Supreme Court No. 91555-5

Court of Appeals No. 44019-9

SUPREME COURT OF THE STATE OF WASHINGTON

GUY WUTHRICH,

Petitioner,

v.

KING COUNTY and CHRISTA GILLAND,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Plaintiff Guy Wuthrich requests that this Court accept review of the divided Court of Appeals decision designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the divided opinion by Division II in *Wuthrich v. King County, et. al.* (No. 44019-9-II), March 10, 2015.[1]

III. ISSUES PRESENTED FOR REVIEW

ISSUE ONE: Is review warranted under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals decision conflicts with decisions of both this Court and the Court of Appeals holding that a municipality's duty to provide reasonably safe roads extends to hazardous roadside conditions?

ISSUE TWO: Is review warranted under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals decision conflicts with decisions of both this Court and the Court of Appeals that impose a duty on property owners to maintain their premises such that adjacent public roads are not rendered unsafe for ordinary travel?

ISSUE THREE: Is review warranted under RAP 13.4(b)(2) because the Court of Appeals (Division II) decision conflicts with the Court of Appeals (Division I) decision in *Chen v. City of Seattle*, 153 Wn. App. 890, 894, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010), which held that the question of whether roadway conditions are

[1] A copy of the Court of Appeals opinion is attached as Appendix A.

reasonably safe depends on the totality of the circumstances existing at a particular location?

IV. STATEMENT OF THE CASE

A. The collision

On June 20, 2008, Plaintiff Guy Wuthrich was operating a Harley Davidson motorcycle southbound on Avondale Road in King County, approaching an intersection at 159th Street. He was traveling at 35 mph, five mph under the speed limit.[2] Defendant Christa Gilland, an off-duty Kirkland Police Officer,[3] approached the intersection traveling in an easterly direction on 159th Street, which is controlled by a stop sign and a stop line.[4]

Ms. Gilland testified that she stopped at the stop line, looked both ways, did not see Mr. Wuthrich's motorcycle approaching, and started her left turn onto Avondale Road.[5] This put her directly and suddenly in the path of Mr. Wuthrich's southbound motorcycle, causing a collision.[6]

Mr. Wuthrich sustained multiple, severe injuries in the collision.

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[2] CP 1544 (*Wuthrich Dep.* at 8).
[3] As a police officer, Ms. Gilland has specialized training regarding driving and applies defensive driving principles. CP 1560 (*Gilland Dep.* at 30-31).
[4] *See* Appendix B (photograph of the intersection).
[5] CP 1564, 1581, 1583 (*Gilland Dep.* at 45-46, 114-116, 122).
[6] CP 1564, 1581, 1583 (*Gilland Dep.* at 45-46, 114-116, 122).

B. Ms. Gilland's ability to see southbound traffic on Avondale was impeded by sight obstructions at the intersection.

The stop line at 159th Street is approximately 15 feet back from the extension of the fog line.[7] Due to a wall of overgrown blackberry bushes along Avondale Road, the available sight distance for a vehicle stopped at the stop line was less than a third of the sight distance that Defendant King County concedes is required.[8]

King County Detective James Leach took the following recorded statement from Ms. Gilland a few hours after the collision:

> I was stopped at the intersection of Avondale and NE 159th ***at the stop line*** looking for traffic. I sat there for quite a while, I waited until it was really wide open. And I pulled out to make a left turn onto Avondale and when I got probably half way through the lane closest to me there was a motorcyclist in front of me and I hit him.[9]

Ms. Gilland's statement that she stopped at the stop line is supported by the testimony of the only witnesses to the collision – Ms. Gilland and Mr. Wuthrich – that they did not see each other until an instant before the collision. Mr. Wuthrich testified that he was driving along and "saw a bumper real close, it was coming fast."[10] Ms. Gilland testified that the motorcycle appeared in front of her just as she started her left turn onto Avondale.[11]

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[7] CP 473.
[8] CP 167 (685 feet of sight distance is required for a 40-mph road); CP 461 (there was only 191 feet of sight distance for a vehicle stopped at the stop line).
[9] CP 432 (emphasis added).
[10] CP 394; CP 396 (he had less than a second to react after he saw Gilland's car).
[11] CP 402.

