No. 836323

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

Division I

SAUK-SUIATTLE INDIAN TRIBE,

Plaintiff-Appellant,

v.

CITY OF SEATTLE,

Defendant – Respondent,

On Appeal from the Superior Court of the State of Washington

for King County

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Appellant Sauk-Suiattle Indian Tribe appeals an Order and Judgment of the King County Superior Court granting Respondent Seattle's CR 12 (b) (6) motion to dismiss the Tribe's complaint for failure to state claims.

Specifically, the Tribe appeal's the Superior Court's decision concluding:

1. That Seattle as a municipal corporation is not subject to the Washington Consumer Protection Act;

2. That the Tribe's claim of nuisance *per se* should be dismissed because the Complaint lacked allegations that the City's statements constituted advertising to sell a product or to increase consumption of a product and therefore was not an unlawful act; and

3. That the Tribe's common law nuisance claim should be dismissed on grounds that "there is no allegation of how the City's speech is the proximate cause of harassment."

The Tribe timely filed a Notice of Appeal.

ASSIGNMENTS OF ERROR

The court erred in extending *Washington Natural Gas Co. v. Public Utility District No. 1*, 77 Wn. 2d 94 (1969), and its progeny to this

cause in that this cause is distinguishable for the following reasons:

(1) Such cases exempting public corporations from the Consumer Protection Act involved entities regulated by outside governmental bodies;

(2) Washington Natural Gas was decided when no federal consumer protection agency had applied Consumer Protection Acts to municipal corporations; and

(3) None of such cases relied upon by the Superior Court involved a municipal corporation engaging in conduct prohibited by other state statutes.

(4) The Court's Order was erroneous in its assertion that the Plaintiff's Complaint contains "no allegation that the City's statements amount to advertising to sell a product or increase consumption of a product, as otherwise required by RCW 9.04.010."

The trial court further erred in dismissing Plaintiff's nuisance claim by ruling that:

(1) The touchstone for nuisance liability is actual harm, not the reasonableness of a Defendant's conduct;

(2) Proximate causation is an element of a Nuisance claim. Proximate cause is a question of fact for the *jury*, not an element of a *prima facie* nuisance claim; and

(3) The First Amended Complaint relied exclusively upon the harassment of tribal members as the basis for the Nuisance claim. Other allegations of the complaint reflect of harm far beyond the harassment of tribal members.

STATEMENT OF THE CASE

On September 17, 2021 the Sauk-Suiattle Indian Tribe filed a Complaint alleging that certain conduct by Seattle outlined in the Complaint violated the Washington Consumer Protection Act. CP 1. The Complaint sought *inter alia* certification as a Class Action on behalf of commercial and residential consumers of electricity generated by Seattle and sold to them. CP 1, pp. 1, 26-31. The Tribe sought declaratory and injunctive relief.

On October 21, 2021, before the made the findings necessary to certify the action as a Class Action pursuant to CR 23 (c), Seattle moved to dismiss plaintiff's complaint under CR 12 (b) (6). CP 8.

On November 19, 2021 the Tribe filed a First Amended Complaint adding claims of statutory and common law Nuisance Claims in additions to the Consumer Protection Act violations alleged in its original complaint. CP 24.

Seattle's motion to dismiss was argued on January 14, 2022 and,

on February 22, 2022 the Superior Court granted the motion and dismissed the Tribe's First Amended Complaint. CP 45. Dismissal of the Tribe's Consumer Protection Act claims was based upon the Court's determination that Seattle as a publicly owned corporation was categorically exempt from the Consumer Protection Act as enunciated by *Washington Natural Gas Company v. P.U.D. No. 1 of Snohomish County*, 77 Wn.2d 94 (1969). CP 45, p. 2, ln. 10-11.

The Superior Court dismissed the Tribe's nuisance claims on grounds that no "unlawful act" of Seattle was alleged in the complaint (CP 45, p. 2, ln. 17-18) and that the complaint contained no allegation that the City's speech was the proximate cause of harassment of the Tribe. CP 45, p. 2, ln. 18-19.

The trial court stated that the First Amended Complaint contained "no allegation that the City's statements amount to advertising to sell a product or increase consumption of a product" (Id., ln. 15-16).

STANDARD OF REVIEW

Motions to dismiss under CR 12 are to be "granted 'sparingly and with care.'" Kinney v. Cook, 159 Wn.2d 837, 842 (2007)(quoting *Hoffer v. State*, 110 Wn.2d 415, 420 (1988)) The "plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record." M.H. v. Catholic Archbishop of Seattle, 162 Wn.

