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SUPREME COURT
STATE OF WASHINGTON

ARTHUR T. LANE, et al., individually and on behalf of the class of all
persons similarly situated, Respondents/Cross-Appellants,

vs.

THE CITY OF SEATTLE, Respondent,

vs.

THE CITY OF SHORELINE, KING COUNTY, KING FIRE DISTRICT
NO. 2, KING COUNTY FIRE DISTRICT NO. 4 (a.k.a. Shoreline Fire
Department), NORTH HIGHLINE FIRE DISTRICT NO. 11, KING
COUNTY FIRE DISTRICT NO. 16 (a.k.a. Northshore Fire Department),
and KING COUNTY FIRE DISTRICT NO. 20, Respondents,

THE CITY OF BURIEN, THE CITY OF LAKE FOREST PARK,
Appellants.

REPLY BRIEF OF APPELLANT CITY OF BURIEN

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I. ARGUMENT

General municipal governments should not be held liable for fire hydrant expenses when they merely regulate hydrants and neither operate a water system that furnishes fire flow to hydrants nor a fire department that uses hydrants to engage in the function of fire suppression that is carried out by Fire Districts.

A. SPU Is Liable for Hydrant Costs.

As argued in Burien's opening brief, fire hydrants are necessary, regulated components of SPU's water system.¹ RCW 80.28.010(8) requires that "[e]very . . . water company shall construct and maintain such facilities in connection with the manufacture and distribution of its product as will be efficient and safe to its employees and the public." The legislature has authorized the Department of Health ("DOH") to regulate water purveyors such as SPU. RCW 70.116.010. As part of its water system plan, SPU is required to provide hydrants, or else risk revocation of its water system operating permit. WAC 246-293-630(1); WAC 246-293-650(1). Thus, unlike streetlights, which are a discretionary component of an electric utility, fire hydrants are a mandatory, regulated component of a water utility; this is not an "immaterial difference" as the Ratepayers allege.² As mandatory components of a water system, hydrants are properly embedded in SPU's

¹ Brief of Appellant City of Burien, at 8 – 13.

water rates as part of its operating costs.

Relying on *Okeson v. City of Seattle [Okeson I]*, 150 Wn.2d 540, 78 P.3d 1279 (2003) and *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006), the Ratepayers and Seattle argue that fire protection is a general government function and the fact that a hydrant is connected to the proprietary water utility system does not convert a general government function into a proprietary one. However, *Stiefel* is factually distinguishable from the present case. In *Stiefel*, Division I was asked to decide whether the public duty doctrine shielded the City of Kent from liability for the alleged negligent operation and maintenance of City and County fire protection services. *Stiefel*, 132 Wn. App. at 525 – 526, 529. Since the public duty doctrine applies only when the public entity is performing a governmental function, *Id.* at 529 (citing *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987)), Division I examined the particular function at issue since Kent, like Seattle and unlike Burien, operates a water system in its proprietary capacity and a fire department in its governmental capacity. *Id.* at 530. The facts of *Stiefel* are entirely distinguishable since Burien does not provide the functions at issue in *Stiefel*: neither the operation of a municipal water system (a proprietary function) nor the provision of fire protection services (a governmental function). Instead, SPU provides the water system

² Brief of Respondents Ratepayers, at p. 22, 24 -26.

and the Fire Districts provide fire protection services in Burien – a distinction that makes a difference. This case presents inter-jurisdictional issues not present in *Stiefel*, a practical reality that requires a closer examination of which governmental entities are providing which services. The legal analysis in *Stiefel* is nevertheless instructive on the issue of who should pay hydrant costs, to the extent such costs are not legally and operationally required of water system providers. The *Stiefel* court noted that “[i]t is well established that the creation, maintenance, and operation of a fire department and all reasonably incident duties are a governmental function.” *Id.* at 529 – 530 (citing *Lakoduk v. Cruger*, 47 Wn.2d 286, 289, 287 P.2d 338 (1955)). In this regard, Burien is not the general government analogous to Seattle.³ It is significant – both legally and as a matter of public policy – that Burien does not maintain a municipal fire department or a municipal waterworks as does Seattle (in this case) and as does Kent (in the *Stiefel* case). The better analogy is to the Fire Districts that serve Burien, since they are the governmental entities directly responsible for fire protection services.

