No. 91555-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GUY WUTHRICH,

Plaintiff/Petitioner,

vs.

KING COUNTY and CHRISTA GILLAND,

Defendants/Respondent

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the scope of the duty of care of governmental entities with respect to design, construction and maintenance of roadways.

II. INTRODUCTION AND STATEMENT OF THE CASE

This review provides the Court an opportunity to clarify whether, in assessing the tort liability of a municipality for negligent failure to correct an inherently dangerous or misleading condition that renders a roadway unsafe, the trier of fact is limited to consideration of conditions existing in the roadway itself.

Guy H. Wuthrich (Wuthrich) brought this action against Defendant/Respondent King County (County) and Defendant Christa Gilland (Gilland) for negligence arising out of a traffic accident that

occurred on June 20, 2008. The underlying facts are set forth in the unpublished opinion of the Court of Appeals and the briefing of the parties. See Wuthrich v. King County, *noted at* 186 Wn. App. 1023, 2015 WL 1035905(2015); Wuthrich Pet. for Rev. at 2-5; County Ans. to Pet. for Rev. at 3-10; Wuthrich Br. at 3-11; County Br. at 7-25; Wuthrich Reply Br. at 1. For purposes of this brief, the following facts are relevant: This case arises out of a collision between a car driven by Gilland and a motorcycle operated by Wuthrich, resulting in severe injuries to Wuthrich. Gilland had been traveling eastbound on 159th Street near Woodinville in King County. After stopping at the stop sign at the intersection of 159th Street and Avondale Road, Gilland turned left onto Avondale Road in front of Wuthrich's southbound motorcycle, leading to the collision.

Wuthrich sued Gilland for failure to yield the right of way, and the County for negligently maintaining the intersection. With respect to the County's negligence, Wuthrich alleged the intersection was not reasonably safe for ordinary travel and that the County had failed to remediate an inherently dangerous or misleading condition. This condition included a bank of blackberry bushes on the northwest corner of the intersection that

obscured Gilland's vision of traffic proceeding southbound on Avondale Road. [1]

Following discovery, the County moved for summary judgment, contending it did not breach its duty of care or proximately cause Wuthrich's injuries. The superior court granted the County's motion for summary judgment and dismissed the claim against it, staying the action against Gilland pending appeal.

The Court of Appeals affirmed dismissal of the County on summary judgment, with one judge dissenting. See Wuthrich, 2015 WL 1035905 at *6; id. at *7-8 (Bjorgen, J., dissenting). The majority concluded that no genuine issue of fact existed regarding whether the intersection was reasonably safe for ordinary travel, holding that "the brush line [i.e., blackberry bushes] here is not an inherently dangerous condition because under our Supreme Court precedent, such a condition must exist in the roadway itself," relying on a series of early cases. Id. at *3; see also id. at *4. The dissent questioned the cases on which the majority relied, and stated that whether the county is liable in negligence for unsafe conditions depends upon the totality of the circumstances, including the existence of a sight obstruction created by the blackberry bushes, the position of the stop line in relation to the bushes, and the lack

[1] The property where the blackberry bushes were located was apparently owned by the County. See Wuthrich Pet. for Rev. at 11-12 & n. 24.

of warning to oncoming traffic, ultimately concluding that there are genuine issues of material fact. See id. at *7-8 (Bjorgen, J., dissenting).

Wuthrich petitioned this Court for review, challenging the Court of Appeals' affirmance of summary judgment against the County based on its duty of care regarding roadways, as well as the court's failure to address his alternate premises liability theory. See Wuthrich Pet. for Rev. at 1-2; Wuthrich at *4 n. 7. This Court granted review, without limitation. See Order, dated September 2, 2015.[2]

III. ISSUE PRESENTED

> Is a municipality subject to tort liability for negligent failure to correct an inherently dangerous or misleading condition that renders a roadway unsafe based on the totality of the surrounding circumstances, or is the municipality's duty limited to a condition existing in the roadway itself?

IV. SUMMARY OF ARGUMENT

After the waiver of sovereign immunity, a municipality's duty of care regarding inherently dangerous or misleading conditions is not limited to conditions in the roadway itself. Whether a municipality has acted reasonably in responding to an inherently dangerous or misleading

[2] Because review was granted on September 2, 2015, supplemental briefs of the parties are not due until October 2, 2015. See RAP 13.7(d). Consequently, this amicus curiae brief was prepared without the benefit of reviewing any supplemental briefs that may be filed by the parties.

condition is evaluated under the totality of the surrounding circumstances, including those that are beyond the confines of the roadway itself.