App. 183, 189 (2011), citing Tenore v. AT & T Wireless Servs.,136 Wash.2d 322, 330 (1998). "Accordingly, we must take the facts alleged in the complaint, as well as hypothetical facts, in the light most favorable to the nonmoving party." *Id.,* quoting Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 122–23 (2000). Whether allegations of a complaint support the claims asserted therein proceeding further is based upon a fair reading of the complaint, during which the court presumes all well-pleaded allegations of the complaint to be true. Bailey v. Town of Forks, 108 Wn.2d 262, 264, 737 P.2d 1257 (1987). The motion is construed most strongly in favor of the non-moving party and should be granted only if it is apparent from the face of the complaint that under no circumstances could the plaintiff make out a claim for which relief may be granted. Tenore v AT&T Wireless Services, 136 Wn. 2d 322, 329-330 (1998).

The Court of Appeals reviews CR 12(b)(6) dismissals *de novo*. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). "A CR 12(b)(6) motion challenges the legal sufficiency of the allegations in a complaint." *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25 (2016). All facts alleged in the complaint are presumed to be true and the reviewing court may consider hypothetical facts supporting the plaintiff's claim. *FutureSelect*, *supra*, 180 Wn.2d at 962.

ARGUMENT

The Superior Court erred in dismissing the Tribe's Consumer Protection Act Claim

In *Washington Natural Gas*, *supra*, a provider of natural gas alleged that a public electric utility committed an unfair trade practice by limiting energy provided to new building construction to electricity, thereby excluding natural gas as a source of energy for such construction. The court concluded that, because the public utility was empowered by *statute* to determine the time, place, manner, type and price of the delivery of electricity, it was empowered to adopt such a policy and therefore was exempt from the CPA.

As stated in RCW 19.6.170:

> Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States[.]

RCW 19.86.170. It should be borne in mind that the reason behind the ruling in *Washington Natural Gas*, *supra*, that the defendant municipal corporation (public utility district) was exempt was that the conduct alleged to have been committed was subject to *separate regulation* by a governmental body and authorized by *statute* to establish the terms and

conditions under which electricity may be delivered. As such, the corporation was either empowered to perform the act or were not prohibited from doing so. Consequently the court concluded that determination of whether the corporation was permitted or prohibited should be a determination left up to the body which licensed or oversaw the municipal corporation.

That this is what the *Washington Natural Gas* court meant when it exempted the public utility from application to it of the Consumer Protection Act is borne out within the opinion of the Washington state supreme court itself. The *Washington Natural Gas* decision was *expressly* based by the Washington supreme court upon the court's *prior* decision in *Williamson v. Grant County Public Hospital District*, 65 Wn. 2d 245 (1961). As stated by the state supreme court in Washington Natural Gas:

> [Our] view is supported by our holding in *Williamson v. Grant County Pub. Hosp. Dist. 1*, where, in considering the application of the Consumer Protection Act to a public hospital district, we said:
>
> > Defendant Grant County Public Hospital District No. 1 is a municipal corporation created by state statute. Its power are vested in its duly elected officials and medical staff and regulated by statute. RCW 19.86.170 (Consumer Protection Act) provides:

> *"Nothing in this chapter shall apply to* actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington public service commission, the federal power commission or *any other regulatory body or officer acting under statutory authority of this state or the United States*. . . ." (Italics ours.) Hence, the Consumer Protection Act does not apply to the instant case.

77 Wn. 2d at 98-99. *Williamson*—the case relied upon for the decision in *Washington Natural Gas*—was an action brought by an osteopath against a public hospital alleging an unfair trade practice in violation of the Washington Consumer Protection Act arising from denial of the osteopath's hiring as a hospital staff member. The court, relying upon RCW 77.44.160, in which the legislature delegated regulation of hospital standards to a Council of the American Medical Association, held that the public corporation was exempt from the reach of the Consumer Protection Act by virtue of RCW 19.86.170, which exempted actions done under authority of "another regulatory body," in that case the American Medical Association. Id.

Certainly, from the public policy perspective there are sound reasons for, on a case by case basis, determining that a publicly owned corporation is not subject to the Consumer Protection Act if it is engaging in activity that is either authorized by or subject to regulation of another regulatory body. In this case plaintiff is not alleging that, defendant Seattle is violating the Consumer Protection Act in the

delivery of electricity or setting its *prices* as provided for in its charter, since that is what its utility is authorized to engage in.

