No: 83632-3

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SAUK-SUIATTLE INDIAN TRIBE,

Appellant,

v.

CITY OF SEATTLE,

Respondent.

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF OF SKAGIT COUNTY

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I. INTRODUCTION

Amicus curiae Skagit County ("Skagit County") has submitted briefing urging this court to reverse the Superior Court's dismissal of Appellant Sauk-Suiattle Indian Tribe's ("Sauk-Suiattle") nuisance claims. *See* Amicus Curiae Brief of Skagit County ("Skagit Br."). Skagit County purports to present "additional relevant authorities" specific to its "routine prosecution" of nuisance actions, but its amicus curiae brief fails to present any actual substantive legal arguments beyond what has already been raised by Sauk-Suiattle in direct contravention of the requirement in RAP 10.3(e) that "Amicus must review all briefs on file and avoid repetition of matters in other briefs." Skagit County's brief does not effectively assist the Court in its determination, and this Court should reject Skagit County's arguments.

II. ARGUMENT

A. The Superior Court Correctly Dismissed Sauk-Suiattle's Nuisance Claims

Skagit County essentially makes the same argument already raised by Sauk-Suiattle: the Superior Court erred in dismissing Sauk-Suiattle's nuisance claims because nuisance claims (allegedly) do not require the tort analysis of proximate cause. *Compare* Skagit Br. at 5, *with* Opening Br. at 2, 20–21. Skagit County boldly claims that "nuisance abatement actions are not tort claims" and that the legal standard for nuisance abatement claims differs from nuisance damage claims. Skagit Br. at 5–6.[1] According to Skagit County, and without citing to any substantive authority, while nuisance damage claims "are correctly constrained to limits imposed by tort law – foreseeability, proximate causation, and so forth[,]" nuisance

[1] To be clear, Sauk-Suiattle's First Amended Complaint does not contain a "nuisance abatement" cause of action, nor has Sauk-Suiattle ever alleged or pled a separate "nuisance abatement" cause of action. Sauk-Suiattle's First Amended Complaint contains only two nuisance causes of action: private and public nuisance. *See* CP 234; *see also* CP 239. Sauk-Suiattle claims it has asserted "a theory of nuisance per se," Opening Br. at 20, but its First Amended Complaint does not allege or plead nuisance per se, only private and public nuisance. *See also* Resp't Br. at 32 n.2. As the City explained in its brief, the Superior Court correctly dismissed all of Sauk-Suiattle's nuisance claims. Resp't Br. at 29–50.

abatement claims are not subject to such analysis. Skagit Br. at 5. To state an "effective[]" nuisance abatement claim, all that is required is an allegation that "the reasonable standards of the community are being unreasonably violated." *Id.* at 6. According to Skagit County, Sauk-Suiattle has done as much.[2] *Id*.

While Skagit County claims that it has "significant and successful experience using nuisance actions to abate problematic conditions" in its communities, it provides no examples of such nuisance abatement actions, nor does Skagit County provide any examples of successful nuisance abatement actions that did not require the alleged "limits imposed by tort law – foreseeability, proximate causation, and so forth." Skagit Br. at 5. Instead, the only case Skagit County cites in support of its novel argument that the legal standard for nuisance damage claims differs for nuisance abatement claims is *Kitsap Rifle &*

[2] Note that while Sauk-Suiattle's First Amended Complaint seeks declaratory and injunctive relief, Sauk-Suiattle has reserved its right to amend its First Amended Complaint "to assert damages as the evidence may warrant." CP 209.

Revolver Club v. Kitsap County, 184 Wn. App. 252, 285 (2014), the exact same case Sauk-Suiattle points to in support of the same proposition in its Opening Brief. *See* Opening Br. at 21. But *Kitsap Rifle* does not stand for such a proposition. *Kitsap Rifle* contains no discussion of differing legal standards for nuisance abatement actions versus nuisance damage actions.

Perhaps this is because the notion that there are "nuisance abatement claims" and "nuisance damage claims" is a misnomer. Certainly, there are various types of nuisance claims—*e.g.*, public nuisance, private nuisance, nuisance per se. But nuisance abatement and damages are not nuisance claims or causes of action, they are remedies a plaintiff is entitled to after it is found that a defendant's action (or inaction) constitutes a nuisance and is the legal cause of plaintiff's injury.

