

The public duty rule of nonliability applies to the claims asserted by Mr. Pierce against Yakima County in this case. Absent a showing of a duty running from Yakima County to Pierce as an individual, no liability may be imposed for alleged negligence by Yakima County in approving All-American's installation of the tank and piping outside Pierce's house.

Washington courts have recognized certain narrow exceptions to the Public Duty Doctrine's general rule of non-liability. Summary judgment was properly granted in this case because none of the exceptions to the general rule apply.

B. The "Failure to Enforce" Exception Does Not Apply.

1. The County Had No Actual Knowledge of the Hazardous Condition.

Pierce's opposition to summary judgment, and his brief in this Court, are based primarily on his assertion that he could establish all elements of the "failure to enforce" exception to the Public Duty Doctrine. Pierce's claims, however, meet none of the requirements of this exception. The failure to enforce exception applies only where a city or county approved a building or project with *actual knowledge* of a statutory violation by the applicant which created an "inherently hazardous and dangerous condition." In addition, the failure to enforce exception cannot apply unless the county or city had a *specific mandatory statutory enforcement obligation* which was breached. Honcoop v. State, *supra*, 111 Wn.2d at 189-90. Neither of these conditions is present in this case.

The failure to enforce exception is strictly construed, and has been found applicable in only very narrow circumstances. The Washington Supreme Court's ruling in Atherton Condo. Ass'n. v. Blume Development Co., 115 Wn.2d 506, 799 P.2d 250 (1990) shows

why the failure to enforce exception does not apply in this case. In Atherton, a developer submitted plans to the City of Lynnwood for a proposed condominium construction project. The Lynnwood building official reviewed the developer's plans and prepared correction sheets, identifying numerous problems which needed to be addressed by the developer. Many of these deficiencies related to fire resistivity and safety. 115 Wn.2d at 511. The city eventually approved the final plans. During construction, the city building official regularly visited and inspected the project. Ultimately the project was approved as constructed and a certificate of occupancy was issued, which expressly certified that the project complied with all relevant provisions of the Uniform Building Code. 115 Wn.2d at 511-12.

Subsequently, the exterior walls began to deteriorate, and were found to violate the fire code. The owners sued the city for negligently approving the work, and argued that their claim fell within the "failure to enforce" exception to the public duty doctrine. The trial court dismissed the claim against the city and the Supreme Court affirmed, reiterating the rule enunciated in the Taylor v. Stevens County case. The Atherton court held that the failure to enforce exception would be construed narrowly, to be in keeping with the general rule of non-liability set forth in Taylor:

The plaintiff has the burden of establishing each element of the exception. In addition, we construe this exception

narrowly. To do otherwise would effectively overrule Taylor and eviscerate the policy considerations therein identified.

115 Wn.2d at 531. The plaintiffs in the Atherton case argued that the Lynnwood building official had sufficient information to have been on notice that the fire resistant characteristics of the structure were inadequate. They alleged that the city had failed to enforce provisions of the building and fire codes. The Supreme Court made clear, however, that mere *constructive* notice (negligence in failing to discover a defect) was insufficient:

In the present case, owners argue that the plan correction sheet which Farrens filled out after reviewing the first set of Atherton building plans and the plans which include Farrens' notations constitute actual knowledge of an inherently dangerous and hazardous condition at Atherton. We disagree. The evidence presented to us does not establish actual knowledge on the part of any Lynnwood building official of any inherently hazardous and dangerous condition at Atherton as actually constructed. [citations omitted]. *Owner's evidence, at most, points to constructive knowledge. Constructive knowledge, however, is not enough. The requirement of actual knowledge does not encompass facts which the building official should have known.*

115 Wn.2d at 532. (Emphasis added).

In this case, IRC procedures for initial operation of the propane system require that the person putting the system into place (a) inspects the interior lines for open valves and uncapped lines (IRC § G2417.6.2); and (b) checks for leaks (§ G2417.6.3). Mr. Pierce suggests that if a County inspector had gone inside the home and performed such

procedures he might have discovered the defective interior pipe in the attic. But the argument is flawed. First, the IRC does not envision that the Building Official would be present or involved in such procedures. These are operational steps which did not require permits. IRC §R105.1. If no permit is required, no inspection is contemplated. IRC §R019.1. Second, there is no reason Yakima County should have anticipated that Pierce would attempt to put the system into service without professional help.

The County's inspection of the propane tank outside the house occurred *a full month before* Pierce connected the furnace to the piping system in the house, opened all the valves and, without inspecting for uncapped lines or checking for leaks, attempted to operate the system and the furnace on the day of the explosion. All-American Propane, an experienced propane installer, had certified its pressure test of the new gas piping outside the house. Inspector Granstrand had no reason to believe that Pierce would undertake the interior work without professional help. Pierce did not request an inspection or even guidance regarding his efforts on October 4. The County had no notice that such work was occurring, or that Pierce had decided to attempt to connect the furnace, open the valves, and operate the system by himself without experienced professional help. (CP 975-977).