Accident reconstruction expert Paul Olson explained that, for Ms. Gilland's vehicle to have been "coming fast," as Mr. Wuthrich testified, she had to be far enough back from the intersection (*i.e.*, at the stop line) when she began accelerating to pick up speed by the time she entered the intersection:[12]

> [W]hen a witness tells you first thing I saw was a quick movement from something, you know it isn't just sitting there waiting and accelerating. It is back a little bit and it is accelerating and it's got some speed when it gets here.
>
> Otherwise, you'd say I see him creeping out because in one second, literally, this is all the further that car can go (indicating). And in two seconds it might travel five feet total, in the first two seconds. So that's not quick. What [Wuthrich] describes is seeing the front bumper of a car coming out quickly in front of him. What that indicates is that car has to be back – further back – say further back than this one here and accelerating before the front bumper comes out.[13]

Ms. Gilland testified that the view to her left (north) was obstructed by overgrown vegetation (blackberry bushes) and a utility pole. She testified that she looked left and saw the blackberry bushes and utility pole, but did not see Mr. Wuthrich's motorcycle:[14]

> A. I believe that the bushes contributed to me not seeing the oncoming motorcyclist.[15]
>
> * * *
>
> A. ... I think there are things that contributed to me not seeing

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[12] CP 405.

[13] CP 440-441.

[14] CP 423-425, 428; *see also* CP 403-404, 406.

[15] CP 408.

him.

Q. And what would those be?

A. I think the . . . overgrown bushes that are on the corner.[16]

The wall of blackberries along Avondale Road was described by Detective Leach as a sight obstruction for drivers at the intersection:

> On the northwest corner of the intersection there is a large brush line that runs from the corner northbound along the west side of Avondale Rd NE. This brush line causes somewhat of a site [sic] obstruction from vehicles stopped eastbound NE 159 St at the stop bar looking north on Avondale Rd NE.[17]

Expert testimony confirmed that the sight distance for drivers in the immediate vicinity of the Avondale Road-159th Street intersection was substandard and inadequate at the time of the collision, and created an unsafe condition for drivers. According to transportation engineer Edward Stevens, "[t]hese sight obstructions in the northwest quadrant of the intersection created an inherently dangerous condition . . . ."[18] Accident reconstruction expert Paul Olson testified that "clearly the sight line for drivers pulling up to this intersection was obstructed."[19]

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[16] CP 414

[17] CP 445. A photograph taken by the King County Sheriff's office at the accident scene (attached as Appendix C) demonstrates the sight-obstructing wall of overgrown vegetation.

[18] CP 1265.

[19] CP 439; *see also* CP 1501-1502 (Exhibit 9 to the Deposition of Paul H. Olson at 1). Exhibit 9 to the Olson Deposition is a letter written by Mr. Olson to Plaintiff's counsel, which was referenced during his deposition. The letter sets forth Mr. Olson's opinions and analysis in this case. *See* CP 1513 (*Olson Dep.* at 38-40).

V. ARGUMENT

A. The trial court applied the wrong legal standard, and because of this erroneously dismissed Mr. Wuthrich's case.

Whether a municipality owes a duty in a particular situation is a question of law. *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002). As a matter of law, Defendant King County has a duty to exercise ordinary care to keep its public roads in a reasonably safe condition for ordinary travel. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005). This includes a duty to eliminate inherently dangerous or misleading conditions. *Owen*, 153 Wn.2d at 788; *Chen v. City of Seattle*, 153 Wn. App. 890, 894, 223 P.3d 1230 (2009). Governmental entities are required by law to design and maintain roads so that they are reasonably safe for drivers, even if the driving is imperfect. *Keller*, 146 Wn.2d at 245.

Whether road conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway, including traffic operations. *Chen*, 153 Wn. App. at 894. It is not necessary to prove a violation of a statute or ordinance for a governmental entity to be liable for an unsafe road. *Chen*, 153 Wn. App. at 901 ("In effect, the city argues that the scope of its duty to Liu extended only to eliminating actual physical defects or to taking action expressly required by a statute, ordinance, or regulation. The city is incorrect on both accounts.").