B. The Fire Districts Are Liable for Hydrant Costs.

Should this Court find that hydrant expenses are not part of a proprietary water system’s overhead to be embedded in rates consistent with

³ See Respondent City of Seattle’s Brief, at 8.

historical practice and sound public policy and instead find that such expenses are properly borne by the general government whose function is to suppress fires, then the appropriate general governments to pay hydrant expenses, in this case, are the Fire Districts. As the governmental entities utilizing the hydrants for the public benefit of fire suppression, the Fire Districts are the proper parties to bear hydrant expenses.

1. Consistent with the Trial Court's Order, the Fire Districts Were Properly Joined as Necessary Parties.

The Fire Districts argue that the issue of their liability for hydrant expenses is not properly before this Court.⁴ This argument is without merit.

The trial court granted Seattle leave to amend its pleadings to join the Fire Districts as necessary parties pursuant to CR 19. CP 1891 – 1893. As the trial court judge's reasoning reflects, the ultimate legal issue of liability for hydrant costs could not be resolved without the Fire Districts being joined as necessary parties:

. . . if the court were to conclude that the third-party defendants' summary judgment motions are meritorious and ought to be granted, it would, at least arguably, be the equivalent of a finding that the fire protection districts are liable. **It seems inappropriate to reach that conclusion without the fire districts participating in this litigation. Accordingly, pursuant to CR 19, the court is inclined to grant Seattle's request, but to do so prior to resolving this significant issue so that all potentially affected parties can be heard on the question . . .**

⁴ Brief of Respondents Fire Districts, at 6 – 8.

CR 1892 (lines 10-21) (emphasis added).

The trial court's ruling is consistent with the purpose of CR 19. "A necessary party under CR 19(a) has been defined as one who 'has sufficient interest in the litigation that the judgment cannot be determined without affecting that interest or leaving it unresolved.'"⁵

In support of their argument, the Fire Districts rely on *Pacific Northwest Shooting Park Ass'n ("PNSPA") v. City of Sequim*, 158 Wn.2d 342, 144 P.3d 276 (2006).⁶ In *PNSPA*, the plaintiff, a gun show organizer, sought to use the city's convention center for a gun show and brought suit against the city alleging tortious interference claims between it and the city. *PNSPA*, 158 Wn.2d at 347. In its response to the city's motion for summary judgment, PNSPA alleged for the first time that the city had also interfered

⁵ 14 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE, § 11.15 (1st ed. 2003) (internal citations omitted); *see also*, 9A DAVID E. BRESKIN, WASHINGTON PRACTICE: CIVIL PROCEDURE FORMS AND COMMENTARY, § 19.1 (2000).

⁶ The Fire Districts also rely on *Mitchell v. Duquesne Brewing Co.*, 34 F.R.D. 145, 147 (W.D.Pa., 1963) and *Okeene ex rel. Burgard v. Kratz*, 45 F. Supp. 629 (D.C.Okl., 1942) in support of their improper joinder argument. Their reliance on these cases is misplaced. In *Mitchell*, the district court denied the third-party defendant's motion to dismiss where it found sufficient notice was presented to indicate the basis of the claim upon which the parties intended to rely. *Mitchell*, 34 F.R.D. at 147 ("While the claim is not set forth with the precision that is now demanded by [third-party defendants], it, nevertheless, presents sufficient notice to [third-party defendants] as to indicate the basis for the claim upon which [the parties] intend to rely."). In *Okeene*, although the district court found no proper issue before it as between certain codefendants, it nevertheless reiterated the general rule that "courts have given a most liberal construction to the rule relative to third-party or ancillary proceedings looking to a speedy adjudication of all controversies between the parties in a single action and without multiplicity of suits." *Okeene*, 45 F.Supp. at 636.