However, the essence of plaintiff's claim is not directed at activity which the municipal corporation Seattle City Light may lawfully engage in subject to authorization of its governing body such as the pricing of electricity or its selection of contractors to provide electricity delivery or maintenance services. Rather, plaintiff claim is that defendant is engaging in *false advertising*, commonly known as "greenwashing" or asserting facts which deceive the public. That is not something that is "permitted" or "regulated" by "any other governmental body" within the meaning of RCW 19.86.170—nor can it be. Instead, it is conduct that is *prohibited*. False or deceptive advertising is not *permitted* in the State of Washington, nor is it "regulated". As expressly stated in RCW 9.04.050:

> *It shall be unlawful for any person to publish, disseminate or display*, or cause directly or indirectly, to be published, disseminated or displayed in any manner or by any means, including solicitation or dissemination by mail, telephone, electronic communication, or door-to-door contacts, *any false, deceptive or misleading advertising, with knowledge of the facts which render the advertising false, deceptive or misleading, for any business, trade or commercial purpose or for the purpose of inducing, or which is likely to induce, directly or indirectly, the public to purchase, consume, lease, dispose of, utilize or sell any property or service*, or to enter into any obligation or transaction relating thereto: PROVIDED, That nothing in this section shall apply to any radio or television broadcasting station which broadcasts, or to any publisher, printer or distributor of any newspaper, magazine, billboard or other advertising medium

> who publishes, prints or distributes, such advertising in good faith without knowledge of its false, deceptive or misleading character.

RCW 9.04.050.

It is acknowledged that if plaintiff were alleging that Seattle, operating as a publicly owned electricity provider, violated the CPA because, for example, of the manner in which it delivered electricity, its price, or to whom it could be delivered, that would conceivably be beyond the reach of the CPA. Those are among the things defendant is empowered to do within its corporate charter and regulated by city codes, ordinances, and subject to oversight by and within the powers of the Seattle City Council.

On the other hand, the allegations of plaintiff's complaint are not centered on the manner in which defendant provides electricity—which presumably it is empowered to do under its governing documents overseen by city codes and ordinances and the powers the City Council is empowered to engage. That was the reasoning behind the court-created doctrine that municipal corporations are exempt from the CPA: because they *were* subject to governmental regulation.

However, plaintiff's allegations focus upon "advertising" or marketing, essentially advertising in a false light. Had plaintiff not

determined to act in such a courtly matter, plaintiff claims could easily been cast as the common law tort of Fraud.

The line of cases relied upon by the defendant arose under distinguishable circumstances because plaintiffs in those cases sought to apply the CPA to conduct subject to regulation or permission of other governmental authorities.

In ruling upon defendant's motion which is chiefly based upon precedent over 50 years old[1], numerous facts asserted in plaintiff's complaint must be taken into account in distinguishing such cases.

For example, ¶ 2.28 of plaintiff's complaint (CP 24, p. 16, ln. 10) alleges that:

> Defendant Seattle has publicly communicated and advertised an extensive level of false and misleading environmental claims regarding its Skagit Project, fish passage, and the LIHI Low Impact certification, information that Defendant knew or should have reasonably known was deceptive[.]

See, Complaint, ¶ 2.28. Paragraph 2.29 of plaintiff's first amended complaint asserts *inter alia* that:

> [O]n a website entitled "Protecting the Natural Environment with Low Impact Energy Generation", Seattle made the claim that "*all three of the [Skagit Project] dams are upstream of a natural barrier to fish passage*[.]"

However, the report resulting in defendant Seattle's certification as a

[1] Washington Natural Gas was decided in 1969.

Low Impact Hydropower Facility actually notes that the *only* natural barrier to fish passage in the vicinity of Seattle's Gorge Dam[2] was *above*, not below, the dam. The report is noted in ¶ 2.5 of plaintiff's complaint. CP 24, p. 17). That defendant's public pronouncements are deceptive is borne out by the allegation—presumed to be true—alleged in paragraph 2.17 of the complaint that:

> The National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NOAA Fisheries") flatly disagrees with Defendant Seattle's claim that there are natural barriers to fish passage downstream of Defendant Seattle's dams[.]

See also, ¶ 2.18 (comments of United States Fish & Wildlife Service) (Seattle City Light "did not address the fact that SCL has failed to document a fish passage barrier in the Skagit River using best available science; in fact, a 1915 survey of the Skagit River (USGS 1915) found no evidence of a passage barrier").

Other allegations in the Complaint asserting false and deceptive advertising by defendant is alleged in ¶ 2.30 where defendant announces that it is the "Nation's Greenest Utility" notwithstanding that there is no such official designation of defendant as such, nor does such title even exist. Instead, defendant's utility is the largest electric utility, in terms of number of megawatts generated, certified by the Low

[2] Also known as "Newhalem Dam."