In granting the County's motion for summary judgment, the trial court relied upon language in *Ruff v. King County*, 125 Wn.2d 697, 887

P.2d 886 (1995), that "[a] county has a duty to maintain its roadways in a reasonably safe condition for ordinary travel ***by persons using them in a proper manner.***" *See Ruff*, 146 Wn.2d at 704 (emphasis added).[20] Based on this language, the trial court ruled that the County could not be liable for an unsafe intersection here because, in pulling out into a lane of travel when she could not see approaching traffic, Ms. Gilland was not a "prudent" driver, and therefore King County had no duty to provide a reasonably safe road under these circumstances.[21]

The legal basis for the trial court's ruling was rejected by this Court in *Keller v. City of Spokane*, *supra*, which held that the characterization of a governmental entity's duty with regard to providing reasonably safe roads as stated in *Ruff* was an incorrect statement of the law because it could wrongly be interpreted as "limit[ing] the scope of a municipality's duty to only those using the roads and highways in a non-negligent manner." *Keller*, 146 Wn.2d at 249. Instead, under the correct legal standard in highway safety cases, "a municipality owes a duty to all persons, ***whether negligent or fault-free***, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel." *Ibid.* (emphasis added). Contrary to the trial court's approach in this case, *Keller* requires that the fault of a governmental entity be analyzed independent of the fault of other persons that may have been involved in a

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[20] VRP 60 (7/27/12).

[21] VRP at 60-61 (7/27/12). The trial court used this same legal standard and rationale to rule that Ms. Gilland's negligence was the sole proximate cause of the collision. *See* VRP at 65, 67 (7/27/12).

collision.[22] Because the rule of law applied by the trial court in granting Defendant County's motion for summary judgment is contrary to controlling precedent from this Court, Mr. Wuthrich filed an appeal.

B. The Court of Appeals decision conflicts with decisions of both this Court and the Court of Appeals that have long recognized that a municipality's duty to provide reasonably safe roads extends to inherently dangerous and unsafe conditions off or along the roadway.

The Court of Appeals acknowledged that the trial court applied an incorrect legal standard in granting summary judgment,[23] but went on to compound this error by holding that the scope of a municipality's duty to provide reasonably safe roads is limited to conditions existing ***in the roadway itself***. *Slip Opinion* at 6, 7. Because the overgrown brush line that blocked the drivers' view of each other at this intersection was not part of the roadway itself, the Court of Appeals held that the County did not breach its duty to maintain the road in a reasonably safe manner, and affirmed the trial court. *Slip Opinion* at 12.

After rejecting the trial court's erroneous analysis, the Court of Appeals applied an erroneous analysis of its own to affirm the trial court. The Court of Appeals' reasoning would limit a municipality's duty to the confines of the asphalt, and therefore conflicts with decisions of both this Court and the Court of Appeals that have long recognized that a municipality's duty to provide reasonably safe roads extends to conditions

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[22] *Keller* was most recently re-affirmed on this issue by this Court in *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2014).

[23] Slip Opinion at p.5, fn.6 (Appendix A).

off the roadway. One example is *Raybell v. State*, 6 Wn. App. 795, 496 P.2d 559 (1972). In *Raybell*, the plaintiff's vehicle left the highway and tumbled down a cliff. The plaintiff sued the State, claiming that the highway was inherently dangerous due to inadequate guardrails next to the mountain road where the incident occurred. Expert engineering testimony showed that a nearby guardrail would have deflected the vehicle back onto the highway at speeds as high as 48 miles per hour, and that the lack of guardrails was extremely hazardous. The jury returned a verdict in favor of the plaintiff, and the State then appealed.

The appellate court affirmed the jury's verdict, noting that the duty to maintain roads in a reasonably safe condition extends to conditions in or along the highway that are inherently dangerous or deceptive. *Raybell*, 6 Wn. App. at 802. The court ***rejected*** the State's contention "that the duty of a municipality ... is confined to situations where there is an obstruction or defect ***in the driving surface of the road***." *Ibid.* (emphasis added). Instead, the court emphasized that:

> A roadway may be just as hazardous and deceptive by its design as it is by its surface. A roadway may be rendered as hazardous and deceptive by the placement of its signs or the improper placements of its protective railings as it is by an obstruction in its ***traveled*** portion.

