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IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 45819

LAMONT BAIR ENTERPRISES, INC.;
Plaintiff/Appellant

v.

CITY OF IDAHO FALLS;
Defendant/Respondent

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville.
Honorable Dane H. Watkins, Jr., District Judge, presiding.

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STATEMENT OF THE CASE

A. Nature of the Case

This case involves a claim by Lamont Bair Enterprises, Inc. (LBE), an Idaho corporation, for damage to its real property sustained when a water main owned, operated, and controlled by the City of Idaho Falls (the City) ruptured and flooded the basement of the property. On December 28, 2015, LBE suffered property damage when water from a 6-inch broken water main flowed underground and under the structure at 547 Skyline Drive in Idaho Falls, Idaho until it built up sufficient hydraulic pressure to fracture the concrete basement floor at which point water and mud flowed into the structure flooding the basement.[1] The broken water main was, by the City's admission, "past its design life and is (sic) need of replacement."[2]

B. Course of Proceedings

After unsuccessfully attempting to negotiate a resolution with the City, LBE filed its complaint against the City on October 21, 2016 alleging both a general negligence claim and *res ipsa loquitur*.[3] On October 23, 2017, the City filed a motion for summary judgment.[4] In seeking summary judgment, the City asserted that (1) plaintiff failed to present evidence of negligence; (2) the City lacked notice of defects in its waterline; (3) *res ipsa loquitur* was not applicable; and (4) it was entitled to immunity under the Idaho Tort Claims Act (ITCA).[5] On November 29,

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[1] R, pp. 95-97 and 134-135.

[2] R, p. 245.

[3] R, pp. 6-11.

[4] R, pp. 19-20.

[5] R, pp. 99-116.

2017, LBE filed a memorandum in opposition asserting that (1) LBE was relieved of the burden of producing direct evidence of negligence due to the application of *res ipsa loquitur*; (2) the City's own business records exposed both its negligence and notice of the defects in its water works; (3) and that the immunity provisions of the Idaho Tort Claims Act were not applicable to the situation.[6] Contemporaneous with its memorandum in opposition, LBE moved to strike a single paragraph from the affidavit of the City's engineer, David Richards (Richards) on the grounds it was not supported by appropriate foundation and was inconsistent with his prior deposition testimony.[7] On December 5, 2017, the City filed its reply memorandum in support of its motion for summary judgment together with a memorandum opposing LBE's motion to strike.[8]

A hearing on both pending motions was held on December 13, 2017, and on January 9, 2018, the Court entered a Memorandum Decision and Order denying LBE's motion to strike and granting the City's motion for summary judgment on the grounds it was entitled to discretionary function immunity with respect to the maintenance of its water works.[9] The Court entered judgment of dismissal on February 1, 2018.[10] LBE filed this appeal on March 2, 2018.[11] On March 15, the Court entered a second judgment awarding costs to the City.[12]

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[6] R, pp. 333-355.

[7] R, pp. 117-118.

[8] R, pp. 356-373.

[9] R, pp. 392-407.

[10] R, pp. 408-409.

[11] R, pp. 410-414.

[12] R, pp. 422-423.

C. Statement of the Facts

The City operates a public drinking water system (the system) through the Water Division of its Public Works Department.[13] The system is operated by the City's Water Division under the oversight and direction of its Water Superintendent, Richards.[14] The system includes over 310 miles of City pipe.[15] Those pipes, including the pipes at issue in this case, are in the exclusive control of the City.[16]

The City adopted a Water Facility Plan (WFP) dated June 2015, six months before the events giving rise to this action.[17] At least part of the purpose of the plan is to identify deficiencies in the City's water supply system and in the City's administration of that system.[18] More specifically, the plan compares the City's operations and maintenance practices to similar municipalities and provides recommendations for improvement.[19] "The City's water system Operations and Maintenance (O&M) program was assessed to determine current deficiencies in its existing procedures and to identify areas of improvement."[20] The WFP reveals that the City's water department is understaffed, distributing 1,633,000 gallons per day (gpd) per full time

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[13] R, p. 148.

[14] R, pp. 125 and 209.

[15] R, p. 150.

[16] R, p. 126; Idaho Falls Code of Ordinances § 8-4-23.

[17] R, pp. 132, 136-315.

[18] *Id.*

[19] R, p. 148.

[20] R, p. 154.

equivalent (FTE) employee as compared to a national average of 210,000 gpd per FTE.[21] The City does not have official guidelines for system leak detection and does not have any policy or procedure in place for ensuring the integrity of its distribution lines.[22] Moreover, prior to completion of the WFP, the City did not have a pipe replacement program.[23]

LBE is an Idaho corporation doing business in Idaho Falls as the owner of 76 apartment units located on or near Skyline Drive, including the four-plex unit at 547 Skyline Drive (the Property).[24] It's property manager, Rick Ackerman, became aware of a flood in the basement of the units at 547 Skyline Drive and contacted the City on December 28, 2015.[25] The City became aware of the leak in the late afternoon when it received an emergency call for assistance in shutting off water because water was leaking into the basement at the Property.[26] The City initially treated the call as a service line leak and shut off the service line delivering water from the main line to the Property at the location.[27] Contrary to the City's assumption, the service line was not broken.[28]

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[21] R, p. 216.