Impact Hydropower Institute but that does not translate into defendant claiming status as our nations greenest utility. False advertising is beyond the scope of what activities a municipal corporation is empowered or regulated to engage in and, consequently, unlike the entities described in RCW 19.86.170 is not exempt from the reach of the Consumer Protection Act. That distinguishes the facts alleged in this case from those involved in the cases cited by defendant where the utilities in those case were not acting *ultra vires*, or beyond the scope of activities they were chartered to engage in.

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. Advertising well beyond a municipality's jurisdiction could not have been envisioned in that the internet was far from invention. As stated in State v. Valentine, 132 Wn. 2d 1 (1997), *stare decisis* must necessarily periodically "change to meet the ever-changing needs of an ever-changing society and yet, at once, to preserve the very society which gives it shape". 132 Wn. 2d at 11.

Further, it should be borne in mind that, strictly speaking, the Washington Consumer Protection Act has been amended numerous times by the Washington state legislature since 1969. *See, e.g.*, Washington Session Laws, 1983, ch. 3 § 25 and ch. 288 § 4; 1985, ch. 401

§ 1. The most recent version, enacted in 1985 as Substitute House Bill No. 46 and entitled "Restraints of Trade—Unfair and Deceptive Business Practices—Intent Clarified", embodied in RCW 19.86.920, states as follows:

> The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. *It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts* and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.
>
> It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

SHB 46 (approved May 20, 1985) (emphasis added). This is pertinent to consideration of defendant's motion to dismiss in reliance of aged decisions of the Washington supreme court to the effect that publicly owned corporation were determined exempt from the Consumer Protection Act. However, the language and scope of the Washington

Consumer Protection Act is characterizable as virtually identical to the Sherman Act. *See, e.g.,* 15 U.S.C. § 1, *et seq*; 15 U.S.C. § 45, *et seq*. As the Washington State Legislature clarified in 1985:

> *It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts*[.]

RCW 19.86.920 (emphasis added). *See* Appendix.

In *City of Lafayette v. Louisiana Power and Light Company*, 435 U.S. 389 (1978), the United States Supreme Court was presented with the question of whether the term "person" within the Sherman Act provisions addressing unfair trade practices included municipal corporations. As stated in the Court's opinion, the definition of "person" within § 8 of the Sherman Act[3] and § 1 of the Clayton Act[4] includes municipal corporations:

> We conclude that these additional arguments for implying an exclusion for local governments from the antitrust laws must be rejected. We therefore turn to petitioners' principal argument, that "*Parker's* findings regarding the congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions." Plainly, petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws.

[3] 15 U.S.C. § 7.

[4] 15 U.S.C. § 12.

435 U.S. at 408. Citing *Chattanooga Foundry & Pipe Works v. Atlanta*[5] and *Georgia v. Evans*[6], *the Supreme Court held that:*

> Although both *Chattanooga Foundry* and *Georgia v. Evans* involved the public bodies as plaintiffs, whereas petitioners in the instant case are defendants to a counterclaim, the basis of those decisions plainly precludes a reading of "person" or "persons" to include municipal utility operators that sue as plaintiffs, but not to include such municipal operators when sued as defendants.

435 U.S. at 397. Consequently, the United States Supreme Court, applying the comparable Sherman and Clayton Acts, has held that municipal corporations are subject those Acts, RCW 19.86.920 compels a conclusion that they are similarly subject to the Washington Consumer Protection Act that our courts "be guided by the final decisions of the federal courts." RCW 19.86.920. That the Washington Consumer Protection Act is to be construed liberally and harmoniously with and guided by federal interpretations of the Federal Trade Commission and the federal courts is expressly noted in *Klem v. Washington Mutual Bank*, 176 Wn. 2d 771, 792 (2013). The United States Supreme Court, having construed the counterpart federal consumer protection laws prohibiting false or deceptive trade practices as applicable to municipal corporations, the intent of the Washington

[5] *203 U.S. 390* (1906).

[6] *316 U.S. 159 (1942).*

State Legislature now embodied in its 1985 "clarification of intent" requires a conclusion that the Washington Consumer Protection Act is similarly to be applied to include municipal corporations. It cannot be said that a decision of the United States Supreme Court or a statute embodying the express intent of the Washington State Legislature are not controlling authority.

It is perhaps dispositive that, in 1969 when *Washington Natural Gas* was decided, no federal court consistent with RCW 19.86.920 had held consumer protection laws applicable to municipal corporations. That was the specific argument made by the respondent, Public Utility No. 1, in its appeal brief:

> Respondent agrees that the federal and state statutes are similar in purpose and intent. Respondent also agrees that under RCW 19.86.920, federal anti-trust decisions are applicable in construing the Consumer Protection Act.
>
> Respondent, however, knows of no federal decision holding a municipal corporation in violation of any federal anti-trust statute. In fact, respondent knows of no decision in which a municipal corporation has even been held subject to a federal anti-trust statute. Certainly, appellant has cited no such case.