Raybell, 6 Wn. App. at 802 (emphasis added).

Similarly, in *Breivo v. Aberdeen*, 15 Wn. App. 520, 550 P.2d 1164 (1976), a vehicle traveling at an excessive rate of speed went out of control, jumped a curb and careened along the sidewalk for 66 feet, striking a solid immovable barrier 13 inches off the traveled roadway.

The barrier had been erected by the city to protect a light standard. The court found the city liable even though the light standard was located off the street, ruling that reasonable minds could not differ that "the City was palpably negligent in erecting a solid, immovable barrier in such a location." *Breivo*, 15 Wn. App. at 527.

More recently, in *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387, 391 (2013), this Court held that municipalities may be held liable for placing a utility pole "too close to the roadway." *Lowman*, 178 Wn.2d at 171. The Court stated,

> Whatever the reasons for a car's departure from a roadway, as a matter of policy we reject the notion that a negligently placed utility pole cannot be the legal cause of resulting injury.

Lowman, 178 Wn.2d at 172.

The Court of Appeals decision also conflicts with cases from both this Court and the Court of Appeals holding that a municipality's duty to provide reasonably safe roads includes correcting inherently dangerous conditions existing at a given location. For example, *Owen v. Burlington Northern and Santa Fe R.R. Co.*, *supra*, had nothing to do with a defect in the roadway itself; the case involved dangerous traffic conditions. In *Owen,* this Court held that the City of Tukwila could be held liable for its failure to eliminate or correct traffic congestion at a major intersection where traffic backed up to such an extent that vehicles were being trapped on nearby railroad tracks.

Likewise, *Chen v. City of Seattle*, *supra*, involved a pedestrian who was killed while trying to cross a busy downtown street in a crosswalk. In

Chen, the city argued that "Chen can prevail only if she shows that a particular physical defect in the crosswalk itself rendered the crosswalk inherently dangerous or inherently misleading." *Chen*, 153 Wn. App. at 900. The Court of Appeals rejected this argument, holding that a totality of the circumstances standard governs in determining whether or not a road authority breached its duty to provide a reasonably safe road. Based on this standard, a plaintiff

> . . . need not prove that the crosswalk contained a particular defective physical characteristic rendering the crosswalk inherently misleading or inherently dangerous. Rather, a trier of fact may infer that the city breached the duty of care it owed . . . based on the totality of the circumstances.

Chen, 153 Wn. App. at 901.

The Court of Appeals' holding that the scope of a municipality's duty is limited to eliminating inherently dangerous conditions existing in the roadway itself conflicts with the cases discussed above, and would dramatically narrow the scope of a municipality's duty. Review by this Court is therefore warranted under RAP 13.4(b)(1) and (b)(2).

C. The Court of Appeals decision conflicts with decisions of both this Court and the Court of Appeals that impose a duty on property owners to maintain their premises such that adjacent public roads are not rendered unsafe for ordinary travel.

The uncontested evidence before the trial court showed that King County owned the land where the overgrown, sight-obstructing wall of brush was located.[24] Thus, in addition to the County's governmental duty

[24] CP 939-940 (*Stevens Dep.* at 44-45) ("the blackberry vines in question of the sight visibility line were on county property"); CP 1625 ("The topographic survey

to maintain its roads in reasonably safe condition, the County had an independent duty as the owner of the land where the brush was located. Plaintiff Wuthrich moved for partial summary judgment recognizing the rule of law that a property owner has a duty to eliminate an unsafe condition on land that abuts a street and presents a potential hazard for traffic.[25] Specifically, Mr. Wuthrich argued that, under well-established common law, "a property owner must use and keep his premises in a condition so adjacent public ways are not rendered unsafe for ordinary travel"[26] and that this duty applied to King County as the owner of the subject parcel.[27]