[22] R, p. 215.

[23] R, p. 224.

[24] R, p. 95-97.

[25] *Id.*

[26] R, p. 128-129.

[27] *Id.*

[28] *Id.*

Instead, a water main had failed near the intersection of Brentwood Drive and Skyline Drive.[29] The failed water main was part of the system and was in the exclusive control and management of the City.[30] The broken main was made of cast iron and was installed by the City in 1958.[31] The break occurred on a six-inch mainline at a point along Brentwood approximately 20-25 feet west from the line's juncture with the eight-inch line running along Skyline.[32] Less than one year earlier, the system had sustained another break to a main line of the same material and age on Stimson Avenue within less than one mile of the Brentwood/Skyline break.[33]

From the main line break on Brentwood Drive, water flowed underground eastward under Skyline Drive and under the Property on the east side of Skyline Drive until it built up sufficient hydraulic pressure to fracture the concrete basement floor beneath one of the units at 547 Skyline Drive at which point water and mud flowed into the structure and flooded all or part of the basement of each of the four units in the four-plex.[34] While a flood of residential property from a broken water main is atypical, the City's water superintendent knew, as soon as the main break was discovered, that it was the source of the water flooding the basement of the Property.[35]

Prior to developing its WFP, the City had roughly 30 years of data regarding the location, date, and description of water main breaks in its system revealing that 70% of all breaks occur in

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[29] R, p. 126.

[30] *Id.*

[31] R, p. 127.

[32] *Id.*

[33] *Id.*

[34] R, p 134-135.

[35] R, p 132.

cast iron pipe installed between 1920 and 1959, the same type of pipe responsible for the flood at 547 Skyline Drive.[36] Moreover, "[d]escriptions of the types of breaks and repairs performed on the 1950s-era cast iron pipe include . . . clamp-type repairs of rusting and cracked pipelines. . . . indicate that the material is past its design life and is (sic) need of replacement."[37]

ISSUES PRESENTED ON APPEAL

Issues presented include:

Whether the District Court erred in denying LBE's motion to strike portions of the affidavit testimony of Richards;

Whether the District Court erred in finding that Idaho Code § 6-904(1) provides a municipality with immunity for injury caused by its failure to maintain its municipal water delivery system in a reasonably safe condition; and

Whether the District Court erred in granting summary judgment.

ARGUMENT

The Court should reverse the decisions of the District Court and remand the matter for further proceedings. The District Court erred in denying LBE's motion to strike portions of the testimony of Richards because the testimony was not supported by adequate foundation. The District Court erred in granting summary judgment because the maintenance of an existing public works system to keep it in a safe condition is not a discretionary task subject to

[36] R, p. 245.

[37] *Id.*

discretionary function immunity. For these reasons, as outlined in greater detail below, LBE respectfully requests a reversal of the District Court's decisions.

I. Standard of Review

A. Admission of Evidence

"Trial courts have 'broad discretion in the admission of evidence at trial, and [their] decision to admit such evidence will be reversed only when there has been a clear abuse of that discretion.'" *Karlson v. Harris*, 140 Idaho 561, 564, 97 P.3d 428, 431 (2004) (quoting *Empire Lumber Co. v. Thermal–Dynamic Towers, Inc.*, 132 Idaho 295, 304, 971 P.2d 1119, 1128 (1998)). "The same standard applies to the admission of expert testimony." *Id.* (quoting *Basic Am., Inc. v. Shatila*, 133 Idaho 726, 743, 992 P.2d 175, 192 (1999)). In reviewing whether a district court erred in admitting evidence, this Court must determine:

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Kirk v. Ford Motor Co., 141 Idaho 697, 701, 116 P.3d 27, 31 (2005) (quoting *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

"Expert opinion must be based upon a proper factual foundation." *State v. Hall*, 163 Idaho 744, 419 P.3d 1042, 1077 (2018) (quoting *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999)). "Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible as evidence under Rule 702." *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999)

(quoting *Ryan v. Beisner*, 123 Idaho 42, 46, 844 P.2d 24, 28 (Ct.App. 1992)). "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." IDAHO R. EVID. 703 (2018).

B. Summary Judgment

The standard of review on an appeal from an order granting summary judgment is the same as the standard used by the district court in ruling on a motion for summary judgment. Caldwell v. Idaho Youth Ranch, Inc., 132 Idaho 120, 123 968 P.2d 215, 218 (1998). A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." IDAHO R. CIV. P. 56(c) (2017); *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 516-17, 808 P.2d 851, 853-54 (1991). When assessing the motion for summary judgment, the court must draw all facts and inferences in favor of the non-moving party. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854 ; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994); *Haessley v. Safeco Title Ins. Co. of Idaho*, 121 Idaho 463, 825 P.2d 1119 (1992).

The moving party bears the burden of establishing the lack of a genuine issue of material fact. *Tingly v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960 (1994). The non-moving party need not present evidence on every element of his or her case at that time, but must establish a genuine issue of material fact regarding the element challenged by the moving party's motion. *Olsen v. J.A. Freemen Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990), (citing, *Celotex v. Catrett*,

477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); see also *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. *Dodge-Farrar v. Am. Cleaning Servs., Co.*, 137 Idaho 838, 841, 54 P.3d 954, 957 (Ct. App. 2002). In ruling on a motion for summary judgment, a court is not permitted to weigh the evidence to resolve controverted factual issues. *Meyers v. Lott*, 133 Idaho 846, 849, 993 P.2d 609, 612 (2000).