See, *Brief of Respondent Public Utility No. 1 of Snohomish County*, Washington Supreme Court no. 40519, pp. 15-16, an excerpt of which is filed herewith in the Appendix. Unlike the posture of the law as it existed when Washington Natural Gas was decided in 1969, the

governing federal law arising from *City of Lafayette v. Louisiana Power and Light Company* and its progeny result in applicability of the Washington Consumer Protection Act to municipal corporations, as required by the unequivocal expression of legislative intent embodied in RCW 19.86.920.

Additionally, it is an established principle of constitutional law that, as to federal laws of general applicability, the laws of state and local governments in the exercise of police powers may more restrictive but not *less* restrictive than federal laws nor provide less public protection. Since the companion federal consumer protection acts have been held *applicable* to municipal corporation doing business as public utilities, the Washington's consumer protection laws cannot provide *less* protection by exempting them from their reach.

It also must be borne in mind that it was never contemplated 50+ hears ago that a public utility would be operating some 100+ miles outside their territorial jurisdiction. A primary policy consideration for not generally applying the CPA to decisions or conduct engaged in by publicly owned utilities is that voters within the utility district are shareholders. Under ordinary circumstances, what the utility does vis-à-vis electricity is responsible to their shareholders.

As stated by the Washington State Supreme Court on numerous

occasions sometimes over time changing conditions and new decisions require that past cases like *Washington Natural Gas* and its progeny be relegated to the dust bin.

Nuisance Claim

The Court's Order at page 2, lines 13-16, dismissing this cause of action, states:

> [W]ith regards to Plaintiff's nuisance *per se* theory, there is no allegation that the City's statements amount to advertising to sell a product or increase consumption of a product, as otherwise required by RCW 9.04.010.

In ¶¶ 2.28 – 2.34 of the Tribe's First Amended Complaint, however, it alleged numerous instances in which Defendant is intentionally misleading the public, specifically associating same with the marketing of its products and services. *See*, *e.g.*, First Amended Complaint (CP 24) at ¶ 2.30:

> As another blatant example of Defendant Seattle's "greenwashing" of its environmental reputation, Defendant Seattle adopted as its brand and public slogan the bald assertion that Defendant Seattle is, allegedly, the "Nation's Greenest Utility," prominently displaying logos and claims to that effect on countless websites, materials, and presentations intended for marketing purposes and public consumption.

See also First Amended Complaint ¶ 2.40.[7]

In addition to asserting a theory of nuisance *per se*, Plaintiff's Complaint asserts nuisance arising from the fact that the City's conduct unreasonably interferes with the rights of the Tribe. Among other things, Plaintiff alleged that Plaintiff's members experience harassment in their fishing activities due to "blame shifting" caused by Defendant's greenwashing. However, this was only *one* of various harms the Defendant's conduct creates. Nevertheless, the Court's Order dismissed the nuisance claims solely and exclusively on that basis, on grounds that the Complaint fails to allege sufficient proximate causation between the greenwashing and the harassment:

> [T]here is no allegation of how the City's speech is the proximate cause of harassment. Within the First Amended Complaint, it is alleged that third parties are making independent decisions to harass and vandalize Plaintiff's members and their use of their property. These intervening third-party acts disrupt the flow of causation from the City's statements to the discrimination, harassment, and vandalism alleged by Plaintiff. For that reason, the Court dismisses Plaintiff's nuisance claims.

Court's Order at page 2, lines 18-24. The trial court inappropriately treats a nuisance action as if it were an action for damages action in

[7] "The harm Plaintiff has experienced has been monetized by the Defendant Seattle and wrongfully transferred into the pockets of each and every Seattle City Light electrical power customer, each and every one of whom pays electrical rates far below the national average, a privilege that rests in significant measure on the immense amounts of "green" money that the Skagit Project generates for Defendant Seattle's power utility – based on a LIHI certification, brand and reputation for environmental responsibility that is wholly unjustified."

tort. In *nuisance* actions, evidence of damages or proximate causation are not the touchstones. Rather, as the Washington Supreme Court has made clear:

> Whether an activity causes actual or threatened harm or a reasonable fear is not the dispositive issue. The crucial question for nuisance liability is whether the challenged activities are reasonable when weighing the harm to the aggrieved party against the social utility of the activity.

Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wn. App. 252, 285 (2014)(citing *Lakey v. Puget Sound Energy, Inc.,* 176 Wn.2d 909, (2013) (cited at page 24, lines 8-12 in Plaintiff's Consolidated Opposition Brief dated Dec 31, 2021).

Second, even *if* the allegation of harassment were the only allegation of harm, proximate causation, particularly here where there are clear factual allegations made, the question of proximate causation is a matter for the jury. *See*, Bernethy v. Walt Failor's Inc., 97 Wn.2d 929, 935 (1982)("Generally, the issue of proximate causation is a question for the jury.")

The gist of a *private* nuisance action is unreasonable interference with someone's right to enjoyment of their property, while the gist of a *public* nuisance action is something that "affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." RCW 7.48.130. Thus, the difference between public nuisance and private nuisance is the way in which the Court looks at

the harm suffered. In a private nuisance, the Court assesses the harm to an individual, while a public nuisance involves assessment of the harm to an entire community. The Superior Court erred in disposing of the Tribe's public nuisance claim by simply stating in its order that "the City's statements are not a statutorily enumerated public nuisance." Order, p. 2, ln. 12-13. Public nuisances are not limited to the enumerated public nuisance listed in RCW 7.48.140. On the contrary, Washington courts have frequently recognized public nuisance outside the RCW 7.48.140 enumerated nuisances, consistent with RCW 7.48.130. See, e.g., *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 139 (1986):

> A public nuisance is a nuisance that affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal. Almost daily violations of controlled substance and prostitution laws is activity that violates the comfort, repose, health, or safety of others, and can clearly affect an entire neighborhood or community.

Id. Neither controlled substances nor prostitution are mentioned in the RCW 7.48.140 enumerated public nuisance list, reflecting that the Washington Supreme Court takes a considerably broader view of public nuisance law than the Superior Court. In this regard, the court erred in dismissing the Tribe's complaint solely upon considering claims of nuisance based upon the impacts upon the Tribe *qua* Tribe. The Tribe's complaint was also based upon its allegations as a potential and prospective class representative of residential and commercial consumers of Seattle electricity, *i.e.*, that Seattle's repeated display of false information interfered with their quiet enjoyment. Nothing in the

Superior Court's order demonstrates that the Tribe's allegations made in its capacity as class representative were even considered. According to CR 23 (c) (1), "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained"—the term "shall" being mandatory. It does not appear from the record that the Superior Court made such a determination nor that it considered the Tribe's complaint in light of its allegations as a class representative.

Separate from the public community, as alleged in the Complaint, the harm experienced by the *Tribe* is not limited to *animus* from local people wrongly convinced that tribal fishermen are the cause of anadromous fish species decline. In First Amended Complaint § 2.35, Plaintiff made clear that its brand and reputation associated with the fishery resource is broadly connected to public perception and reputation of the Skagit for sustainable fisheries:

> Plaintiff Sauk-Suiattle Indian Tribe participates in commercial fishery, as well as hunting and gathering in the Skagit ecosystem, with its tribal reputation and brand inherently connected to public perception and reputation of the health, environmental responsibility and sustainability of the Skagit ecosystem, including the viability of its species and the management of the river system by major actors such as Defendant Seattle.

See also First Amended Complaint §2.37:

> The "Magic Skagit" is well known as a place of environmental consciousness, and the misleading and deceptive trade practices by which Defendant Seattle has bolstered its own brand and

> reputation have come squarely at the expense of the reputation of our people, our waters, and our lands.

In First Amended Complaint § 2.38, Appellant set forth that Defendant's environmental misrepresentation and misbegotten certification are misleading the general public:

> Our Tribe's harm has been shared by the vast number of public electrical power customers and environmental certification recipients that have, in ways far too numerous to practicably assess or calculate, paid for LIHI Low Impact certified power derived from a hydroelectric project that clearly fails to meet LIHI Low Impact standards, values and ethics, their normal commercial defenses against 'environmental snake oil' dulled by the overwhelming weight of Defendant Seattle's popularly-understood but entirely self-generated reputation for ESG stewardship in the Skagit ecosystem.

In First Amended Complaint 2.51, detail that Defendant has been using its misbegotten environmental claims and reputation to the detriment of the Plaintiff tribe and its property interest in the fishery resource:

> Defendant Seattle has only been able to avoid public scrutiny by leaning on the extensive political, market and social clout it has built through relentless misrepresentation of its environmental responsibility, turning its unearned reputation for environmental rectitude against the very indigenous peoples that Defendant Seattle frequently claims to care about.