Whether the remedy for a nuisance is damages or abatement (or in some instances, both) does not change the fact a nuisance (public, private, or per se) is a tort and requires a finding that a defendant is the legal cause of the nuisance. *See*,

e.g., 17 Wash. Prac. Real Estate § 10.3 (2d ed.) ("To commit a 'nuisance' is a tort."); *see also* Restatement (Second) of Torts § 824, comment (b); Restatement (Second) of Torts § 9, comment (b) (citing Restatement (Second) of Torts §§ 430 – 453 and § 870) (stating that for a defendant's action to be the legal cause of an invasion of another's interest, the act must be a substantial factor in bringing about the harm, and cannot be superseded by unforeseeable intentional or criminal acts of third parties). Courts will evaluate whether a plaintiff has "successfully alleged facts showing proximate cause" when deciding whether a nuisance claim should be dismissed. *See City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1105–07 (W.D. Wash. 2017). Moreover, "unforeseeable intervening acts break the chain of causation." *Id*. at 1107.

By omitting the foundational tort analysis of proximate cause from the legal standard applied to a nuisance claim, Sauk-Suiattle and Skagit County are essentially asking this Court to hold a defendant liable for nuisance even if the defendant was

not the legal cause of the nuisance. This defies the inherent logic of not just nuisance, but all tort claims. As explained in the City's brief, the Superior Court correctly dismissed Sauk-Suiattle's nuisance claims because Sauk-Suiattle cannot establish the requisite causal connection between the City's statements and the alleged acts of third parties causing harm to Sauk-Suiattle. *See* Resp't Br. at 37–40.

Skagit County also seems to allege that the Superior Court erred in dismissing Sauk-Suiattle's nuisance claims because a plaintiff need not "prove actual, ongoing harm[.]" Skagit Br. at 6. The City does not doubt that the Tribe's fear and anxiety from the racist and hurtful comments directed to members of Sauk-Suiattle exists. Skagit Br. at 6. But such comments from persons wholly unrelated to, and outside the control of, the City do not establish causation. The City's statements do not encourage any person to harm Sauk-Suiattle or its members; they are merely statements regarding the City's efforts to obtain electricity from sources with a lower impact on the environment than carbon-

based options.

B. The Court Should Ignore Skagit County's Un-researched Opinion on *Washington Natural Gas*

Skagit County states that it "has not researched and therefore takes no position as to whether *Washington Natural Gas v. PUD No. 1 of Snohomish County*, 77 Wn.2d 94 (1969) exempts municipal government" from the Washington Consumer Protection Act, Chap. 19.86 RCW ("CPA"), but then proceeds to opine on the statutory language and more than fifty years of case law that it admits it has not researched. Skagit County states that Sauk-Suiattle "appears correct that *Washington Natural Gas* and its progeny don't address the situation here." Skagit Br. at 7, n.3. Just as Sauk-Suiattle offered no authority to support its argument that this Court should overturn more than fifty years of case law because "in 1969 it was never contemplated that a utility owned and operated by a municipality would be operated some 90+ miles outside the municipality's jurisdiction[,]" Skagit County also offers no authority to support its admittedly un-researched opinion that

Sauk-Suiattle's argument "appears correct." *See* Opening Br. at 13, 18; *see also* Skagit Br. at 7.

The Washington Supreme Court, state courts (including this Court), and federal courts have held for more than fifty years that municipal corporations are not subject to the CPA. *See* Resp't Br. at 18–22. Skagit County's un-researched opinion that Sauk-Suiattle "appears correct" is uninformed and categorically wrong. The plain text of the CPA, supported by more than fifty years of case law, makes clear that the City is not subject to the CPA.

C. The City Agrees that "Good Government" Requires Truth

The City, of course, agrees with Skagit County that good government requires truth. Skagit Br. at 7. The City's conduct and statements regarding the Project do not violate this norm. While Skagit County states that the alleged conduct of the City contained in Sauk-Suiattle's First Amended Complaint "would appropriately be enjoined[,]" Skagit Br. at 9, the City has demonstrated that the Superior Court correctly dismissed Sauk-

Suiattle's CPA and nuisance claims under CR 12(b)(6).

III. CONCLUSION

For the foregoing reasons, this Court should disregard the arguments of Skagit County. For the reasons outlined in the City's brief, the Superior Court did not err in dismissing Sauk-Suiattle's First Amended Complaint, and this Court should affirm the Superior Court's Order.

Pursuant to RAP 18.17, I certify that the foregoing contains 1,442 words.

DATED this 15th day of July 2022.

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CERTIFICATE OF SERVICE

I, Sabrina Mitchell, hereby certify under penalty of perjury under the laws of the State of Washington that on the 15th day of July 2022, I caused the foregoing document to be served by the manner specified, to all parties listed below:

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