But even assuming for the sake of argument that the County should have somehow anticipated Pierce's actions and unilaterally demanded additional inspections, this could not give rise to liability under the failure to enforce exception, because the County had no actual knowledge of an existing hazard. There was no danger or defect in the exterior lines that the County inspected. The defect was the uncapped interior line which was apparently located in the attic. (CP 1039). At the time of the County inspection, the outside line had been purged and the valves were closed, so no gas could enter the house. (CP 979). No actual hazard existed until Pierce, acting alone, opened the valves and introduced propane into his house without performing the inspection and leak check required by the IRC, without notice to anyone and without requesting competent professional help or inspection. Pierce's unsafe actions inside the house occurred a full month after the County's inspection of the permitted work outside the house. Because the County had no actual knowledge of the dangerous condition, the "failure to enforce" exception cannot apply.

In Zimbelman v. Chaussee Corp., 55 Wn. App. 278, 777 P.2d 32 (1989), rev. den., 114 Wn.2d 1007 (1990) the owner of a building sued King County, alleging that the County Inspector failed to ensure that the builder complied with code requirements including fire alarm systems, fire resistant materials and flooring which met minimum fire

resistance standards. The plaintiff contended that the inspector had failed to verify that previously noted deviations from the UBC had been corrected. The plaintiff specifically alleged that if the building official had taken more care in performing his inspection, he would have noted the deficiencies. The trial court granted summary judgment for King County and the Court of Appeals affirmed, noting that the plaintiff had not established the critical elements of the “failure to enforce” exception:

Under Taylor, a public official must possess actual knowledge of a hazardous condition before any duty is imposed. Knowledge does not include what an official might have known if he had performed his duties more effectively or vigilantly. Each of the cases cited in Taylor in support of this exception involved actual personal knowledge. Hence, *personal knowledge of an inherently dangerous and hazardous condition by one enforcing the building code is required to create a duty to act.*

55 Wn. App. at 278. (Emphasis added). In Zimbelman, the plaintiff’s claims against King County were dismissed as a matter of law, based on the Public Duty Doctrine. The same result was proper in this case.

Pierce cannot avoid the Public Duty Doctrine by arguing that the County should have investigated further, e.g., by demanding to inspect the interior piping and appliances or by withholding approval of the installation of the tank and pipe outside the house until the furnace was installed and tested. In Smith v. City of Kelso, 112 Wn. App. 277, 48 P.3d 372 (2002), a group of homeowners sued the City of Kelso after a

severe landslide destroyed their homes. The homeowners alleged that the City negligently approved the plat and building permit applications for their subdivisions and homes. They argued that the City failed to enforce ordinances relating to soil and geology studies. The plaintiffs specifically claimed that the City should have ordered a soil investigation report, which might have revealed slope instability on their property. The City moved for summary judgment, and the trial court granted the motion with respect to some claims and denied it as to others. On appeal, the Court of Appeals held that the trial court should have dismissed all of the homeowners' claims against the City based on the Public Duty Doctrine, because the City had no *actual* knowledge of statutory violations creating a hazardous condition. The Court held that merely because a further investigation might have revealed a dangerous condition, this could not constitute "actual knowledge" by the City of a statutory violation creating a hazard:

Unlike KMC 13.04.516, this provision requires something of the developer in certain circumstances: a soil investigation report. *But while the City might have learned about slope instability from a soil investigation, had one been required or submitted, the failure to enforce exception requires actual knowledge of a violation.*

Id. at 286. (Emphasis added). The same rule applies in this case. There is no evidence that a Yakima County official had actual knowledge of the uncapped pipe in Pierce's attic. Indeed, Mr. Pierce admitted this in his deposition. (CP 976).

Pierce's brief ignores longstanding strict requirements and narrow application of the "failure to enforce" exception and purports to create duties for local government that are not intended by applicable codes and that have never been imposed by Washington courts. In abbreviated form, Pierce's argument goes like this: (a) there was a code violation (Pierce's failure to perform the necessary leak check and inspection on October 4); (b) therefore, the County failed to enforce the code; and (c) therefore, the "failure to enforce" exception to the public duty doctrine must apply. The argument is illogical on its face. The failure to enforce exception cannot be established simply because a property owner or contractor failed to undertake some necessary test or safety measure, unless a County official knew of the dangerous defect and intentionally ignored the danger.

In Garibay v. State, 131 Wn. App. 454, 128 P.3d 617 (2005), rev. denied, 158 Wn.2d 1017, a worker at a chemical plant died when a pipe burst, releasing deadly chemical vapors. His estate sued the State of Washington, alleging that its inspectors negligently failed to enforce workplace safety regulations at the plant. An investigation after the accident showed that the pipe burst because it was old and degraded. Further, the evidence established that the plant owner had failed to comply with chemical safety rules which required such plants to have a "pipe wall thickness inspection program." 131 Wn. App. at 456. The

trial court rejected Garibay's argument that the state could be liable for failure to ensure that the owner complied with the safety regulations, and the Court of Appeals affirmed, noting the absence of evidence that state inspectors had actual knowledge of the dangerous condition (the worn pipe):

There is no evidence the safety inspectors had actual knowledge of the facts constituting the dangerous violation leading to the accident. This [the failure to enforce] exception also does not apply.

131 Wn. App. at 462 (2005).

The facts in favor of Yakima County are even stronger in this case than in Garibay, as Yakima County's inspectors never even entered Pierce's house, much less observed the defect (the uncapped line in the attic). Under these undisputed facts, the trial court properly held that the failure to enforce exception did not apply.

2. The International Residential Code Does Not Place on the County a Duty to Perform Pressure Tests, Leak Checks or Inspections for Uncapped Lines.