If reasonable people could reach different conclusions or inferences from the evidence, the motion for summary judgment must be denied. *Thompson v. Pike*, 125 Idaho 897, 900, 876 P.2d 595, 598 (1994); *Doe v. Durtschi*, 110 Idaho 466, 470, 716 P.2d 1238, 1242 (1986).

II. The district court erred in considering portions of Richards' testimony.

In its motion to strike, LBE requested the exclusion of paragraph 19 of the Richards' Affidavit, which reads:

> Further, it is my professional opinion that the City of Idaho Falls' water line located at the intersection of Skyline Drive and Brentwood Drive and at issue in this matter was designed, constructed, and maintained in accordance with engineering standards and met all state and federal standards on December 28, 2015. Although a water system may meet all state and federal standards, it remains vulnerable to acts of nature such as significant freezing and frost penetration into subsoils.[38]

The concern with this testimony is the first sentence, in which Richards expresses an opinion without any proper factual foundation. Richards failed to identify any facts from which

[38] R, p. 25.

he could know whether the water line in question was designed, constructed, and maintained in accordance with engineering standards. The District Court's admission of the evidence was not consistent with the legal standards applicable to the admissibility of expert testimony.

This Court is called upon to determine:

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Kirk, supra.

"Expert opinion must be based upon a proper factual foundation." *Hall, supra.* Yet there is nothing in the record from which the District Court could conclude that Richards' opinion was based upon "facts or data in the case that the expert has been made aware of or personally observed." IDAHO R. EVID. 703.

Richards first went to work for the City as a water superintendent in 2004, 45 years after the installation of the water line at the intersection of Skyline Drive and Brentwood Drive.[39] When asked about the inspection of municipal water lines after installation he testified, "Once they're buried, there's not much that can be done to inspect the integrity."[40] And with specific reference to the water line in question at Skyline Drive and Brentwood Drive he testified that he did not even inspect the repairs that were performed on that water line because by the time he

[39] R, p. 125.

[40] R, p. 126.

visited the location the following day to "see how the repairs had gone[,]" he could not see them because "they were backfilled."[41]

Conspicuously absent from Richards' testimony in paragraph 19 are the following: evidence that he is familiar with the design drawing for the installation about which he testified; evidence that he is familiar with how the construction was completed; evidence that he had any knowledge of maintenance performed on the pipes, if any, prior to 2004 when he became the water superintendent; evidence that he ever observed the pipes in question to determine how they were installed; evidence that he reviewed the engineering standards or otherwise became familiar with the standards applicable at the time of installation; evidence that he compared those standards to the standards applicable in 2015, the period about which he testified; and evidence that he had any facts or data about the pipes in question at all, other than the facts produced by this case, to wit, that the pipe had failed on or about December 28, 2015.

The District Court appears to have perceived the issue as one of discretion, and also reached its decision by the exercise of reason, but does not appear to have applied the proper legal standard to the exercise of discretion. The District Court outlined several foundational statements from which it concluded there was sufficient foundation for Richards' opinion, including the following:

- Richards' bachelor's degree in civil and environmental engineering and professional engineer credentials;

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[41] R, pp. 125-126.

- Richards' employment as the City's water superintendent;
- The material composition and locations of city pipes;
- The age and life expectancy of the pipe at issue;
- Soil types in Idaho Falls;
- A map of leaks around the City; and
- The nature of the break to the pipe at issue.[42]

Absent from any of this is anything that would support an opinion regarding the design, construction and maintenance of the pipes at issue. Even the testimony that does relate to the pipes, the material and age of the pipes for example, does not say anything about the design, construction or maintenance of their installation. Because the opinion testimony in question is not supported by facts or data of which Richards was made aware or personally observed, his testimony could not have been based upon a proper foundation. The District Court, in admitting the evidence, did not act consistently with the applicable standard. Accordingly, the District Court abused its discretion and its decision on the motion to strike should be reversed.

III. The District Court erred in finding the City was entitled to discretionary function immunity under the Idaho Tort Claims Act (ITCA).

While the City raised several theories in its motion for summary judgment, the District Court relied upon a single theory in granting that motion: the alleged existence of discretionary function immunity under the ITCA. *See* IDAHO CODE ANN. § 6-904(1). For this reason, this brief focuses primarily on the issue of discretionary function immunity. However, because this Court

[42] R, pp. 397-399.

could affirm the judgment based upon other theories, the additional theories raised by the City will be addressed in a later section. With respect to discretionary function immunity, the theory upon which the District Court granted summary judgment, the District Court erred in finding that the maintenance of a municipal water system is a discretionary function because there is a critical and well-established public policy in this state obligating a municipality to maintain its water supply system in a reasonably safe condition.