King County argued that *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943), and *Bradshaw v. City of Seattle*, 43 Wn.2d 774, 264 P.2d 265 (1953), relieve it of any duty to maintain vegetation on property it owns adjacent to a road. The County also claimed that the cases cited by Mr. Wuthrich were "irrelevant to the case at bar because they all involve the duties of private entities who own property next to a municipal roadway." Mr. Wuthrich responded that the County's attempt to draw a distinction between private and public landowners ignored our State's waiver of sovereign immunity (RCW 4.96.010), which makes a

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measurements that I took on April 21, 2011, in combination with the Sheriff's accident scene survey, document that the overgrown shrubbery (blackberry vines) depicted in the accident scene photos are located on land owned by King County.").

[25] CP 1659-1663; *see, e.g., Re v. Tenney*, 56 Wn. App. 394, 396, 783 P.2d 632 (1989).

[26] *Re v. Tenney*, 56 Wn. App. 394, 396, 783 P.2d 632 (1989).

[27] CP 1662.

municipality liable for its tortious conduct "to the same extent as if it were a private person or corporation."[28]

The trial court denied Mr. Wuthrich's motion to establish the duty of an owner of land adjacent to a public road.[29] At the same time, the trial court granted King County's motion for summary judgment.[30] The trial court then made findings under CR 54(b) to allow an appeal to proceed on the summary judgment order in favor of the County.[31]

Mr. Wuthrich's Notice of Appeal[32] included the order denying his partial summary judgment motion to establish the duty of a landowner.[33] However, because the trial court did not certify that order for review under CR 54(b),[34] the Court of Appeals directed Mr. Wuthrich to file a motion for discretionary review on the landowner duty issue.[35] A Commissioner subsequently denied Mr. Wuthrich's Motion for Discretionary Review as to the issue of a landowner's duty.[36]

Based on the Commissioner's ruling, Mr. Wuthrich was required to drop the issue of a landowner's duty from his appeal. The County, however, responded to Mr. Wuthrich's Opening Brief by citing *Barton* and *Bradshaw* to support its argument that "where a street itself is

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[28] CP 1662-1663.
[29] CP 1276-1278.
[30] CP 1279-1281.
[31] CP 1424-1433; CP 1475-1479.
[32] *See* Appendix D.
[33] Appendix E – Court Commissioner's Ruling Denying Review at 2.
[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*

reasonably safe for public travel, it is not rendered inherently dangerous solely because a municipality fails to cut down natural vegetation which tends to obstruct the view of an intersection."[37] Mr. Wuthrich objected to the County's reliance on *Barton* and *Bradshaw* because the County opposed discretionary review on the landowner duty issue. Mr. Wuthrich asked the Court of Appeals to either disregard the County's argument or give him an opportunity to fully brief the issue of a landowner's duty:

> As the record in this case will show, Defendant County opposed Appellant's request to have the trial court's ruling[] on [the] summary judgment motion[] relating to ... landowner duty reviewed as part of this appeal. Yet Defendant County injected [this] issue[] into its response brief. *See Brief of Respondent* at 11-12 and 40-41. This Court should either disregard those portions of Defendant County's brief, given the fact that those issues are not presently before the Court, or should agree to resolve [this] issue[] as part of this appeal and give Appellant Wuthrich an opportunity to submit a brief on this issue[]. Appellant Wuthrich is prepared to brief the issue[] of ... landowner duty on appeal if requested to do so by this Court. A motion for discretionary review on [the] issue[] was argued on April 24, 2013. [The] issue[] [was] discussed in Appellant Wuthrich's Motion for Discretionary Review (pp. 12-20) and Appellant Wuthrich's Reply in Support of Motion for Discretionary Review (pp. 4-10).[38]

The Court of Appeals proceeded to rely on *Barton* and its progeny to affirm the trial court,[39] ignoring Mr. Wuthrich's arguments that those cases are no longer good law after the waiver of sovereign immunity,[40]

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[37] *Brief of Respondent* at pp. 40-41.

[38] The relevant pages from the discretionary review briefs are attached as Appendix F.

[39] Appendix A – Slip Opinion at 7-8.