Pierce's opposition to summary judgment depends entirely on his assertion that the IRC mandates that the County inspector perform all necessary pressure tests, leak checks and inspections for loose ends; and that no approvals may be issued until all tests have been completed, both inside and outside the structure. Pierce points to language in the Code using the term "shall," and then makes the unwarranted leap to the conclusion that all mandatory testing referenced in the IRC is to be

performed by a county or city inspector. Yet the Code says no such thing. To the contrary, the IRC places the duty for permit applications, testing and compliance with code on the applicant and his contractor. The County urges the Court to carefully compare the actual language of the IRC with Pierce's assertions as to what the IRC says.

Yakima County had no duty beyond inspecting the pressure test results that All-American Propane posted on the exterior line which it had installed. A county's inspection duty does not go beyond the scope of the permit for which the applicant applied. IRC Section R105.3 specifically places on the applicant the responsibility to file an application for a permit *identifying and describing the work to be covered by the permit*. (CP 278). Further, IRC Section R105.8 places the responsibility for the installation on the person who performs the work. (CP 280). Section R105.8 is consistent with the Public Duty Doctrine, which provides that it is for applicants, homeowners, and their contractors to ensure Code compliance. Taylor v. Stevens County, supra, 111 Wn.2d at 168-69.

Furthermore, any obligation the County may have relative to inspections depends on prior notice by the applicant. There is no duty of inspection which arises on the part of a municipality until it has been notified that that portion of the work is ready to be inspected:

R109.1 Types of Inspections. For on-site 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).

(CP 284). In this case, the County was notified only of the exterior installation, and not of any interior work, so that was the extent of its inspection. Section R109.1, apparently contemplating permits that include more work than the permits involved in this case, also makes clear that the County may approve “that portion of the construction which is completed,” and need not anticipate further work which may be undertaken in the future under existing or possible permits.

Pierce’s contention that all “inspections” referred to in the code are to be undertaken by a governmental official is unsupported by the code language. For example, IRC Section G2417.1.1 refers to inspections “during and after manufacture, fabrication and assembly.” Obviously, such inspections are not undertaken by a local building inspector. In general, the IRC requires permits for construction work that changes the built environment by installation or removal of physical things. IRC § 101.3. Typically no such permits are required with respect to the *operation* of those physical things.

R105.1 Required. Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical

or plumbing system, the installation of which is regulated by this Code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.

(CP 277).

Because the IRC § G2417.6.2 inspection and the § G2417.6.3 leak check do not involve changes to the built environment but rather involve steps in operating the system, the IRC does not require a permit for those steps or contemplate that a government official will perform, inspect or otherwise be involved in those procedures. Pierce's attempt to insert such language into the code should not be condoned. In interpreting the statute, the Court should refrain from adding to, or subtracting from the language of a statute unless imperatively required to make it rational. Millay v. Cam, 135 Wn.2d, 193, 203, 955 P.2d 791 (1998).

The IRC also provides that the term "final inspection" applies to the work included in the permit, not necessarily to an entire system or structure:

R109.1.6 Final Inspection. Final inspection shall be made after the *permitted work* is complete and prior to occupancy. (Emphasis added).

Since the only permit Pierce applied for was the tank and the gas piping outside the house, the final inspection by Yakima County pertained only to that permitted work. The suggestion by Pierce that the County had inspected and approved the interior piping is supported by no evidence

and indeed is refuted by Pierce's own deposition testimony. (CP 973-976).

Pierce's contention that the County may not approve a portion of a piping installation is directly refuted by the language of the IRC:

G2417.1.4 Section Testing. A piping system shall be permitted to be tested as a complete unit or in sections. . . .

This provision makes abundantly clear that a section of piping can be tested (and approved) without there being a simultaneous testing of other sections. Indeed, the Commentary to this section of the IRC emphasizes this point:

Depending on the progression of the job, it may be desirable to test portions of the system as they are completed. It is also possible that portions of the system will be put in service before the entire system is completed. . . .

(CP 306).

Pierce contends that Yakima County was negligent in failing to "ensure" that a leak check and an inspection for open fittings was undertaken before gas was introduced in the home. Pierce points to the language of IRC Sections G2417.6.2 and G2417.6.3, which address the inspection for loose ends and the leak check respectively. Yet as those code provisions state, the tests and inspections occur at the time gas is introduced into the house and are therefore undertaken by the installer:

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.

2417.6.3 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 586). (Emphasis added).

Because the leak check is performed only as the gas is introduced into the structure, that leak check is always performed by the party introducing the fuel into the building. A local government inspector is almost never present when gas is first introduced into a home.

(CP 141).

Simply stated, there is nothing in the Code that places the responsibility on a local building inspector to be present at the time fuel is introduced into a home. And contrary to Pierce's argument, the IRC places no duty on Yakima County – or any other local government – to perform the 6.2 inspection and the 6.3 leak check.

Moreover, liability on the part of Yakima County is even more untenable in this case, because the County was not even made aware that Pierce was hooking up the interior piping and introducing gas into the house without professional help. There is no authority for Pierce's argument that the County should be liable for Pierce's own failure to inspect the piping system before he turned on the gas, where (a) Pierce

did not seek a permit for any interior work; (b) he did not notify the County that he was undertaking the work; and (c) no applicable code places a duty on a local jurisdiction to perform the inspection and leak check that Pierce himself failed to fully perform.