"This Court uses a two-step analysis for reviewing a motion for summary judgment based upon an immunity defense under the ITCA." *Grabicki v. City of Lewiston*, 154 Idaho 686, 690, 302 P.3d 26, 30 (2013). "First, the Court 'determine[s] whether the plaintiffs' allegations and supporting record generally state a cause of action for which "a private person or entity would be liable for money damages under the laws of the state of Idaho."'" *Id.* (citing *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 330, 775 P.2d 640, 644 (1989)). Second, the Court must "determine whether an exception to liability under the ITCA shields the alleged misconduct from liability." *Id.* The preliminary questions are whether LBE alleged a viable cause of action in tort and whether an exception to liability exists within the ITCA to immunize the City from liability. The first must be answered in the affirmative and the second in the negative.

A. LBE's Complaint states a claim for which a private person or entity would be liable for damages.

LBE's complaint against the City alleges a claim for negligence. It is settled law in Idaho that "[e]very person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use

his property as to avoid such injury." *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990) (citations omitted). More importantly, with respect to a municipality, "a municipal corporation, acting in a proprietary capacity, such as when it owns, maintains and operates a water system for the benefit of its inhabitants, is subject to liability for damages arising out of its negligence under the same rules as are applied to private individuals or corporations." *Skaggs Drug Centers, Inc. v. City of Idaho Falls*, 90 Idaho 1, 7, 407 P.2d 695, 697 (1965); *see also C.C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, 372 P.2d 752 (1962); *Hansen v. City of Pocatello*, 145 Idaho 700, 184 P.3d 206 (2008)).

It is not, and cannot be, disputed that LBE has alleged a claim against the City for which a private individual would be liable under the laws of this state. The complaint alleges, as count one, a standard negligence claim, specifically that: the City had a duty to exercise reasonable care in the installation, maintenance, repair, and replacement of its municipal water pipes; the City breached its duty by failing to exercise reasonable care; the City's failure to exercise reasonable care was the direct and proximate cause of damage to LBE and its property; and LBE suffered damages.[43] Having alleged a claim for negligence, the first step in the ITCA immunity defense analysis must be answered in LBE's favor.

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[43] R, pp. 8-9.

B. Public policy required the City to maintain its water works in a reasonably safe condition.

Similarly, the second step in the immunity defense analysis must be answered in LBE's favor, though it is on this step that the District Court erred and ruled against LBE on the City's motion for summary judgment.

"The purpose of the ITCA is to provide 'much needed relief to those suffering injury from the negligence of government employees.'" *Rees v. State, Dep't of Health & Welfare*, 143 Idaho 10, 19, 137 P.3d 397, 406 (2006) (quoting *Sterling v. Bloom*, 111 Idaho 211, 214, 723 P.2d 755, 758 (1986)). Liability is the rule and immunity is the exception because "[t]he ITCA is to be construed liberally, consistent with its purpose, and with a view to 'attaining substantial justice.'" *Id.* Stated exceptions are closely construed to favor liability and to limit the exceptions. *Grabicki*, at 691, 31. With respect to discretionary function immunity, the ITCA provides for immunity with respect to a claim that:

> Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

IDAHO CODE ANN. § 6-904(1). "Th[is] discretionary function exemption does not apply to negligent operational decision-making[.]" *Czaplicki v. Gooding Joint School Dist. No. 231*, 116 Idaho 326, 330, 775 P.2d 640, 644 (1989). On the contrary, the ITCA "makes a governmental entity liable for damages arising out of its own negligent operational acts or omissions." *Id.* at 330-31; 644-45. Section 6-904(1):

> contains two prongs, each of which provides a different degree of governmental immunity. Under the discretionary function prong, a governmental entity is entitled to absolute immunity regarding claims arising from the performance of a "discretionary function." However, under the operational prong a government entity can be liable if it fails to exercise ordinary care in implementing a pre-established policy.

Lawton v. City of Pocatello, 126 Idaho 454, 460, 886 P.2d 330, 336 (1994). "Routine matters not requiring evaluation of broad policy factors will likely be 'operational,' whereas decisions involving a consideration of the financial, political, economic, and social effects of a particular plan are likely 'discretionary' and will be accorded immunity." *Id.* (citing *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987)). "The discretionary function exception does not immunize the negligent implementation of policy, neither does it immunize negligent operational decision-making." *Czaplicki* at 331, 645. When there is an existing policy already in place, the execution of that policy is not discretionary, but operational, and the operational prong demands that the policy be carried out with ordinary care. *Id.* at 330, 644.

Where, as here, a municipality has undertaken to provide a service, where it has already assumed responsibility for a thing, then it must exercise ordinary care in the pursuit of that responsibility.

Oppenheimer v. Johnson Cattle Co., Inc., 112 Idaho 423, 732 P.2d 661 (1986), is instructive. *Oppenheimer* involved a claim against the State Brand Board for negligently allowing the sale of stolen cattle. *Oppenheimer*, 112 Idaho at 424, 732 P.2d at 662. The deputy brand inspector had inspected the cattle prior to the sale and noted two brands, one of which was fresh, with no scabs. *Id.* The deputy brand inspector did not request proof of ownership or a bill

