Supreme Court No. 98351-8
Court of Appeals No. 79132-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE CITY OF BELLEVUE,
Petitioner/Respondent/Defendant

vs.

SHANNON OGIER,
Respondent/Appellant/Plaintiff

On Appeal from the King County Superior Court
KCSC Case No. 08-2-22750-2SEA

RESPONDENT SHANNON OGIER'S RESPONSE TO AMICUS BRIEF OF THE CITY OF SEATTLE AND KING COUNTY

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CASES

I. IDENTITY OF RESPONDENT

Shannon Ogier asks this court to decline review of the City of Bellevue's (the City) Petition for Review of the Court of Appeals' decision reversing an order of summary judgment that dismissed Ogier's claims.

II. COURT OF APPEALS DECISION

The published decision was filed on March 2, 2020, and is attached to The City's Petition as Appendix "A."

III. ARGUMENT

Ogier was lawfully driving her car in the City. She was not in the City of Seattle (Seattle). Nor was King County legally responsible for the maintenance or ownership of the roads and storm drains in the City. Neither are parties in this action nor will they be materially affected by the outcome.

Seattle and King County argue the Court of Appeals' decision conflicts with existing law and that the lower Courts did not address those cases. It is also relevant to point out that the City did not address two out of three of those cases in its briefing. The only actual basis for the Amicus brief is that both parties are municipalities or public entities and do not like the outcome of the Court of Appeals' decision. Under that logic, every city and county in the State of Washington should be affected in this

action and file Amici briefs; likewise, the over 7.5 million residents of the State of Washington affected by the decision should also file briefs.

In their brief, Seattle and King County cite to *Hunt v. City of Bellingham*, 171 Wash. 174, 17 P.2d 870 (1933), *Batten v. S. Seattle Water Co.*, 65 Wn.2d 547 (1965), *Wilson v. City of Seattle,* 146 Wn. App. 737 (2008) as cases that are "in conflict." None of these cases conflict with the Court of Appeals' decision, and one, in fact, supports it.

In *Hunt v. City of Bellingham*, 171 Wash. 174, 17 P.2d 870 (1933) the court addressed a verdict after a ***jury trial*** (not a summary judgment). In *Hunt*, the plaintiff tripped over an open water meter box maintained by the City of Bellingham. Besides being a case decided after an actual trial, the facts are distinguishable. In *Hunt*, after receiving a complaint from the plaintiff, Bellingham installed a new box with a cover that would not slide off, and regularly inspected the box <u>every month</u>. This was a key to the Court's ruling as the active role played by Bellingham negated any claim that it was acting negligently, and there was no evidence that Bellingham had thereafter created a dangerous condition. In contrast, and as pointed out by the Court of Appeals here, the City inspected the storm drains ***once every five years*** (not monthly) and admitted that manhole cover locks should have been installed—and were not. See Ogier v. City of Bellevue, 459 P.3d 368 at ¶16 (2020). The facts are distinguishable in both cases.

In *Wilson, supra*, the Court of Appeals upheld the granting of a

summary judgment motion. In that case, the plaintiff was walking on a parking strip, when an attached manhole cover flipped, and she fell into the hole. In *Wilson*, the lower court and the Court of Appeals ruled on a "breach of a duty of care," not whether the City of Seattle had a duty.

It is not disputed that the issue framed by the City here was whether the City had a duty at all (not merely whether it breached that duty. The Court of Appeals found issues of fact existed as to breach). The *Wilson* court found that "without any evidence showing that the City knew or had reason to know that the manhole cover was a danger or evidence from which one could infer that a City employee placed the cover improperly, we can only speculate that the City's negligence was a proximate cause of Wilson's injuries." *Wilson* at 999-1000. *Wilson* involved a parking strip, not a roadway, and not an ***uncovered*** manhole—but a covered one. The factual evidence also showed that the many people inspecting the cover after the accident found no defects and could not recreate the incident. There was also evidence the cover had been previously replaced. None of that evidence was present here—to the contrary the City pled ignorance to the entire situation and has tried to wash its hands of any responsibility. In sum, there are different legal standards required. There was ample evidence in this case that the City had a duty and breached it. Summary judgment should not have been granted here.

Finally, in *Batten, supra*, the appellate court's decision again followed a jury trial—not a summary judgment. Seattle and King County ***concede*** *Batten* does not support the City of Bellevue's position in this case (see Amicus, page 3). Relying upon *Hunt*, supra, the defendants in *Batten* appealed the trial court's refusal to grant motions to dismiss and for judgment notwithstanding the verdict. These motions were based upon the premise that, from the evidence given, the only permissible inference was that someone had tampered with the lid and since the defendant had no notice, it could not be held liable. *Batten* at 550. In *Batten*, the Supreme Court affirmed that "where a municipal corporation creates the dangerous condition, no notice is required," citing to *Russell v. Grandview*, 39 Wn.2d 551, 236 P.2d 1061.[1]

Indeed, that was the conclusion of the Court of Appeals in this case—that the evidence, taken in the light most favorable to Ogier, showed the City could have anticipated the hazard, could have placed locks on the cover, conceded locks ***should*** have been on the covers, and

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1 In *Russell*, the City of Grandview was sued for permitting combustible gas into the city's water lines. Grandview argued it was not liable, because it lacked notice the gas was combustible. The Supreme Court held:

> If the defects do not occur by reason of active negligence upon the part of the city, the duty to repair cannot arise until the city has actual or constructive notice of the defects. The city becomes negligent when, after such notice, it fails to make the necessary repairs. ***If, however, the dangerous condition is caused by agents of the city in the performance of their duties, the rule of liability is not based on notice and failure to repair, but upon the creation of a dangerous condition by the city. (Emphasis added).***

Russell v. Grandview, 39 Wn. 2d 551, 554 (Wash. 1951)

had no system in place for inspection of the storm drain covers or monitoring who had access to them. All of this gave rise to the favorable inference that the City knowingly created a dangerous condition to exist. The lower court in this case did not even reach the issue of breach. Instead, it ruled there was no duty as a matter of law. This was correctly rejected by the Court of Appeals.

IV. CONCLUSION

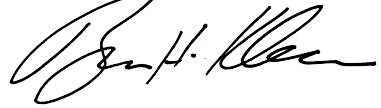
Sometimes bad cases make bad laws. And sometimes, poorly conceived motions for summary judgment make bad laws. The City of Bellevue filed its motion and must accept the consequences of an erroneous ruling by the lower court.

The lower court incorrectly concluded that—as a matter of law—the City owed absolutely no duty to Ogier to ensure there was no open storm drain on its streets. The Court of Appeals correctly found that there were a plethora of factual issues to be determined on whether the City breached its existing duties and relied upon established legal authority.

Respectfully submitted,

Dated: June 17, 2020

KRIKORIAN LEGAL, PLLC

By 

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June 17, 2020 - 6:15 PM

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Appellate Court Case Number:	98351-8
Appellate Court Case Title:	Shannon Ogier v. City of Bellevue

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