

FILED
MAY 25 2005

CLERK OF SUPREME COURT
STATE OF WASHINGTON

No. 76954-1

(Court of Appeals No. 53920-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSEF VENTENBERGS, KENDALL TRUCKING, INC., a Washington
Corporation, RONALD HAIDER, and HAIDER CONSTRUCTION
INC., a Washington Corporation,

Plaintiff/Appellants,

v.

THE CITY OF SEATTLE, a municipal corporation, SEATTLE PUBLIC
UTILITIES, and CHUCK CLARKE, in his official capacity as Director of
Seattle Public Utilites,

WASTE MANAGEMENT OF WASHINGTON, INC., d/b/a Waste
Wanagement of Seattle, a Delaware Corporation,

RABANCO, LTD., a Washington Corporation,

Defendants/Respondents.

AMICUS CURIAE MEMORANDUM OF BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON

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I. INTRODUCTION

The Building Industry Association of Washington (“BIAW”) believes that a free market for construction waste hauling services will provide competitive, efficient, and affordable services that protect the public interest, health, safety, and welfare. Affordable housing, the free market, and consumers of construction waste services, like BIAW members, are best served by ensuring that the constitutional liberties of waste hauling companies to contract and provide waste hauling services are not infringed by the City of Seattle granting monopolies to two influential multi-national corporations.

This Court should accept review of this matter as consumer choice is an issue of substantial public interest pursuant to RAP 13.4(b). Ventenbergs’ constitutional liberty to follow a chosen profession, like hauling construction waste, is a fundamental right protected by long-standing case law. *Plumbers & Steamfitters Union Local 598 v. Washington Pub. Power Supply Sys.*, 44 Wn. App. 906, 724 P.2d 1030 (1986); *Conn v. Gabbert*, 526 U.S. 286 (1999); *Examining Bd. Of Eng’rs v. Otero*, 426 U.S. 572 (1976). This case is about best serving the consumers and protecting constitutional liberties from being infringed. If municipalities are allowed to award monopolistic contracts beyond statutory authority, then consumers will suffer.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

A. BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

The Building Industry Association of Washington (“BIAW”) has over 11,630 members who are involved in construction and homebuilding projects statewide. Construction is a highly regulated industry and solid waste collection from construction sites is governed pursuant to RCW 81.77.020. BIAW’s members are consumers of services provided by companies that collect, haul, and dispose of construction waste. As consumers, BIAW members’ businesses are negatively impacted by the City of Seattle restriction of the market in construction waste hauling services to only two multi-national companies.

III. ISSUES OF CONCERN TO AMICUS CURIAE

1. Do RCW 81.77.020 and SMC 21.36.012(5) interfere with the right to contract, restrict open markets and consumer choice, and violate constitutional liberties?

2. Does WA Constitution Article I, Section 12 prohibit the City of Seattle from passing laws to create a monopoly in the construction waste hauling industry for Waste Management Inc. and Rabanco?

IV. STATEMENT OF THE CASE

BIAW adopts the statement of the case as set out in the opening brief of appellant Ventenbergs and re-states the pertinent facts herein.

Plaintiff/Appellant Josef Ventenbergs (“Ventenbergs”) hauls construction, demolition, and land-clearing waste (“CDL”) for a living. Plaintiff/Appellant Ronald Haider (“Haider”) is a small contractor wishing to hire Ventenbergs to haul CDL from his construction sites in the City. Solid waste collection, including construction waste, is governed by RCW 81.77.020 which provides:

RCW 81.77.020 Compliance with chapter required – Exemption for cities. No person, his lessees, receivers, or trustees, shall engage in the business of operating as a solid waste collection company in this state, except in accordance with the provisions of this chapter: PROVIDED, That the provisions of this chapter shall not apply to the operations of any solid waste collection company under a contract of solid waste disposal with any city or town, nor to any city or town which itself undertakes the disposal of solid waste.

Since 1961, the Washington Utilities and Transportation Commission (“WUTC”) has regulated every waste company in the state and granted certificates of convenience and necessity to certain waste hauling companies to operate within the state. Pursuant to RCW 81.77.020, the City of Seattle (“City”) pre-empted WUTC jurisdiction by electing to contract with private companies to provide commercial solid waste hauling. Ventenbergs owns Kendall Trucking (“Kendall”) has hauled CDL in the City for contractors since 1994 without a certificate of convenience and necessity.