of sale from the seller evidencing its right to sell the cattle. *Id.* The trial court concluded that IDAPA 11.02.3 provides for discretionary judgment on the part of a brand inspector and that the discretionary function immunity applied to the deputy brand inspector's actions. *Id.* Rejecting this position and reversing the district court's decision, this Court reasoned that IDAPA 11.02.3 addressed a brand inspector's standard of conduct in two distinct situations. *Id.* at 425, 663. Specifically, with respect to fresh brands, the regulation indicates that they "*shall not* be accepted as proof of ownership unless accompanied by a brand inspection certificate or a bill of sale covering older brands." *Id.* (emphasis in original). The regulation also provided, "The state brand inspector may inquire into the ownership of all livestock bearing two or more brands." *Id.* Relying on this plain language, the Court reasoned that if cattle had two brands, the brand inspector had discretion to request proof of ownership unless one of the brands was fresh, in which case the request for proof of ownership became mandatory. *Id.* The Court reasoned, "the appearance of a '*fresh*' brand *mandates* that the same inspector *shall not* accept such brand as proof of ownership absent a certificate or bill of sale covering older brands." *Id.* When there is a policy in place requiring specific conduct, such conduct cannot, by definition, be discretionary.

In the present case, there is a policy in place requiring that a municipality maintain its water system in a reasonably safe condition, a policy that has been repeatedly recognized by this Court. When a city undertakes the operation of a water utility, the city is "responsible for maintaining the water works . . . in a reasonably safe condition." *Hansen v. City of Pocatello*, 145 Idaho 700, 703, 184 P.3d 206, 209 (2008). A city, including the City of Idaho Falls, has "a general duty to use due or ordinary care not to injure others, to avoid injury to others by any

agency set in operation by [it], and to do [its] work, render services, or use [its] property as to avoid such injury." *Id.* (quoting *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 300, 796 P.2d 506, 509 (1990) (quoting *Whitt v. Jarnagin*, 91 Idaho 181, 188, 418 P.2d 278, 285 (1966))). In addition to this well established and judicially recognized public policy, the policy is further embodied in the Public Utilities Law set forth at Idaho Code §§ 61-101 et. seq.

> Every public utility *shall furnish, provide and maintain* such service, instrumentalities, *equipment and facilities as shall promote the safety*, health, comfort and convenience of its patrons, employees and the public, and shall be in all respects adequate, efficient, just and reasonable.

IDAHO CODE ANN. § 61-302 (emphasis added). The Public Utilities Law further provides:

> In case any public utility shall do, cause to be done or permit to be done, any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the constitution, any law of this state, or any order or decision of the commission, according to the terms of this act, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom. An action to recover such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person.

IDAHO CODE ANN. § 61-702.

Because the City made the historical policy decision to operate a water utility, a decision which was, incidentally, truly discretionary, its duty to maintain its water works in a reasonably safe condition is not discretionary. Just as the appearance of a fresh brand mandates obtaining additional documentation of proof of ownership, the decision to operate a water utility mandates the maintenance of that utility's water works in a reasonably safe condition.

> Municipalities can decide whether or not to undertake particular responsibilities. They cannot define through ordinances the legal consequences of these decisions. To hold otherwise would render the discretionary function exception meaningless.

Tomich v. City of Pocatello, 127 Idaho 394, 398, 901 P.2d 501, 505 (1995). The City has attempted to do just that, not through ordinances, but through its WFP. The City made the decisions to undertake the operation of a water utility, and when it did so, it embraced the legal obligation to maintain the water works of that utility in a reasonably safe condition. When it knowingly allowed miles and miles of cast iron pipe to deteriorate past its design life, it breached that obligation. To hold that the City may now shirk its duty through the adoption of the WFP would be to render the discretionary function exception, and more critically the ITCA, meaningless. Every municipality could thereafter avoid its liability under the ITCA by simply adopting a plan or ordinance to address its negligence after the negligent conduct had already occurred.

C. Not every municipal financial decision is discretionary.

The District Court, relying on a two-part test articulated in *Dorea Enterprises, Inc. v. City of Blackfoot,* 144 Idaho 422, 163 P.3d 211 (2007), concluded that the because the WFP was based upon budgetary constraints, manpower, and other resources, its adoption and the replacement of obsolete pipe over the succeeding fifteen years was a policy decision and discretionary. The flaw in the District Court's reasoning, however, is two-fold: First, the adoption of the WFP came after the negligence had occurred and must be viewed, as discussed above, as an attempt to shirk liability for accomplished negligence; and second, not every municipal action subject to such financial or resource allocation considerations is discretionary.

With respect to the two-part test relating to application of the discretionary function exception, *Dorea* provides:

> There is a two-step process for determining the applicability of this exception. *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987); *City of Lewiston v. Lindsey*, 123 Idaho 851, 856, 853 P.2d 596, 600 (Ct.App.1993). The first step is to examine the nature and quality of the challenged actions. *Id.* "Routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be 'operational.'" *Ransom*, 113 Idaho at 205, 743 P.2d at 73. Decisions involving a consideration of the financial, political, economic and social effects of a policy or plan will generally be planning and "discretionary." *Id.* "While greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions; ... those with the least authority may, on occasion, make planning decisions which fall within the ambit of the discretionary function exception." *Id.* at 204, 743 P.2d at 72. The second step is to examine the underlying policies of the discretionary function, which are: to permit those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government. *Id.* at 205, 743 P.2d at 73. Thus, the question is whether the City's decision to flush the sewage lines was discretionary and therefore, the City would be immune from liability; or alternatively, if the City's decision was operational, and consequently, the City would be subject to liability if it failed to exercise ordinary care. *Jones v. City of St. Maries*, 111 Idaho 733, 736, 727 P.2d 1161, 1164 (1986).