[40] *Barton* (1943) and *Bradshaw* (1953) were decided before the Legislature waived sovereign immunity in 1967. RCW 4.96.010. It does not make sense that overgrown vegetation can render an intersection dangerous if it is on a private landowner's property but not if it is on a governmental entity's property.

and that governmental landowners should be held to the same legal duty as private landowners. Worse yet, the court in a footnote stated that "[b]ecause Wuthrich does not provide 'reasoned argument,' other than an attempt to incorporate arguments here from his motion for discretionary review and his reply in support of his motion for discretionary review, we hold that Wuthrich abandoned any arguments about the inapplicability of *Barton* and its progeny."[41]

The Court of Appeals relied on *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943), *Rathburn v. Stevens County*, 46 Wn.2d 352, 281 P.2d 853 (1955), and *Bradshaw v. City of Seattle*, 43 Wn.2d 774, 264 P.2d 265 (1953) in holding that "the brush line did not create an inherently dangerous condition"[42] because "[a]n inherently dangerous condition is one that exists in the roadway itself."[43] But the court's reliance on these cases is misplaced because King County ***owned*** the land where the sight-obstructing vegetation existed and therefore has the same duty to maintain its land as a private landowner.[44] RCW 4.96.010.

Under well-established Washington common law, "a property owner must use and keep his premises in a condition so adjacent public

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[41] *Id.* at 8, n. 7. The Commissioner's denial of discretionary review on the landowner duty issue put Mr. Wuthrich in a Catch 22 – unable to raise the applicability of *Barton* in his Opening Brief, and in need of direction from the Court of Appeals as to whether the court wished to entertain the issue after the County raised it in its Response Brief. The Court of Appeals used Mr. Wuthrich's compliance with the Commissioner's ruling against him, incorrectly holding that Mr. Wuthrich abandoned the landowner duty issue on appeal.

[42] *See* Slip Opinion at 7.

[43] *Ibid.*

[44] CP 939-940 (*Stevens Dep.* at 44-45); CP 1625; CP 1659.

ways are not rendered unsafe for ordinary travel." *See Re v. Tenney*, 56 Wn. App. 394, 396-397, 783 P.2d 632 (1989). As explained in *Tenney*, this duty applies to any condition on the property over which the owner has control:

> Generally, an abutting property owner must use and keep his premises in a condition so adjacent public ways are not rendered unsafe for ordinary travel. *Collais*. The duty, however, is imposed only when correction of the unsafe condition is within the owner's control, as in *Kelly v. Gifford*, 63 Wn.2d 221, 386 P.2d 415 (1963), or responsibility, as in *Groves v. Tacoma*, 55 Wn. App. 330, 777 P.2d 566 (1989) and *Stone v. Seattle*, 64 Wash.2d 166, 391 P.2d 179 (1964).

Tenney, 56 Wn. App. 396-397, 783 P.2d 632 (1989) (*citing Collais v. Buck & Bowers Oil Co.*, 175 Wash. 263, 27 P.2d 118 (1933)).[45]

Washington law on this issue is consistent with Restatement (Second) of Torts §840(2):

> A possessor of land who knows or has reason to know that a public nuisance caused by natural conditions exists on his land near a public highway, is subject to liability for failure to exercise reasonable care to prevent an unreasonable risk of harm to persons using the highway.

Restatement (Second) of Torts §840(2).

Under Washington's waiver of sovereign immunity, a municipality is liable for its tortious conduct "to the same extent as if it were a private person or corporation." RCW 4.96.010. Private landowners have a duty to keep their property in such a condition that it does not render an

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[45] *See also Rockefeller v. Standard Oil Co. of Calif.*, 11 Wn. App. 520, 523 P.2d 1207 (1974) (upholding a jury instruction stating that "[a]n owner or occupier of property adjacent to a public street has a duty to exercise ordinary care in connection with the use or condition of his property so as not to render the adjacent way unsafe for ordinary travel or to cause injury to persons using it").

adjacent public roadway unsafe. After the waiver of sovereign immunity, the same duty applies to King County as the owner of the property where the overgrown vegetation existed. The fact that it is a governmental entity does not relieve the County of its common law duties regarding land that it owns.[46] If it owns the land, it is responsible for maintaining the land in such a manner that it does not present a hazardous condition for persons using the adjacent roadway.