This undermines the Tribe's valuable property interests in the fishery resource (for which it relinquished the entirety of the land base), and their right to its quiet enjoyment. This was further explained to the Court in the course of the hearing, which the trial court did not heed. For example, in Plaintiff's Consolidated Opposition brief (CP 28)

at p. 15, ln. 2-3, the Tribe articulates that Seattle's inappropriate green power certification and other marks of superlative environmental performance are being misused commercially and in the regulatory sphere for all manner of wrongfully-obtained benefits:

> Seattle's inappropriate reliance on its LIHI certification for all manner of undeserved regulatory and commercial perks continues unabated.

Other commercial and regulatory agencies are not in a position to look at the misbegotten nature of these superlative environmental claims, and tend to take them at face value, undermining and degrading the Tribe's valuable property interests in the fishery resource and its quiet enjoyment of them.

Also, in First Amended Complaint § 2.39, Plaintiff alleged that Seattle's wrongfully-obtained and utilized environmental claims are undermining salmon recovery efforts and thus the Tribe's recovery efforts by polluting the public consciousness, convincing the public that the situation is far better than it is, all of which was conducted specifically to sell electricity:

> While Skagit salmon numbers have plummeted, Defendant Seattle has told stories of increasing salmon numbers while contributing the least to environmental performance and claiming the most, undermining public faith in legitimate environmental initiatives through the Skagit Valley and the region.

Thus, the trial court erred, *inter alia*, in dismissing the nuisance claims on grounds that the allegation of harm and harassment of tribal members was the sole basis for the claims.

It has been held that, an action under the nuisance statute by corporations composed of sportsmen some of whom held fishing licenses and fished rivers in question, should be dismissed was appropriately dismissed since they failed to allege any special injury to themselves. *Kemp v. Putnam*, 47 Wn. 2d 47 (1955). In contrast, one who has regularly engaged in fishing in certain rivers and whose right so to fish has been interfered with, may maintain action to abate public nuisance and for injunctive relief, since he or she suffers injury different from or greater than that suffered by general public. Id.

Additionally, where a defendant's conduct causes a reasonable fear of using property, this constitutes an injury taking the form of an interference with property. *Lakey v. Puget Sound Energy*, 176 Wn. 2d 909 (2013). This is so because comfortable enjoyment means mental quiet as well as physical comfort. *Everett v. Paschall*, 61 Wash. 47 (1910). Such action under RCW 7.48.020 may be brought by any person whose property is, or whose patrons or employees are, injuriously affected or whose personal enjoyment is lessened by the nuisance.

It is well-established that the Treaty right is a legally-cognizable

property right, constituting both a *profit a prendre* (involving the right to harvest salmon on specifically-identifiable areas of land and water) as well as an easement (as necessary to reach the land and waters in question), which applies to the entirety of the Tribe's Treaty-ceded territory:

> In *United States v. Winans*, 198 U.S. 371, 381, 25 S. Ct. 662, 49 L. Ed. 1089 (1905), the United States Supreme Court held that the fishing rights reserved by the Native Americans through the Yakama Nation treaty "imposed a servitude upon every piece of land as though described therein."

Robbins v. Mason County Title Insurance Company, 195 Wn.2d 618, 630-32 (2020). The Superior Court appears to have acknowledged that the Tribe alleged that the City's conduct affected its property rights:

> [H]ow do the City's statements, if true, which the Court must—must assume that the City is making false statements, right, for the purpose of this motion, I have to accept that as true, how do those not impact the property rights that they do have under the Boldt Decree and under Judge Martinez's recent ruling?

RP, p. 16. Additionally, the following exchange occurred:

> THE COURT: And do you agree it's not just—they're not just alleging in the Complaint that their fishing is affected, but it's also their comfort and their security because of the alleged harassment and vandalism and other community backlash that occurs, frankly, in that general area? Is that a potential right that—that's being interfered with? If the other things are met. I understand your argument, but I'm just focusing right now on their property rights.
>
> MR. FILIPINI: I—I do think, Your Honor, that that is a fair assessment of their claims.

RP, 17.

In this respect, the Superior Court erred in ruling that the Tribe could not maintain its nuisance *per se* claim because "the City's statements are not an unlawful act." Unlawfulness is not an element of a nuisance *per se* claim, nor of a public, private or common law nuisance claim. RCW 7.48.120 describes a nuisance *per se*, quoted here in relevant part:

> Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency….or in any way renders other persons insecure in life, or in the use of property.