with its business expectancies with vendors and the general public. *Id.* at 348. Significantly, although PNSPA requested leave to amend its complaint, “it did so only to add a claim for breach of contract, not to amend the interference claim [to include a reference to the expectancies between PNSPA, the vendors, and the general public].” *Id.* at 352. This Court found the interference claim was insufficiently pled and failed to give the city fair notice since PNSPA failed to show a specific relationship between it and any identifiable third parties. *Id.* at 352 – 353 (fn.2). In contrast to *PNSPA*, the Fire Districts were specifically identified as necessary parties to the instant litigation. The Fire Districts do not – and cannot – claim unfair surprise or any prejudice resulting from their joinder in this action. This action involves purely legal issues, and the legal theories to support imposition of liability for hydrant costs on the Fire Districts have been clearly articulated. The trial court correctly determined that the Fire Districts are necessary parties, and Seattle joined them in this action. CP 2075 – 2082, 2106 – 2111. In Seattle’s Third-Party Cross-Complaint against the Fire Districts, its prayer for relief seeks “a declaration that since Seattle’s general fund has been found liable . . . for fire hydrant expenses . . . , then one set of third-party defendants (Cities and County or Fire Districts) is liable to SPU for fire hydrant expenses . . .” CP 2081. The Fire Districts have since appeared, filed an answer and defended their position. They are simply trying to

finesse their way out of this matter on procedural grounds, yet there is no force to their arguments.

2. Fire Districts, Although Special Purpose Districts, Exercise General Governmental Functions.

The Fire Districts not only attempt to limit their role in this litigation on procedural grounds, but they also invite this Court to find that they are *special purpose* districts without authority to exercise governmental functions.⁷ This argument is contrary to state law and defies logic. Fire protection districts are political subdivisions of the state and are municipal corporations, just like cities, and “possess all the usual powers of a corporation for public purposes as well as all other powers that may now or hereafter be specifically conferred by law.” RCW 52.12.011. This includes the exercise of their *governmental power* to: contract with any governmental entity for fire prevention and suppression (RCW 52.12.031(1), (3)); take property for a public use under the power of eminent domain (RCW 52.12.041); execute contracts, promissory notes, deeds of trust, or mortgages with any governmental entity for the purchase or sale of *any* real or personal property (RCW 52.12.021, .061); and use equipment or personnel beyond district boundaries (RCW 52.12.111). These are examples of the many and various actions that fire protection districts are statutorily authorized to undertake in exercising their governmental functions. The argument that

they are not the proper governmental entity to pay hydrant costs because they are a *special purpose* governmental entity lacks merit.

Although RCW 52.12.021 does not specifically call out hydrants as authorized expenditures, as the Districts argue, the statute does authorize their payment.⁸ Fire protection districts organized under Title 52 RCW may:

- (1) Lease, acquire, own, maintain, operate, and provide fire and emergency medical apparatus and **all other necessary or proper facilities**, machinery, and equipment **for the prevention and suppression of fires**, . . . and the protection of life and property;
- (2) Lease, acquire, own, maintain, and operate real property, improvements, and fixtures for housing, repairing, and maintaining the apparatus, facilities, machinery, and equipment described in subsection (1) of this section;

RCW 52.12.031(1), (2) (emphasis added). Given the broad authority conferred by statute, the Fire Districts that utilize the hydrants for fire suppression are the appropriate party to pay hydrant costs assuming that this obligation does not otherwise fall on SPU as the water purveyor.

⁷ Brief of Respondents Fire Districts, at 10.

⁸ The Colorado cases relied upon by the Fire Districts are inapposite since in each case the Colorado courts found the water districts liable for supplying water and maintaining fire hydrants within their boundaries in discharge of their statutory duty to provide water for fire protection. In this regard, the Colorado cases actually support Burien's argument that public fire hydrant costs can be lawfully imposed on SPU's ratepayers.

II. CONCLUSION

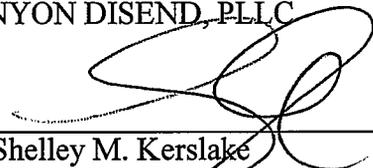
The hydrant costs at issue in this case are part of SPU's water system infrastructure and, as such, are appropriately included in the rates charged to SPU customers, as this is part of the proprietary function of the utility. Moreover, hydrants are mandated by state law and are essential to the continued permitting of the water utility and are thus a necessary operating expense of the utility, which is appropriately included in the general rate.

Should the court conclude that hydrants are part of fire suppression services, then the Fire Districts are the appropriate party to pay such charges, not the City of Burien. The City of Burien does not engage in fire suppression activities. Thus, if the one who uses the hydrant is the one that must pay, Burien is not the proper party. Based upon the forgoing, Burien respectfully requests that its appeal be granted and that the case against it be dismissed.

DATED this 10 day of December, 2007.

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