The Court of Appeals decision conflicts with the decisions of both this Court and the Court of Appeals that impose a duty on property owners to maintain their premises such that adjacent public roads are not rendered unsafe for ordinary travel. For this reason, review is warranted under RAP 13.4(b)(1) and RAP 13.4(b)(2).

D. The Court of Appeals decision conflicts with the decision of the Court of Appeals in *Chen v. City of Seattle* that held that the question of whether roadway conditions are reasonably safe for ordinary travel depends on the totality of the circumstances existing at a particular road location, not merely the condition of the road itself.

The evidence below established that the overgrown brush on the County's land abutting the intersection obstructed motorists' vision at the location of the stop line and thereby created an inherently dangerous

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[46] *See, e.g., Oberg v. Department of Natural Resources*, 114 Wn.2d 278, 283, 787 P.2d 918 (1990) (State has same common law duty to prevent the spread of fire from its property as private landowners have); *see also Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, 888, 288 P.3d 328, 337 (2012) (Chambers, J., concurring, joined by four Justices, forming a majority of five on this issue) ("all possessors of land owe the same duties to those who enter, whether the landowners are public or private entities").

condition. Both transportation engineer Edward Stevens and accident reconstruction expert Paul Olson confirmed that "[t]hese sight obstructions in the northwest quadrant of the intersection created an inherently dangerous condition at the intersection."[47]

Despite this evidence, the Court of Appeals ruled that, because the brush line is not part of the roadway, the County did not have a duty. But a municipality may be liable without showing a defective condition in the roadway itself:

> In determining whether a dangerous condition exists at a roadway and whether a municipality has breached its duty to maintain a roadway in a safe condition, the trier of fact may infer that a breach has occurred based on the totality of the relevant surrounding circumstances, ***regardless of whether there is proof that a defective physical characteristic in the roadway rendered the roadway inherently dangerous or inherently misleading***.

Chen v. City of Seattle, 153 Wn. App. 890, 909, 223 P.3d 1230 (2009) (emphasis added). As pointed out in Judge Bjorgen's dissenting opinion in this case, "[a]mong those relevant circumstances in this appeal are the placement of the stop bar on 159th Street and the presence of signs on Avondale Road warning traffic to slow down."[48]

Mr. Stevens testified in his deposition that: (1) the brush line at the intersection "obstructed drivers' view of traffic conditions on Avondale Road and 159th Street" and that the resulting "sight obstructions" "created an inherently dangerous condition at the intersection" that prevented

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[47] CP 1265; *see also* CP 1501-1502.
[48] Appendix A – Slip Opinion at 16.

drivers stopped at the stop line from seeing oncoming traffic "in time to avoid a collision;"[49] and (2) because of the overgrown brush, the sight distance from the stop bar was less than a third of the required sight distance.[50] Similarly, both Ms. Gilland and the investigating officer noted that the brush line obstructed Ms. Gilland's view of traffic on Avondale Road as she pulled forward from the stop line.

In response to the question whether he noticed "any deficiencies in signage" at the intersection of Avondale and 159th Street, Mr. Stevens responded as follows:

> Well, it depends on how the county should have rectified the sight distance deficiency. If it was their desire to leave the blackberry bushes where they were, then there would be speed reduction called for through the intersection. If they decided to cut all the blackberries down, let's say, to provide adequate sight visibility, then the signing that's there would have been appropriate.[51]

The Court of Appeals erred both factually and legally in ruling that a municipality's duty to provide a reasonably safe roadway is limited to the conditions existing in the roadway itself. This ruling is squarely contrary to the holding in *Chen,* which requires consideration of the totality of the circumstances. Because the Court of Appeals decision directly conflicts with *Chen*, review should be granted under RAP 13.4(b)(2).