Under Washington law, to satisfy the “actual knowledge” element of the failure to enforce exception, Pierce would have to identify a Code provision that requires a building inspector to verify that the 6.2 inspection and the 6.3 leak check have been performed before approving an installation of a section of exterior piping. There is no such code provision. The code must be applied as written and enacted, not as plaintiff’s attorney wishes it were written.

Pierce also argues that the County had notice of a Code violation when inspector Granstrand saw that All American Propane had connected the exterior line to the shutoff valve on the outside wall of the house. Pierce cites IRC § R111.1 which provides that neither a landowner nor his contractor should make connections from a fuel source to a building for which a permit is required “until approved by the building official.” But there are several flaws in Pierce’s argument. First, § R111.1 applies to *new construction*, where interior piping in a building has never been tested or approved. The explicit concern is that power not be connected to a building for which no testing or inspection has ever occurred. In this case, on the other hand, the existing piping

within the house had been tested and approved at the time of original construction, so § R111.1 would have no application. (CP 140). Yakima County had no notice of any change to the indoor piping after the initial construction.

Furthermore, by the very language of § R111.1, any technical infraction from connecting the exterior line to the shutoff valve on the exterior wall could exist only “until approved by the building official.” (CP 287). Thus, the County inspector’s observations could not constitute “actual knowledge of a Code violation” because once the County’s inspectors observed and approved the connection, any potential violation of R111.1 would be extinguished. Further, IRC § R111.2 expressly provides that a building official has the authority to authorize and approve the temporary connection of a fuel source:

R111.2 Temporary Connection. The building official shall have the authority to authorize and approve the temporary connection of the building or system to the utility, source of energy, fuel or power.

(CP 288). As the inspector has express authority under the IRC to approve such a connection, Pierce’s argument that the County had actual knowledge of a code violation is unsupported.

Moreover, there can be no liability under the “failure to enforce” exception to the public duty doctrine unless the code violation which the inspector observed constituted an “inherently hazardous and dangerous condition.” Atherton Condominium Association v. Blume Development

Company, supra, 115 Wn.2d at p. 531. The inspector must have had “actual knowledge of the facts constituting the dangerous violation leading to the accident.” Garibay v. State, supra, 131 Wn. App. at 462 (2005). In this case, what the inspector observed was not “an inherently hazardous and dangerous condition,” as required under the failure to enforce exception, because the valve on the tank and the shutoff valve on the outside wall of the house were closed, and no fuel could leave the storage tank, much less enter the home. (CP 482). Indeed, it is undisputed that no fuel entered the home until Mr. Pierce ignored the directions of All American Propane and opened the valves outside and inside the house without professional help, and without performing the 6.2 inspection and the 6.3 leak check required by the IRC.

Plaintiffs presented no competent evidence that an official of Yakima County had actual knowledge of the uncapped pipe or that Pierce was violating a statute which created a hazardous condition when he turned on the gas on October 4. The requirements of the “failure to enforce” exception are not present, and therefore the general public duty rule of non-liability applies.

3. There Was No Statute Placing a Mandatory Enforcement Duty on the County.

Even if Yakima County had possessed actual knowledge of a code violation, there is no applicable statute that imposed a mandatory duty on County officials to take specific enforcement action based on

what the inspector observed. This is a second, independent reason why the claim against Yakima County does not fall within the “failure to enforce” exception to the public duty rule of nonliability. The failure to enforce exception cannot apply unless the local government violated a specific and mandatory duty of enforcement. A mere general provision, e.g., that the building official is “directed to enforce the provisions of the code” is insufficient to satisfy this element.

In Forest v. State, 62 Wn. App. 363, 814 P.2d 1181 (1991), certain persons who were injured by a parolee sought damages from the State of Washington. A state corrections officer knew the parolee was in violation of specific conditions of his parole, but elected not to re-arrest him. The plaintiffs argued that their claim against the state therefore fell within the “failure to enforce” exception to the Public Duty Doctrine. The trial court disagreed, and the claim against the state was dismissed. The Court of Appeals affirmed, holding that *the failure to enforce exception cannot apply unless the municipality violates a statutory mandate that it take specific corrective action*:

We conclude that even if Rose was in technical violation of the general conditions of parole that apply to all parolees, the facts of which were known to Tabet, Forest cannot establish that the state's correction officers had a mandatory duty to take specific action. McKasson v. State, 55 Wn. App. 18, 27, 776 P.2d 971 (1989); Honcoop v. State, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988).

* * *

Unlike the situation in Bayley, where the police officer was required to take specific action, there is no statute here that mandates that specific corrective action be taken.

62 Wn. App. at 369. Accord, Ravenscroft v. Water Power Co., 87 Wn. App. 402, 416, 914 P.2d 991 (1997), aff'd, 136 Wn.2d 911.

The “mandatory enforcement” element of the failure to enforce exception applies fully in the context of building and land use regulation. In Smith v. City of Kelso, supra, the Court based its order of dismissal not only on the absence of “actual knowledge” of the dangerous geological condition, but also on the absence of a specific mandatory enforcement requirement in the Uniform Building Code:

Moreover, even if the homeowners presented specific evidence of steep excavation or homes built on fill, the UBC did not require the City to take specific action to correct a violation. . . . And even if the City knew about steep excavations or homes built on fill, UBC Section 2903(a) does not require the City to take specific action based on a soil investigation. Rather, the building official has discretion to determine whether a soil investigation report is “acceptable.”