Dorea Enters., Inc. v. City of Blackfoot, 144 Idaho 422, 425, 163 P.3d 211, 214 (2007).

The District Court focused its attention on the adoption of the WFP and concluded that the City's decision to prioritize and schedule replacement of its 1902-1959 era cast iron pipes over a 15-year period was a policy decision and, therefore, discretionary. But the adoption of the WFP is not the negligent act upon which LBE's claim rests. The claim rests upon the City's failure to maintain its water works in a reasonably safe condition prior to the adoption of the WFP. The District Court concluded that the adoption of the WFP as a discretionary decision because it was based upon the allocation of capital and other resources, but not every act that involves a financial decision is discretionary. The case law clearly demonstrates that many decisions involving the allocation of capital and other resources are not discretionary, but are

mandatory. This principal is closely tied to the public policy doctrine discussed above. When a municipality has an obligation to act, it cannot sustain a failure to perform that act based upon the discretionary function exception.

For example, in *Bingham v. Idaho Department of Transportation*, 117 Idaho 147, 786 P.2d 538 (1989), this Court reversed a grant of summary judgment in favor of the transportation department on claims for failing to provide for an appropriate speed limit on a highway and failing to place adequate signs along the same highway. *Bingham*, 117 Idaho at 149, 786 P.2d at 540. The District Court had reasoned:

> [T]he record clearly shows that the type of roadway, the *speed limit,* the *crosswalks* and *signing* of the highway were all decisions made on planning information and/or design information and based upon [Transportation] Department policy and planning procedures. These decisions regarding *signs and speed limits are precisely those types of matters meant to be protected* under 6–904.1, Idaho Code, as the Supreme Court in *Sterling* [*v. Bloom,* 111 Idaho 211, 723 P.2d 755 (1986)] points out.

Id. at 150, 541 (emphasis in original). The Court rejected this conclusion stating:

> [T]he term 'discretionary function' could not include the execution or performance of, *i.e.,* the implementation of statutory or regulatory policy. Since discretionary functions involve actions qualitatively different from implementing policy, and since the former by definition involve the exercise of choice, judgment, and the ability to make responsible decisions, then discretionary functions must actually involve the formulation of policy.

Id. (quoting *Sterling v. Bloom*, 111 Idaho 211, 227, 723 P.2d 755, 771 (1986)). The Court further reasoned, "While it is true that the Department has some discretion in the placement of signs and the determination of speed limits on a highway, that discretion is confined by policy considerations that have already been determined by the legislature and the Department." *Id.*

As in *Bingham*, the City here had a statutory and public policy obligation to maintain its water works in a reasonably safe condition. The mere existence of financial implications including allocation of capital and other resources in the process of maintenance does not render the City's maintenance obligation discretionary. Instead, discretion is confined by predetermined policy considerations. Under those circumstances, in order to establish immunity under Idaho Code § 6-904(1), the City would have to demonstrate that it maintained its water works with due care. *Sterling v. Bloom*, 111 Idaho 211, 231, 723 P.2d 755, 775 (1986) (Discretionary function immunity extends to operational decision making only when carried out with ordinary care); *Lawton*, 126 Idaho at 460, 886 P.2d at 336 (a government entity can be liable if it fails to exercise ordinary care in implementing a pre-established policy); *Crown v. State, Dep't of Agric.*, 127 Idaho 175, 180, 898 P.2d 1086, 1091 (1995) (operational functions conducted without 'ordinary care' give rise to no governmental immunity) .

The City's duty to maintain its water works in a reasonably safe condition is an operational burden that confines is discretion. As discussed in more detail below, the City failed to exercise ordinary care in performing its operational obligation and is not entitled to discretionary immunity. As a consequence, the determination of the District Court should be reversed.

IV. The City's alternative theories should be rejected.

While the District Court based its determination on the theory of discretionary function immunity, the City advanced other theories on its motion for summary judgment. Specifically, the City argued that there was no evidence of negligence and that it was also entitled to immunity

under the design immunity theory articulated in Idaho Code § 6-904(7). Both theories were appropriately rejected by the District Court, but are addressed here because, "it is well-settled that '[w]here an order of a lower court is correct, but based on an erroneous theory, the order will be affirmed upon the correct theory.'" *Grabicki*, 154 Idaho at 692, 302 P.3d at 32 (quoting *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 248, 245 P.3d 992, 1000 (2010)).

A. The City was negligent in the maintenance and upkeep of its water works.

The District Court correctly rejected the City's theory on straight negligence for two reasons: first, the doctrine of *res ipsa loquitur* relieves LBE of the burden of producing direct evidence of negligence; and second, the City's own official position demonstrates its failure to exercise ordinary care in the maintenance of its water works.