V. ARGUMENT

A. Background Regarding A Municipality's Duty Of Care In Designing, Constructing And Maintaining Roadways, Particularly The Duty To Correct Inherently Dangerous Or Misleading Conditions.

A municipality, as well as the State, has a duty to use ordinary care to keep its roadways reasonably safe for ordinary travel. See Keller v. City of Spokane, 146 Wn.2d 237, 254, 44 P.3d 845 (2002). The duty is owed to all travelers, whether negligent or fault free. See Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 786, 108 P.3d 1220 (2005). This duty of care is consistent with general negligence principles because, following legislative waiver of sovereign immunity, municipalities are generally held to the same negligence standards as private parties. See Keller, 146 Wn.2d at 243; Bodin v. City of Stanwood, 130 Wn.2d 726, 742-43, 747, 927 P.2d 240 (1996) (holding composed of "dissent" and concurrence).

Common law liability of a municipality for negligence in maintaining its roadways does not require a direct statutory violation, although a statute, regulation or other positive enactment may help define

the scope of the duty or standard of care. See Owen, 153 Wn.2d at 787. This duty of care:

> includes the duty to safeguard against an inherently dangerous or misleading condition. A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon. *See Keller*, 146 Wn.2d at 249. The inherently dangerous formulation recognizes that "[a]s a danger becomes greater, the actor is required to exercise caution commensurate with it." *Ulve v. City of Raymond,* 51 Wn.2d 241, 246, 317 P.2d 908 (1957). Simply stated, the existence of an unusual hazard may require a city to exercise greater care then would be sufficient in other settings. *Id.* at 246, 251-52. *See also Bartlett v. N.Pac. RR*, 74 Wn.2d 881, 882-83, 447 P.2d 735 (1968).

Owen at 787-88. Owen further provides:

> If the roadway is inherently dangerous or misleading, then the trier of fact must determine the adequacy of the corrective actions under all of the circumstances. *E.g. Goodner v. Chicago, Milwaukie, St. Paul & Pac. R.R.*, 61 Wn.2d 12, 17-18, 377 P.2d 231 (1962). If the corrective actions are adequate, then the city has satisfied its duty to provide reasonably safe roads.

Id. at 789-90; accord Ziao Ping Chen v. City of Seattle, 153 Wn.App. 890, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010).

Notwithstanding recognition in Owen that in determining the adequacy of remedial measures for an inherently dangerous or misleading condition the trier of fact may consider all relevant circumstances, a majority of the Court of Appeals below determined that an inherently dangerous condition must exist "in the roadway itself," Wuthrich, 2015

WL 1035905 at *4, relying on four early decisions of this Court: Rathbun v. Stevens County, 46 Wn.2d 352, 356, 281 P.2d 853 (1955); Bradshaw v. Seattle, 43 Wn.2d 766, 773-74, 264 P.2d 265 (1953); Barton v. King County, 18 Wn.2d 573, 576-77, 139 P.2d 1019 (1943); Leber v. King County, 69 Wash. 134, 137, 124 Pac. 397 (1912). Based on these cases, the Court of Appeals dismissed Wuthrich's negligence claim because a key aspect of the alleged inherently dangerous condition (blackberry bushes obscuring Gilland's view) was not part of the road itself. The majority's treatment of these early cases as precedential is incorrect in light of the waiver of sovereign immunity, as explained in §B.

B. After Waiver Of Sovereign Immunity, Municipal Liability For Negligently Failing To Correct An Inherently Dangerous Or Misleading Condition Should Not Be Limited To Conditions That Only Exist In The Roadway Itself.

The Court of Appeals majority opinion concludes that Wuthrich does not state a negligence claim because the alleged inherently dangerous or misleading condition includes the sight obstruction created by off-road blackberry bushes. See Wuthrich, 2015 WL 1035905 at *3. Specifically, the majority states "that the brush line here is not an inherently dangerous condition because under our Supreme Court precedent, *such a condition must exist in the roadway itself*." Id. (emphasis added). In reaching this result, the majority relies upon the decisions cited in §A - Rathbun, 46

Wn.2d 356; Bradshaw, 43 Wn.2d at 773-74; Barton, 18 Wn.2d at 576-77; Leber, 69 Wash. at 137.[3] See Wuthrich at *4.

The dissenting opinion properly questions the majority's reliance on this line of cases, noting:

> [t]he present validity of a legal definition of dangerousness developed under the road and traffic conditions of a century ago is precarious at best. Whatever its remaining vitality, however, the *Barton/Leber* holding does not control the analysis of this appeal.