112 Wn. App. at 286.

Similarly, in this case there was no specific, statutorily mandated enforcement action which Yakima County was required to undertake, based on what the inspector observed. The applicable building codes place the duty of compliance on permit applicants and contractors. IRC § 105.8. They generally do not place specific mandatory enforcement duties on local governments. It is important to note that the only

references to enforcement by building officials in this context are general and discretionary, and not specific and mandatory. The IRC vests building officials with discretion to enforce, but does not mandate any specific enforcement actions. Section R111.3 provides that when an official observes a Code violation, he “shall have the *authority* to authorize disconnection. . . .” (CP 288). Similarly, Section R113.2 provides that the building official “is authorized” to serve a notice of violation or order where a building or structure is in violation of Code. (CP 290).

In other words, enforcement remedies in the IRC are broadly discretionary, and there is no specific mandatory enforcement obligation under these circumstances.

4. Pierce’s Reliance on *Waite v. Whatcom County* is Misplaced.

At the trial court, and on appeal, Pierce has based his legal argument regarding the “failure to enforce” exception primarily on the case of *Waite v. Whatcom County*, 54 Wn. App. 682, 775 P.2d 967 (1989). But the *Waite* decision is easily distinguishable from this case, both because in *Waite* the inspector admittedly had actual knowledge of the Code violation creating the dangerous condition, and also because the *Waite* court did not even address the “mandatory enforcement obligation” element of the failure to enforce exception. The Court should note the following important differences:

- In Waite, the county official inspected the placement of the furnace in the basement of the house, and thereby observed the Code violation that constituted the inherently hazardous and dangerous condition (placement of the furnace in a basement) with his own eyes.
- In Waite, there were statements from the inspector that he knew a propane furnace installed in a basement was a dangerous violation of the Code.

54 Wn. App. at 687. Based on those facts, the Court held that an issue of fact existed as to whether the “actual knowledge” element of the failure to enforce exception had been satisfied.

In contrast, no Yakima County official inspected or knew of the defect in the system (the uncapped line in the attic). Indeed, no County employee even entered Pierce’s house. Mr. Granstrand testified that he observed no violation outside the house (CP 1009), and Pierce admitted in his deposition that Granstrand had no knowledge of the hidden danger in the attic. (CP 976).

But there is a further reason why the Waite decision provides no support for Pierce’s argument that the “failure to enforce” exception should apply. It is clear that the Court of Appeals in Waite glossed over the “mandatory enforcement obligation” element of the failure to enforce exception, which is easily explainable. This Court should note that briefing for the Waite case occurred in 1988 when the full contours of the Public Duty Doctrine were not widely understood by many attorneys. Importantly, Whatcom County’s brief *did not even address*

the “failure to enforce” exception to the Public Duty Doctrine, much less the required elements of that exception. Indeed, Whatcom County’s entire brief on appeal was only four (4) pages long, and did not refer in any way to the “failure to enforce” exception to the Public Duty Doctrine. (Whatcom County’s brief is attached hereto as Appendix A, for the Court’s review.)

In effect, the defendant in Waite waived any argument that the code did not place a specific mandatory enforcement obligation on the County. 54 Wn. App. at 687. Under those circumstances, it is no surprise that the Court of Appeals did not meaningfully discuss the contours of the “failure to enforce” exception. In short, the Waite decision provides no meaningful guidance as to the “failure to enforce” exception to the Public Duty Doctrine.

In subsequent cases, however, the Washington Supreme Court and the Court of Appeals have made clear that the “failure to enforce” exception does not apply absent a statutory mandate placed upon the government official to take specific enforcement action. See Atherton Condominium Assoc. v. Blume Development Co., supra, 115 Wn.2d 531; Ravenscroft v. Water Power Co., supra, 87 Wn. App. 402, 942 P.2d 991 (1997), aff’d as to public duty doctrine, 136 Wn.2d 911; Halleran v. Nu West, Inc., 123 Wn. App. 701, 716-17 (2004); Smith v. Kelso, supra, 112 Wn. App. 277, 286.

The rule was well stated by the Washington Court of Appeals in Ravenscroft:

This exception is narrowly construed. Atherton, 115 Wn.2d at 531. In order to invoke this exception, the statute must contain a specific duty to take corrective action. See, e.g., Bailey, 108 Wn.2d 262 (statute provided police officer “shall” take into custody a person incapacitated by alcohol); Campbell v. City of Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975) (statute provided building official “shall immediately sever any unlawfully made connection”). **In other words, a specific directive to the governmental employee as to what should be done must be present in this statute.**

87 Wn. App. at 415. (Emphasis added).

In this case, as in most situations involving building codes, discretion is given to government officials as to what, if any, steps should be taken by way of enforcement. IRC 111.3; IRC 113.2. This is in keeping with the general policy of the Public Duty Doctrine to not penalize government for exercising discretion as to appropriate enforcement measures. Smith v. Kelso, supra, 112 Wn. App. at 284.

The Yakima County inspector did not observe the dangerous condition that caused the explosion (the uncapped line in the insulation in the attic). He inspected only the storage tank and line outside the house, which in no way caused Mr. Pierce’s injuries. The valve on the tank and the shutoff valve on the outside wall of the house were closed at the time of his inspection, and the new lines had been purged of gas. Furthermore, the IRC does not place a mandatory enforcement

obligation on an inspector viewing the conditions which the Yakima County inspector observed outside the home. The trial court therefore properly held the “failure to enforce” exception inapplicable, and granted summary judgment to the County.