In other words, "[e]ngaging in any business or profession in defiance of a law regulating or prohibiting the same…is a nuisance *per se*." Kitsap County v. Kev, Inc., 106 Wn.2d 135, 139 (1986).[8] Further, in ruling upon a motion to dismiss, the trial court is obligated to accept the allegations of the complaint as true. In its First Amended Complaint, the Tribe alleged that:

> 2.41. Seattle's misrepresentation of the state of Skagit anadromous species while concurrently taking credit for non-existent improvement has wrongfully shifted blame from Seattle to the Plaintiff and other Skagit Treaty Tribes, who, despite catching a mere handful of salmon and steelhead pursuant to the Treaty each year due to Skagit anadromous species' degraded condition, are, *due to the resultant public misperception of the causes of species decline, frequently the target of public ire, harassment, and vandalism*. As such, Seattle's "greenwashing", by wrongfully transferring culpability

[8] Even if unlawfulness were a necessary element of nuisance per se, the tribe's allegations that Seattle's untrue, deceptive and misleading representations in the course of selling electricity constitutes false advertising prohibited by RCW 9.04.010, the violation of which is a misdemeanor, constitute an unlawful act even under the Superior Court's reasoning and would therefore constitute a nuisance *per se*.

> for anadromous species degradation onto the Plaintiff and its members, directly interferes with the right to quiet enjoyment of Plaintiff's Treaty-grounded property right in the lands and waters of the Skagit, and harms the Plaintiff community.

(Emphasis added). Notwithstanding that such allegation is to be presumed to be true, with all doubts resolved in the Tribe's favor, and subject to proof of such allegation to be presented at trial following discovery, the Superior Court essentially made a finding that the allegation was *not* true:

> [T]here is no allegation of how the City's speech is the proximate cause of harassment. Within the First Amended Complaint, it is alleged that third parties are making independent decisions to harass and vandalize Plaintiff's members and their use of their property. These intervening third-party acts disrupt the flow of causation from the City's statements to the discrimination, harassment, and vandalism alleged by Plaintiff. For that reason, the Court dismisses Plaintiff's nuisance claims.

Order, p. 2, ln. 18-24. In doing so, the Superior Court misstated the exact words in ¶ 2.40 of the Tribe's complaint and exceeded the scope for review of a complaint in a 12 (b) (6) motion and concluded on its own without the benefit of a trial or the parties' engaging in discovery, that the Tribe's allegations as to the harassment being traceable to the City were untrue.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be *reversed*, and the cause remanded with instructions that the trial court "as soon as is practicable" entertain the tribe's request for certification as a class representative.

Respectfully submitted,

DATED 11th this day of April, 2022.

SAUK-SUIATTLE INDIAN TRIBE
By:

S/Jack W. Fiander

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that the foregoing Opening Brief of Appellant was filed with the Clerk on the above date using the Court's electronic filing system with a copy served upon all counsel of record.

S/Jack W. Fiander

CERTIFICATE OF COMPLIANCE

I certify per RAP 18.7 that the foregoing Opening Brief of Appellant comprised 6,737 words, excluding excluded portions.

S/Jack W. Fiander

No. 40519

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON NATURAL GAS COMPANY,
a Delaware corporation,
Appellant,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY,
a municipal corporation,
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

THE HONORABLE ALFRED O. HOLTE, *Judge*

BRIEF OF RESPONDENT

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4. Federal Law

At page 19 of its brief, appellant discusses:

> "Interpretative Decisions of the Federal Anti-Trust Act [which] Are Applicable in Interpreting Our State Act."

Respondent agrees that the federal and state statutes are similar in purpose and intent. Respondent also agrees that under R.C.W. 19.86.920, federal anti-trust decisions are applicable in construing the Consumer Protection Act.

Respondent, however, knows of no federal decision holding a municipal corporation in violation of any federal anti-trust statute.

In fact, respondent knows of no decision in which a municipal corporation has even been held subject to a federal anti-trust statute. Certainly, appellant has cited no such case.

The only decisions cited by appellant concerned *investor-owned companies* in regulated industries which are profit-motivated. The law review articles cited at pages 13-16 of appellant's brief also concern regulated industries which are profit-motivated. None of the commentators cited by appellant suggest municipal corporations should be subject to the Consumer Protection Act or to comparable federal legislation.

Before appellant can argue that municipal corporations are subject to the Consumer Protection Act, appellant must cite some authority for such a unique contention. No such authority has been cited by appellant. The reason is simple: there is no such authority. See *Seattle v. Muldew*, 69 Wn.2d 877, 420 P.2d 202 (1966).

RCW 19.98.920

Purpose—Interpretation—Liberal construction—Saving—1985 c 401; 1983 c 288; 1983 c 3; 1961 c 216.

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

TOWTNUK LAW OFFICES

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