In 2003, the City mailed a letter to Ventenbergs informing him that

it had passed a law that made Kendall Trucking's operations illegal. The City passed an ordinance defining "City's Waste" to include construction waste hauled by Ventenbergs. SMC 21.36.012(5). Prior to this ordinance, construction waste was not "City's Waste" and therefore was the property of either owners or contractors. Between the time the City pre-empted WUTC jurisdiction and prior to this ordinance, contractors like Haider freely contracted with Ventenbergs to haul their private CDL waste. Now that the City has adopted SMC 21.36.012(5), CDL waste has been re-defined as the "City's Waste" and the City has contracts only with Waste Management, Inc. and Rabanco. SMC 21.36.030 makes it illegal for any company to haul City's Waste except Waste Management, Inc. and Rabanco. The City has thus excluded Mr. Ventenbergs from his chosen profession.

V. ARGUMENT

A. The City's Granting of Monopolies Violates the Privileges or Immunities Clause of the WA State Constitution, Article I, section 12.

Article I, section 12 of the WA Constitution provides:

Special Privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. Art. I, § 12.

The general nature of the claims in this case is constitutional

challenges to the validity of the City's actions awarding exclusive contracts to two companies and its adoption of SMC 21.36.012(5). A court's evaluation of those claims typically involves an analysis of whether the alleged rights infringed are "fundamental rights" implicating privileges. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 814, 83 P.3d 419 (2004). This is typically followed by an evaluation of whether the statute or ordinance was a justified exercise of a government's constitutional police powers to enact regulations that promote the health, peace, safety and general welfare of the people. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 27, 992 P.2d 496 (2000).

The trial court presumes that since Ventenbergs is not certified by WUTC pursuant to RCW 81.77.040, that therefore the challenged "ordinances did not interfere with a valid contract between Mr. Ventenbergs and Mr. Haider." *See*, Letter explaining ruling on the motions of the parties dated February 23, 2004. Yet this very conclusion begs the question of whether City actions to restrict the market unconstitutionally infringed Ventenbergs' right to seek a valid contract.

The proper focus is whether the challenged City actions infringed on constitutional rights to seek a valid contract, not whether a constitutional right is conditioned upon demonstrating the existence of a

specific valid contract. To require otherwise creates a “Catch 22” where the City’s ordinance could never be challenged by an uncertified hauler without a City contract. The catch is that a hauler who is either certified or obtains a City contract is in the same monopolistic position as Waste Management, Inc., and Rabanco and has no need to make such a claim.

The trial court apparently understood the illogic of requiring the proof of a valid contract and even specifically referenced it as a “catch 22.” *Id* at 2. However, the trial court dismissively denied the catch 22 exists “because the statute fulfills its legitimate health and safety purpose of insuring regulation of all solid waste haulers by either the WUTC or the city.” *Id*. Yet the valid exercise of police power must “bear a reasonable and substantial relationship to accomplishing its purpose.” *City of Bellevue v. Lorang*, 140 Wn.2d 19, 27, 992 P.2d 496 (2000). Here, the trial court’s determination is contradicted by City testimony that the health and safety goals were not dependent on limiting competition to two hauling companies. (Clerk’s Papers 924. Deposition of Ray Hoffman, p. 182. ll. 9-13.) The City confirmed this at oral argument when directly questioned by the trial court, “is this absolutely the only way to accomplish this? Well, no.” (RP 27.) “Protecting a discrete interest group from economic competition is not a legitimate governmental purpose.” *Craigmiles v. Giles*, 312 F.3d 220 224 (6th Cir. 2002).

B. Promoting Open Markets And Consumer Choice Enhances Consumer Protection And Protects The Public Interest, Health, Safety, And Welfare.

Promoting open markets and consumer choice enhances consumer protection and protects the public interest, health, safety, and welfare. As consumers of CDL hauling services, BIAW members advocate for a competitive market that does not restrict the number of haulers members can use. As opposed to monopolies, open markets foster competition where consumers can choose a waste hauler capable of providing timely services at reduced costs. The benefits of an open market can be passed from the contractor to the homeowner in the form of affordable housing. Where markets are restricted to competitors, costs are neither affordable, nor are services timely or predictable. Higher service costs are either absorbed by the contractor or passed on to the homeowner when the market allows.