C. There Was No “Special Relationship” Between Yakima County and Mr. Pierce.

Another exception to the Public Duty Doctrine may arise where a “special relationship” exists between a public officer and the plaintiff. The trial court in this case properly held that Pierce’s claim did not satisfy the essential elements of this exception. In order to fall within the “special relationship” exception, three strict conditions must be met:

A special relationship arises where (1) there is direct contact between the public official and the plaintiff, (2) the official, in response to a specific inquiry, provides express assurances that a building or structure is in compliance with the building code, and (3) the plaintiff justifiably relies on the representations of the official.

Taylor v. Stevens County, supra at 111 Wn.2d 171.

The “special relationship” exception does not apply to the claims asserted by Pierce herein. Mr. Pierce has admitted that he made no specific inquiry of the County as to whether the work he was planning to undertake inside was in compliance with Code. Nor did the County inspector make any express assurance of code compliance. Indeed, the inspector was not even aware that any changes were being made indoors. (CP 972-973).

For the “special relationship” exception to apply in this case, the County would have had to make an express assurance in response to a specific inquiry from Pierce, that the interior piping installation was in compliance with code. Meaney v. Dodd, 111 Wn.2d 174, 180, 759 P.2d 455 (1988); Zimbelman v. Chaussee Corp., 55 Wn. App. 278, 281, 777 P.2d 32 (1989). Mere issuance of permits or approvals is insufficient to constitute an “express assurance.”

The courts have made clear that an “express assurance” must be detailed, and must arise in the context of a *specific* inquiry from the plaintiff. A mere general approval is insufficient to satisfy the special relationship exception. Thus, in Williams v. Thurston County, 100 Wn. App. 330, 997 P.2d 377 (2000) a homeowner who was remodeling her residence sought damages from the County for negligent inspection and approval of defective foundation work. The plaintiff submitted a declaration from her general contractor which included the following:

I called and spoke with the inspector. I asked if the foundation work was built to County standards. I was assured that it had been so constructed. It was only after I had received that assurance that I instructed Ms. Williams that she could pay the Palms and proceed to the next phase of the project.

100 Wn. App. at 331. The trial court nevertheless dismissed the case against the County based on the Public Duty Doctrine and the Court of Appeals affirmed. The Court held that to satisfy the “special

relationship” exception, the express assurance must be specific, rather than general approval:

Here, considering Trabka’s affidavit in a light most favorable to Williams, as we must, she does not show that Trabka made any specific inquiries of the County inspector or that the inspector gave any express assurances. The inspector did not relay particular information known only to him, as in Rogers. The inspector did little more than to make a general approval. . . .

100 Wn. App. at 335.

In this case, the facts are even stronger from the County’s perspective. Mr. Pierce made no specific inquiry to the County inspector, and no specific express assurances were given. To the contrary, the only discussion was Mr. Pierce’s request that the County inspect the storage tank and outdoor lines so that the trench could be filled in, and Mr. Granstrand’s indication that the outside line could be covered. (CP 973-976, CP 1009). The total duration of the contact between Pierce and Mr. Granstrand was about ten minutes, and no specific assurances were given with regard to anything inside the house. Mr. Pierce has admitted in deposition that he was aware that Granstrand’s inspection related only to the external tank and lines; and that Granstrand had not inspected or approved any interior installation. (CP 975-976).

Indeed, it would have been impossible for Mr. Granstrand to have given any assurances with regard to the condition of piping inside

the house, as he was unaware of any interior work. In fact, the interior connections were not completed by Pierce until 30 days *after* the Granstrand inspection. (CP 977). Under these circumstances, the elements of the special relationship exception simply do not exist.

Nor can Pierce argue that he relied on the fact that the County issued a written inspection record card for the fuel tank installation. First, the inspection and approval were limited to the tank and line outside the house, which were not defective. (CP 1008-1009). Secondly, Pierce has admitted he never saw the inspection record card. (CP 483-484). Moreover, it is settled that the special relationship exception cannot be based on the mere issuance of a permit. Taylor v. Stevens County, *supra*, 111 Wn.2d at 167.

Pierce cannot overcome the Public Duty Doctrine by insisting that Yakima County should have provided more information to him regarding potential dangers from propane installation. In Honcoop v. State, *supra*, the Washington Supreme Court held that the special relationship exception can never arise from silence, or from *implied* assurances on the part of a government official. In Honcoop, several dairy operators whose cows had become infected with brucellosis sought damages from the state, alleging that the state had failed to comply with animal importation, quarantine, and testing requirements by not giving them complete information. The Washington Supreme Court held as a

matter of law that no special relationship existed, because there were no express assurances, and the inspectors owed no duty to provide information to the plaintiffs:

Applying the special relationship test, we conclude that these dairy operators have failed to allege a special relationship between themselves and the state. Although seven of the eight dairy operators allege direct contact with the state, none alleges that the state made express assurances that could give rise to justifiable reliance. *Mere allegations that the state failed to provide adequate information or that the state failed to explore every possible risk or contingency is not sufficient to satisfy the assurance prong of the special relationship test.*

111 Wn.2d at 192. (Emphasis added). The same result is called for in this case.

Finally, Pierce did not rely to his detriment on any express assurance from Yakima County. Reasonable reliance is another required element of the “special relationship” exception. Taylor, 111 Wn.2d at 171. Reliance requires a substantial change of position to the plaintiff’s detriment. Corbit v. J.I. Case Co., 70 Wn.2d 522, 539, 424 P.2d 290 (1967). Pierce did not change his position based on an express assurance from the County. As Pierce has testified, he was already planning to hook up a propane furnace inside the home, and there was no statement by a County employee which changed his plans. (CP 975). The County’s approval of the outside tank merely allowed him to cover the lines in the trench.