Wuthrich at *7 (Bjorgen, J., dissenting). The dissent is correct because the road-based limitation in these early cases was imposed during the reign of sovereign immunity, and should no longer have any currency.

At the time the Washington Constitution was adopted, the doctrine of sovereign immunity was woven into the fabric of the common law. See Billings v. State, 27 Wash. 288, 291, 67 Pac. 583 (1902) (recognizing the State as immune from liability based on sovereign immunity unless provided for by statute, as mandated by Washington Constitution Art. II §26).[4] Existence of the doctrine of sovereign immunity is implicit in

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[3] The passage from Leber, 69 Wash. at 137, culminating in the statement "[t]he unusual danger noticed by the books is a danger in the highway itself," was cited with approval in Ruff v. County of King, 125 Wn.2d 697, 706, 887 P.2d 886 (1995). A different aspect of Ruff, limiting a municipality's duty of care to persons using roadways in a proper manner, was later disapproved in Keller, 146 Wn.2d at 249.

[4] For general background on the adoption of sovereign immunity in this country based upon English common law, see Restatement (Second) of Torts Ch. 45A, introductory cmt. at 393-94 & §895B cmt.a (1979). For a history of sovereign immunity in Washington, and its ultimate waiver, see Charles F. Abbott, Jr., Comment, Abolition of Sovereign Immunity in Washington, 36 Wash. L. Rev. 312 (1961).

Washington Constitution Art. II §26, which provides: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state."

The doctrine of sovereign immunity was eventually waived by the State of Washington, and this waiver encompassed state political subdivisions and municipalities. See RCW 4.92.090; RCW 4.96.010; see also Kelso v. City of Tacoma, 63 Wn.2d 913, 915, 390 P.2d 2 (1964).[5] However, before this waiver occurred, application of sovereign immunity to certain municipalities was problematic. See Abbott, supra at 316. For example, claims by litigants that specific statutes waived municipal immunity for tort liability were reviewed skeptically by the Court. These statutes were strictly construed as in derogation of the common law. See Bradshaw, 43 Wn.2d at 778; see also Billings, 27 Wash. at 292-93 (holding statute authorizing actions against State not sufficiently precise to constitute a waiver of sovereign immunity).

In addition to statutory exceptions to sovereign immunity, grounded in Art. II §26, this Court also recognized a kind of exception to the doctrine, allowing for municipal tort liability in certain instances. Under this exception, a municipality could be held liable in tort for actions characterized as "proprietary," as opposed to "governmental". See

[5] The current versions of RCW 4.92.090 and RCW 4.96.010 are reproduced in the Appendix.

Hagerman v. Seattle, 189 Wash. 694, 698-99, 66 P.2d 1152 (1937); Abbott, supra at 313-17. The distinction rested upon whether the particular undertaking was considered to be for the benefit of the municipality as a corporate body, or for the common good; a proprietary function was considered corporate in nature and subjected the municipality to liability for negligence. See id.

This proprietary-governmental distinction was easy to state, but difficult to apply, resulting in considerable confusion and inconsistent results. See Hagerman, 189 Wash. at 698-99; Abbott, supra at 316. However, it was generally recognized that a municipality's street maintenance and repair was proprietary in nature, thus exposing it to tort liability. See Abbott, supra at 317.

The case law restriction regarding inherently dangerous or misleading conditions, limiting consideration to conditions in the roadway itself, is the result of a narrow construction of what proprietary duties were assumed by a municipality. Overall, the cases suggest that this duty ended at the edge of the roadway maintained by the governmental entity. Any consideration by the municipality of matters beyond the roadside was considered governmental in nature, and subject to sovereign immunity.

This analysis is implicit in several early cases, and perhaps most evident in this Court's opinion in Barton, which involved a claim of an

inherently dangerous condition based upon a heavy growth of weeds and vegetation near an intersection. See 18 Wn. 2d at 574-77. In Barton, this Court vacated a verdict for the plaintiff, refusing to recognize a duty on the part of the county to remediate the roadside vegetation problem. The crux of the Court's analysis is that the proprietary (or corporate) duty assumed by the county stopped at the edge of the roadway:

> It is a general rule, which respondents recognize, that a municipal corporation is under no obligation to open a street or highway to its full width. The extent to which the improvement shall extend is a matter resting in the sound discretion of municipal authorities. *As a corollary, it is established that a municipality is not liable for injuries sustained outside the improved portion of the street or highway.* 7 McQuillin, Municipal Corporations, 2nd Ed., p. 71, § 2931; 29 C.J. 683, § 445; Blankenship v. King County, 68 Wash. 84, 122 P. 616, 40 L.R.A.,N.S., 182; Matson v. Pierce County, 94 Wash. 38, 161 P. 846. McQuillin states the principles as follows, p. 74:
>
> 'If the injury occurs on a part of a street which the city had not invited pedestrians to use, but which had been left in a state of nature, and which had not been thrown open to the use of the public, frequently municipal liability is denied. In such case it is argued that the city's obligation towards persons using its public streets springs from invitation, express or implied, and unless the city does something or omits to do something, from which such invitation reasonably may be inferred or implied, it cannot be said to have assumed any obligation towards the public with respect to merely platted or dedicated streets or public ways on paper. *The city has a right, therefore, to prepare a way of a width which in its discretion will accommodate the public in the middle of a dedicated or platted street, without assuming any duty or liability with respect to the*

portion of the street allowed to remain in a state of nature."

18 Wn.2d at 575-76 (emphasis added). Under this common law principle, any benefit to the municipal corporation in maintaining the roadway--triggering a duty of care--ends at its edge, and it will not be deemed to have assumed any responsibility beyond that point. See id.; accord Bradshaw, 43 Wn. 2d at 773-74 (same; involving roadside vegetation); Rathbun, 46 Wn. 2d at 354-55 (same; no common law duty to construct approach or driveway to roadway); but see Leber, 69 Wash. at 135-39 (upholding dismissal of negligence claim against municipality, but allowing that extraordinary condition of a roadway such as a steep incline may require remediation by warning or barrier); Ulve v. Raymond, 51 Wn.2d 241, 251-53, 317 P.2d 908 (1957) (indicating that fog may be component of an inherently dangerous condition).[6]

Following the broad waiver of sovereign immunity, this artificial limitation of the proprietary function exception to municipal immunity no longer exists, as the immunity itself is gone. Now, a municipality's obligation to remediate an inherently dangerous or misleading condition

[6] Barton also supports this result on the grounds that any contrary holding would expose municipalities to extensive liability and potential financial ruin. See 18 Wn.2d at 576-77 (relying on Leber, 69 Wash. at 136). Following the broad waiver of sovereign immunity, this consideration is no longer appropriate. While the reasonableness of a municipality's conduct in addressing an unsafe condition may take into account the costs of remediation, it cannot simply point to the specter of financial ruin or raise a "poverty defense." See Bodin, 130 Wn.2d at 742 (Alexander, J., concurring) & 743-47 (Johnson, J., dissenting) (constituting 5-justice majority on this point of law).

requires it to consider the totality of the circumstances, including factors beyond the roadway itself. See Keller, 146 Wn.2d at 242-43 (recognizing that after waiver of sovereign immunity municipalities generally held to same negligence standard as private parties, with duty grounded in foreseeability); see also Owen, 153 Wn.2d at 789-90.[7]

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in resolving the issues on review.

DATED this 25th day of September, 2015.

BRYAN P. HARNETIAUX

GEORGE M. AHREND by Bryan Harnetiaux with authority

On Behalf of WSAJ Foundation

[7] Both Keller and Owen refer to cases predating waiver of sovereign immunity. See e.g. Keller at 247 (citing Barton); Owen at 788 (citing Leber). However, these citations relate to principles of law developed in these cases that survived the waiver of sovereign immunity, or the results would otherwise be the same before or after waiver of sovereign immunity.

Appendix

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.92. Actions and Claims Against State (Refs & Annos)

West's RCWA 4.92.090

4.92.090. Tortious conduct of state--Liability for damages

Currentness

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

Credits
[1963 c 159 § 2; 1961 c 136 § 1.]

Notes of Decisions (126)

West's RCWA 4.92.090, WA ST 4.92.090
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

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West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.96. Actions Against Political Subdivisions, Municipal and Quasi-Municipal Corporations (Refs & Annos)

West's RCWA 4.96.010

4.96.010. Tortious conduct of local governmental entities--Liability for damages

Effective: July 22, 2011
Currentness

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

Credits
[2011 c 258 § 10, eff. July 22, 2011; 2001 c 119 § 1; 1993 c 449 § 2; 1967 c 164 § 1.]

Notes of Decisions (174)

West's RCWA 4.96.010, WA ST 4.96.010
Current with all laws from the 2015 Regular Session and 2015 1st, 2nd, and 3rd Special Sessions

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Dear Mr. Carpenter:

Attached is the WSAJ Foundation letter request and proposed amicus curiae brief in this case, and copies of these documents are being served electronically on counsel today, per prior arrangement.

Very truly yours,

Bryan Harnetiaux
WSBA No. 1569

via
Sandra Babcock, Special Assistant to WSAJ Foundation