Idaho recognizes the application of the doctrine of *res ipsa loquitur* with respect to flooding caused by the failure of the City's water main. *Res ipsa loquitur*, a Latin phrase meaning "the thing speaks for itself," is a legal doctrine which allows the jury to draw an inference of negligence when: (1) the agency or instrumentality causing injury is under the exclusive control of the defendant; and (2) the circumstances are such that common knowledge and experience justify an inference that the injury would not happen in the absence of negligence. *Wing v. Clark's Air Serv., Inc.*, 106 Idaho 806, 807, 683 P.2d 842, 843 (1984). It is specifically applicable to a case in which a water main fails and damages private property. *Skaggs, supra*, 90 Idaho at 7-8, 407 P.2d at 697-8. See also *C.C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, 372 P.2d 752 (1962) (plaintiff's judgment affirmed on doctrine of *res*

ipsa loquitur); *Hansen v. City of Pocatello*, 145 Idaho 700, 184 P.3d 206 (2008) (doctrine rejected because instrumentality was not in exclusive control of City).

In *Skaggs*, this Court reasoned:

> The application of the doctrine of res ipsa loquitur does not, theoretically or practicably, transform liability for negligence into insurance or absolute liability. Its only function is to replace direct evidence of negligence with a permissive inference of negligence. It warrants, but does not compel, a finding of negligence. It furnishes circumstantial evidence of defendant's negligence where direct evidence may be lacking.

Id. at 8, 698. Where *res ipsa loquitur* is applicable, summary judgment is improper because the question of whether the inference to be drawn supports a claim is always a question of fact.

As noted, this Court has already concluded that the doctrine applies to claims for damage to private property from broken water works. This case is indistinguishable on its face from the facts of *Skaggs* an Idaho case in which this Court applied the doctrine. An application of the specifics of the doctrine to the case requires the same conclusion. As noted, the doctrine applies when the instrumentality causing the injury is in the exclusive control of the defendant, and the harm is of a kind that does not ordinarily occur in the absence of negligence. *Wing, supra.*

Here, the instrumentality in question, the City's water works, are in the exclusive control of the City as a matter of law. Section 8-4-23 of the City's Code of Ordinances provides, "City shall have exclusive control and management of City water system and shall have exclusive management and control of the supply and distribution of water to the inhabitants thereof."

Richards also testified that the specific pipe in question at the intersection of Brentwood Drive and Skyline Drive is in the exclusive control and management of the City.[44]

The City's exclusive control strips the plaintiff of the ability to determine the cause of injury. "The major purpose of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the occurrence of the negligent act." 65A C.J.S. Negligence § 855. Here, LBE was denied the opportunity to examine the pipe in question to determine the cause of the break and conducting such an examination was impracticable. The City's own representative did not have an opportunity to inspect the pipe and can only speculate as to the cause of the break. Richards did not visit the site until the day after the repairs were performed and by the time he arrived the access had already been backfilled.[45] He never saw the break.[46] Because the broken pipe that caused the flooding was in the exclusive control of the City, circumstances exist to support the application of the doctrine of *res ipsa loquitur*.

The City's duty was to maintain this particular system in a reasonably safe condition in its particular circumstances, including both the reality of pipe corrosion and the reality of deep frost penetration in December in Southeast Idaho. The City "is bound to take notice" as a water supplier "that water pipes will deteriorate with time and use." *Skaggs*, supra, at 8-9, 698. Because the City had neglected its cast iron pipes to the point they were past their design life, there is a high probability that the deterioration of the pipe in question, and thus the City's negligence,

[44] R, p. 126.

[45] R, pp. 125-126.

[46] R, p. 128.

contributed to its failure. The City was on notice of the potential for frost rendering its neglect of the pipes even more consequential.

In addition to the doctrine of *res ipsa loquitur*, the WFP provides sufficient evidence from which a jury could conclude the City was negligent. As noted above, the City had a duty "to use due or ordinary care not to injure [LBE]." *Sharp, supra.* Once a City undertakes the operation of a water supply system, the City has a duty to maintain the system in a reasonably safe condition. *Hansen, supra*, 145 Idaho at 703, 184 P.3d at 209.

The pipe responsible for the flooding of LBE's property is a six-inch cast iron pipe installed in 1959.[47] The City has roughly 30 years of data regarding the location, date, and description of water main breaks in its system revealing that 70% of the breaks occur in cast iron pipe installed between 1920 and 1959.[48] Moreover, "[d]escriptions of the types of breaks and repairs performed on the 1950s-era cast iron pipe include . . . clamp-type repairs of rusting and cracked pipelines. . . . indicat[ing] that the material is past its design life and is (sic) need of replacement."[49] Approximately one year prior and less than a mile away from the break at issue, there was a break in the main of the same material installed at the same time just around the corner on Stimson Avenue.[50] The City, with the adoption of its WFP, has admitted that these

[47] R, p. 127.

[48] R, p. 245.

[49] *Id.*

[50] R, p. 127.

particular pipes, installed between 1920 and 1959, were past design life and in need of replacement. At a minimum, the indication in the WFP creates a disputed question of fact.

The City's duty to maintain its mains in a safe and serviceable condition is not in question.

> Likewise, the city is bound to take notice that its pipes are liable to deteriorate from time and use and it must take such measures as ordinary care would dictate to guard against the leaking of its water system due to deterioration of the pipes used in its construction.