Arguments surrounding affordability and consumer choice are eerily similar to the WUTC's rulemaking in 1999 that essentially deregulating the industry for motor carriers of household goods. The historical context surrounding that rule change arose out of the concern that unlicensed independent trucks were better serving the public interest than the limited number of companies licensed by the WUTC to move

household goods.

In response, the WUTC adopted Chapter 480-15 WAC filed with the Code Revisor on September 16, 1998. In its 1998 General Order No. R-454 adopting new rules, the WUTC held that the rules “ease entry requirements, provide for rate flexibility, strengthen consumer protection and clarify the Commission’s compliance policies.” *In the Matter of Repealing all rules in Chapter 480-12 WAC*, No. TV-971477. In discussion, the WUTC declared:

Any time consumers in our state are incented [sic] to seek illegal options for the activities that they want to pursue, they are making a statement about their lack of consumer choice. When this occurs, something is wrong with the system. This is an example of where the government is viewed by the consumers we exist to serve as being in the way of what they need, rather than being there to help. . . . The rules represent good public policy for the Commission and for the state by promoting open markets and consumer choice, by eliminating barriers to entry, and by enhancing consumer protection.

Id. (Emphasis added.)

Ventenbergs, and Haider now properly raise identical policy concerns discussed above by the WUTC that currently face the CDL waste hauling industry in the City. Ventenbergs argues that he provides a more efficient, less costly service to haul CDL waste and also complies with regulatory requirements to protect the public health, safety, and welfare. The City, being deposed, has admitted that none of its public health and safety justifications are dependent on limiting competition to two hauling

companies. (Clerk's Papers 924. Deposition of Ray Hoffman, p. 182. ll. 9-13.) Nor does the City exert any control over where CDL waste is disposed in order to protect the public health and safety. (CP 530-31.) The City also admits that after awarding the contracts to Waste Management, Inc., and Rabanco, CDL hauling rates actually increased for some. (CP 544.)

It seems patently clear that the actions by the City to restrict Ventenbergs' and Haider's rights were not based on any interest of protecting consumer choice, the public health and safety, or to lower rates. Instead, out of a desire to avoid a lawsuit by the two companies, the City awarded the contract to haul CDL waste to Waste Management Inc., and Rabanco. (CP 518-19.)

C. CDL Waste Hauling Is Not A "City Service."

The trial court ultimately found that because CDL hauling is a city service and a city function, that therefore "hauling solid waste within the City of Seattle is not a fundamental right to which the privileges and immunity clause would pertain." Letter explaining ruling on the motions of the parties dated February 23, 2004, at page 3. Appellants aptly point out that no statute, ordinance, or legislative enactment defines the phrase "city service." While the City attempts to portray appellants as "boorish" and "dense" for not knowing the definition of "city service" the City is

unable to cite to any case law, statute, ordinance, or legislative enactment defining the phrase. *See* Amended Brief of Respondents City of Seattle, page 17. Nor does the trial court attempt to define or cite to a definition of “city service.” Merely stating that private economic activity such as CDL waste hauling is a “city service,” *ipse dixit*, does not support a ruling that the appellants are not entitled to relief under the privileges and immunities clause.

The City neither provides the service itself, nor prohibits individuals from self-hauling CDL waste. In fact, although the City has a contractual right with Waste Management, Inc. to direct the ultimate disposal of CDL waste, it failed to explain why did not exercise such right, or why it could not contract with other haulers to dispose of CDL in an environmentally sound manner. (CP 607, 691.) Aside from awarding contracts to Waste Management, Inc., and Rabanco in order to avoid a lawsuit, one is left to wonder if the City actually provides any “city service” with regards to CDL waste.

VI. CONCLUSION

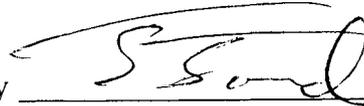
This matter contains issues of substantial public interest which should be determined by this Court pursuant to RAP 13.4(b). Amicus curiae urges this Court to accept review and reverse the decision of the trial court, as affirmed by the unpublished decision of the Court of

Appeals, for the reasons argued herein.

DATED this 13 day of May, 2005.

Respectfully submitted,

By



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CERTIFICATE OF SERVICE

I, Timothy D. Ford, hereby certify that on this 13th day of May, 2005, a true and correct copy of the following documents was served on the following parties via facsimile and US mail:

- 1) Building Industry Association of Washington's Motion to File Amicus Curiae Memorandum
- 2) Building Industry Association of Washington's Amicus Curiae Memorandum
- 3) Certificate of Service

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