In short, the critical elements of the “special relationship” exception are not present.

D. The Public Duty Doctrine Has Been Consistently Upheld, Especially in Cases Involving Building Permits and Inspections.

Recognizing that the Public Duty Doctrine precludes liability on the part of Yakima County in this case, Pierce has asked the Court to overrule 30 years of judicial precedent and to eliminate the Public Duty Doctrine as a part of the common law of Washington. Yet the Public Duty Doctrine is one of the most firmly established principles of tort law, and has been applied consistently by the Washington Supreme Court and the Washington Court of Appeals, especially in cases involving building permits and inspections.

This well established body of caselaw confirms (a) the viability of the Public Duty Doctrine as a defense to claims against local governments arising from permits and inspections (Taylor v. Stevens County, supra); (b) that exceptions to the general rule of nonliability should be narrowly construed (Atherton Condominium Ass’n v. Blume Development Co., supra); and (c) that the “failure to enforce” exception requires actual knowledge by the official of an inherently dangerous code violation, as well as a statutory mandate that the official take specific enforcement action (Smith v. Kelso, supra).

Importantly, this case arises in the context of construction permitting and inspections, where the Public Duty Doctrine has been

uniformly recognized as a defense to claims against local governments since at least 1988. In July of that year, the Supreme Court handed down three decisions which clarified the contours of the Public Duty Doctrine rule of nonliability, and carefully limited the exceptions to the general rule. Taylor v. Stevens County, *supra*, 111 Wn.2d at 159; Honcoop v. State, *supra*, 111 Wn.2d 182; Meaney v. Dodd, 111 Wn.2d 174. In the intervening 22 years, numerous decisions of the Supreme Court and the Court of Appeals have applied the Public Duty Doctrine as established in the 1988 trio of cases. This is not an unsettled area of the law, nor one that is in need of modification.

Judicial support for the Public Duty Doctrine has been especially strong in the context of building and land use permits. Indeed, on five occasions since 1988, the Washington Supreme Court has addressed the applicability of the Public Duty Doctrine in the context of alleged negligent construction permitting and inspections. In each of those five cases, the Washington Supreme Court has affirmed the Public Duty Doctrine as a defense to liability, with no dissents. *See*, Meany v. Dodd, *supra*; Taylor v. Stevens County, *supra*; Atherton Condominium Ass'n v. Blume Development Co., *supra*, 115 Wn.2d 506 (1990); Phillips v. King County, 136 Wn.2d 946, 963-65, 968 P.2d 871 (1998); Howe v. Douglas County, 146 Wn.2d 183, 191-92, 43 P.3d 1240 (2002).

It is true that certain Justices have raised concerns about application of the Public Duty Doctrine in dissenting opinions. But those concerns have all arisen in cases involving “9-1-1” emergency responses, *i.e.*, where police or firefighters allegedly promised to help someone in danger, and where the assurance of help may have increased the plaintiff’s danger. See, *e.g.*, Babcock v. Mason County Fire Dist., 144 Wn.2d 774, 30 P.3d 1261 (2001); Osborne v. Mason County, 157 Wn.2d 18, 134 P.3d 197 (2006). No similar reservations have been raised as to the applicability of the Public Duty Doctrine in building permit cases. For example, in Babcock, Justice Madsen distinguished the “9-1-1 call” situation from permit cases, because in permit cases, a duty of compliance with building codes is placed on the landowner/applicant. 144 Wn.2d at 804.

Significantly, in the Court’s unanimous decision in Howe v. Douglas County, *supra*, Justice Chambers noted that the doctrine had come under some criticism in a different context, but then noted “the Public Duty Doctrine has its roots in building permitting and inspection cases.” 146 Wn.2d 192, n. 4. The opinion went on to affirm the continued viability of the Doctrine in this context:

We now turn to whether these facts otherwise support a cause of action for negligent permitting. We have held that negligent permitting cannot be the basis of a negligence claim against local government, absent a recognized exception. See, Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988); *accord*, Phillips v.

King County, 136 Wn.2d 946, 968 P.2d 871 (1998).
Under *stare decisis*, this Court will not overturn a prior holding unless it is shown that it is incorrect or harmful; no such showing has been made here.

146 Wn.2d at 191-92.

In short, the Public Duty Doctrine is alive and well in Washington, especially in the context of building permit and inspection cases.

V. CONCLUSION

The trial court's summary judgment order in favor of Yakima County was correct, and should be affirmed.

DATED this 20 day of September, 2010.