Yearsley v. City of Pocatello, 71 Idaho 347, 353, 231 P.2d 743, 747 (1951). "The only requirement as to notice is such as is compatible with the application of the doctrine, namely, defendant is bound to take notice that its mains will deteriorate from time and use." *C. C. Anderson Stores Co. v. Boise Water Corp.*, 84 Idaho 355, 362, 372 P.2d 752, 756 (1962).

The City was on notice that its mains would deteriorate and had actual notice that the main in question was past its design life. Although the City maintained records from which it could have discerned the problems with the cast iron pipes, it ignored the warning signs until the pipes had exceeded their design life. The City was negligent in its duty to take such measures as ordinary care would dictate to guard against leaking due to deterioration of its water pipes and the District Court erred in granting the City's motion for summary judgment.

Finally, even in the absence of *res ipsa loquitur* or direct evidence of negligence, the City has statutory liability for the injury sustained by LBE. As noted above, the Public Utilities Law provides:

> In case any public utility . . . shall omit to do any act, matter or thing required to be done, either by the constitution, any law of this state, or any order or decision of

> the commission, according to the terms of this act, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom. An action to recover such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person.

IDAHO CODE ANN. § 61-702. The City had a statutory obligation to maintain its water works in a reasonably safe condition. IDAHO CODE ANN. § 61-302. Because it failed to do so, and instead allowed its pipes to become "past [their] design life[,]" the City is liable to LBE for the damages resulting therefrom.

Based upon the City's statutory obligations, the doctrine of *res ipsa loquitur*, and the City's own evidence of its failure to maintain its water works in a reasonably safe condition, there remain critical questions of fact to be determined on the question of negligence and an order granting summary judgment on this theory is and would have been inappropriate.

B. The Water Facilities Plan is not a design plan.

The City also advanced an argument that it was immune from liability under the design exception of the ITCA, which provides for immunity from liability for a claim that:

> Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

IDAHO CODE ANN. § 6-904(7). The exception to liability arises upon the establishment of two elements: "(1) the existence of a plan or design that was (2) either prepared in substantial conformance with existing engineering or design standards or approved *in advance of*

construction by the legislative or administrative authority." *Grabicki, supra*, 154 Idaho at 693, 302 P.3d at 33 (citations omitted) (emphasis added).

The City's reliance on this theory is flawed because the claim does not arise out of a "plan or design for construction or improvement." Rather, the claim arises from the failure of the City to maintain its water works in a reasonably safe condition after construction or improvement and prior to the adoption of the WFP. Relying upon the foundationless statement of David Richards that the water line was designed, constructed, and maintained in accordance with engineering standards and met all state and federal standards on December 28, 2015, the City claims that the WFP provides or design immunity. But Section 6-904(7) bears no relation to the City's maintenance duties. Those obligations are governed by the Idaho Code §§ 61-302 and 61-702 and the City had, prior to the existence of the WFP, already failed to maintain its water works in a reasonably safe condition. This is not an issue of improvement or construction and negligence in the design of a project, but rather an ongoing obligation to maintain an existing improvement in a reasonably safe condition, an obligation the City failed to fulfill.

The law, as stated above, is clear. Irrespective of whether the original installation was performed in accordance with then existing design standards, and there is no admissible evidence that it was, once the City undertook the operation of the water supply system, the City had a duty to maintain the system in a reasonably safe condition. Even assuming, arguendo, that the City could establish that the system was installed in accordance with the then applicable engineering and design standards or approved by the relevant administrative authority, the issue is a failure to maintain the system in a safe condition.

Moreover, even if the exception were applicable, the City's reliance on its WFP to support the exception is misplaced. First, the WFP is not a plan or design for construction or improvement, but is instead a plan that "documents key water system information and provides analysis and recommendations that inform infrastructure development and *operational decisions* by City staff."[51] The WFP was not prepared to provide engineering or design information for the existing water system facilities at the intersection of Skyline and Brentwood. Those facilities were installed in 1958-59, over five and a half decades prior to both the development of the WFP and the failure of the main that damaged LBE's property.

Because LBE's claims arises from the City's failure to maintain its water works in a reasonably safe condition, and not from any applicable design plan for the installation or improvement of those works, design immunity does not apply.

CONCLUSION

This Court should reverse the decisions of the District Court and remand the matter for further proceedings. In doing so, this Court should instruct the District Court to strike the offending language from the Affidavit of David Richards. The evidence in question is not supported by an appropriate foundation.

The Court should further hold that summary judgment in this case is not proper. The City of Idaho Falls had a clear duty to maintain its water works in a reasonably safe condition and it has failed to do so. Accordingly, it is liable for the injuries cause to LBE based upon common

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[51] R, p. 148 (emphasis added).

law negligence, the doctrine of *res ipsa loquitur*, and Idaho Code § 61-702. The City's statutory and public policy duty to maintain its water works in a safe condition is operational, not discretionary, and is not subject to any other exception granting the City immunity. LBE should have been afforded the opportunity to test its theories of recovery before a trier of fact.

For the foregoing reasons, LBE respectfully requests reversal of the decisions of the District Court.

Dated: July 27, 2018

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CERTIFICATE OF SERVICE

I certify I am a licensed attorney in Idaho and on July 27, 2018, I served true and correct copies of Respondent's Brief on the following by the method of deliver designated below:

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