KARR TUTTLE CAMPBELL

By: 
Mark R. Johnsen, WSBA #11080
Karr Tuttle Campbell
Co-Counsel for Respondent Yakima
County

and

Lawrence A. Peterson, WSBA #14626
Senior Deputy Prosecuting Attorney
Attorney for Respondent Yakima County

APPENDIX

No. 22999-1
~~55197-9~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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/Respondents

BRIEF OF RESPONDENT

RANDALL J. WATTS
Chief Civil Deputy
Prosecuting Attorney
Counsel for Respondent
Whatcom County

Office of the Prosecuting
Attorney
Whatcom County Courthouse
311 Grand Avenue
Bellingham, WA 98225

Phone: (206) 676-6784

TABLE OF CONTENTS

FACTS 1
ARGUMENT 1

TABLE OF AUTHORITIES
Table of Cases

Honcoop vs. State, No. 52997-3-1 1
J & B Development vs. King County,
100 Wn.2d 299, 669 P.2d 468 (1983) 3
Meaney vs. Dodd, No. 53891-4 1
Taylor vs. Stevens County,
No. 53817-4 1, 2, 4

No. 55197-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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/Respondents

BRIEF OF RESPONDENT

RANDALL J. WATTS
Chief Civil Deputy
Prosecuting Attorney
Counsel for Respondent
Whatcom County

Office of the Prosecuting
Attorney
Whatcom County Courthouse
311 Grand Avenue
Bellingham, WA 98225

Phone: (206) 676-6784

FACTS

The undisputed facts in the Michael Waite case show that at the time of the installation and inspection Michael Waite did not reside in the residence. Michael Waite did not begin occupying the residence until August of 1983. (See Appendix "A", Answer No. 1). Michael Waite did not request an inspection by the County nor did Michael Waite rely upon any inspection by the County in entering into the lease of these premises. (See Appendix "A", Answer No's. 6 and 9). The question then is what duty did Whatcom County owe to Michael Waite.

ARGUMENT

Whatcom County would not object to the Supreme Court accepting this case for direct review but for the fact that this Court has so emphatically ruled upon this issue less than one month ago. The Respondent is aware of the three cases ruled upon by this Court which are Meaney vs. Dodd No. 53891-4, Taylor vs. Stevens County No. 53817-4 and Honcoop vs. State No. 52997-3-1.

The Taylor case speaks clearly to the legislative intent doctrine with regards to the language covering the occupants of buildings. This Court ruled on page 5 - 7 of that decision:

This court and the Court of Appeals has on numerous occasions rejected the contention that building codes impose a duty upon local governments to enforce the provisions of such codes for the benefit of individuals. (Citations omitted). These cases recognize that building codes, the issuance of building permits and building inspections are devices used to secure to local government the consistent compliance with zoning and other land use regulations and code provisions governing the design and structure of buildings. (Citations omitted). As such, the duty to issue building permits and conduct inspections is to protect the health and safety of the general public. Accordingly, we continue to adhere to the traditional public duty rule that building codes impose duties that are owed to the public at large.

The buyers argue that under Halvorson the public duty rule does not apply to them because of their status as "occupants" of the house. In Halvorson, we acknowledge the traditional rule that a local government is under no duty, ascertainable in tort, to ensure compliance with its building code. We held, however, that the City of Seattle could be liable for failure to enforce the Seattle Housing Code because the code, in its declaration of purpose, evidenced the "clear intent" to protect building occupants. (Citations omitted). That purpose was to identify

"conditions and circumstances {which} are dangerous and a menace to the health, safety, morals or welfare of the occupants of such buildings and the of the public, . . ." (Citations omitted).

The "clear intent" to protect occupants found in Halvorson is not present here. The purpose section of the Seattle Housing Code focuses on substandard housing that is unfit for human habitation. The primary purpose of the Seattle Housing Code is necessarily more focused on the public health and safety of occupants of substandard buildings. On the other hand, the purpose of the State Building Code Act is much broader. While the Act promotes the welfare of occupants, its primary purpose is to require that minimum performance standards and requirements for building and construction materials be applied consistently throughout the state.

The Court then ruled that the state building code did not create a protected class.

This Court then examined the special relationship exception stressed by the petitioner in this case. The Court then reverses J & B Development vs. King County, 100 Wn.2d 299, 669 P.2d 468 (1983) where that court allowed an inference of assurances and expressly put in its place the requirement of privity with the County. That is something that this plaintiff lacks. This plaintiff never contacted the County, never

requested any type of inspection. Never received any assurances from any one. The Court ruled on page 10 of the Taylor case:

We hold that no duty is owed by local government to a claimant alleging negligent issuance of a building permit or negligent inspection to determine compliance with building codes. The duty to ensure compliance rests with individual permit applicants, builders and developers. Accordingly, the special relationship exception to the public duty doctrine has no application where a claimant alleges negligent enforcement of building codes because local government owes no duty of care to ensure compliance with the codes.

Consequently, this court has disposed of this petition in these cases. This petitioner does not have privity with the County. He did not request an inspection, nor did he seek any advise. The County owed him no duty. Consequently, the order of the Superior Court should be affirmed, if the most expeditious route

to that affirmation is acceptance of this appeal by this Court then Whatcom County would urge this Court to accept appeal so that it could be reviewed in light of the cases which have just been recently handed down by this court.

DATED this 23 day of August, 1988.

Respectfully submitted,


RANDALL J. WATTS
Chief Civil Deputy
Prosecuting Attorney

Office of the Prosecuting
Attorney
Whatcom County Courthouse
311 Grand Avenue
Bellingham, WA 98225
Phone: (206) 676-6784