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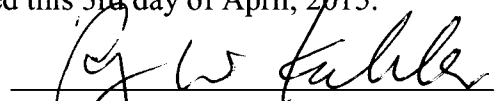
[49] CP at 1265.
[50] CP 454.
[51] *Ibid.*

VI. CONCLUSION

For the reasons set forth above, this Court should accept review under RAP 13.4(b)(1) and (b)(2). With the Court of Appeals rejecting the trial court's reasoning as erroneous and then applying its own erroneous analysis, this case presents three divergent opinions[52] by four judges as to what the applicable law is in this case. There is an obvious need for clarification of the applicable law in highway safety cases involving roadway hazards outside the limits of the asphalt, as well as for clarification of the law applicable to governmental entities in their capacity as owners of land where conditions on the land create hazards for motorists on adjacent public roads.

Respectfully submitted this 3rd day of April, 2015.



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[52] The trial court ruled that the County had no duty because Defendant Gilland was not acting "prudently." Two judges of the Court of Appeals held that the County's duty is restricted to the width of the asphalt. The dissenting judge argued that the County's duty is to provide a reasonably safe road, taking into account the totality of the circumstances, which includes conditions adjacent to the road. The dissenting judge also questioned whether the century-old case law relied on by the majority opinion was still valid. *Slip Opinion* at pp.14-15.

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2015, I served the foregoing to the Clerk's Office of the Court of Appeals Division II via U.S. Postal Service and provided a copy of the document to all counsel of record as follows:

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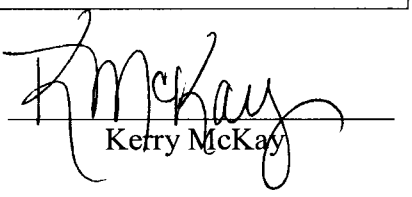

Kerry McKay

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GUY H. WUTHRICH, Appellant, v. KING COUNTY, a governmental entity, Respondent, CHRISTA GILLAND (PRICE), Defendant.	No. 44019-9-II UNPUBLISHED OPINION

JOHANSON, C.J. — In 2008, Guy Wuthrich suffered injuries in a motor vehicle collision with Christa Gilland. After Wuthrich sued both Gilland and King County (County) for negligence, the trial court granted summary judgment in the County's favor, dismissing it from the suit. Wuthrich now appeals. We hold that summary judgment was proper because there is no genuine issue of any material fact regarding the County's breach of its duty to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for ordinary travel. We affirm summary judgment in the County's favor.

FACTS

BACKGROUND AND PROCEDURE

On June 20, 2008, Gilland drove on 159th Street near Woodinville in King County. She stopped at the stop line where 159th Street intersects with Avondale Road. Upon stopping, Gilland looked left and right to scan for traffic on Avondale Road. Gilland saw no oncoming cars and turned left onto Avondale. Unfortunately, Gilland's turn took her into Wuthrich's path, resulting in a collision. Large brush contributed to Gilland's obstructed view of approaching traffic.

Wuthrich sued both Gilland and the County for negligence. The claim against the County alleged that the County had "fail[ed] to design, maintain and operate" the intersection where the accident occurred "in a reasonably safe condition, with adequate sight distance for motorists using the roadway."[1] Clerk's Papers (CP) at 3. The suit alleged that both Gilland's and the County's negligence had proximately caused the accident.

The County answered by denying that it had breached any duty or that it was a proximate cause of Wuthrich's accident and moved for summary judgment on both issues.[2] In opposition to summary judgment, Wuthrich offered Gilland's statement given approximately an hour after the accident.[3] In that statement, Gilland said that just before the accident, she had stopped "at the stop

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[1] Wuthrich's negligence claim against Gilland alleged that she had failed to yield the right of way to him.

[2] The trial court also denied two of Wuthrich's summary judgment motions, but our review is only of the County's motion because it resulted in a final judgment triggering an appeal as a matter of right. RAP 2.2(a)(1).

[3] Because our review is of an order of summary judgment, the evidence is described in the light most favorable to Wuthrich, the nonmoving party.

line looking for traffic." CP at 432. Gilland then said that she began turning onto Avondale and saw Wuthrich just before the accident.

Wuthrich also offered the investigating officer's accident report. In his report, the officer wrote that

> [o]n the northwest corner of the intersection there is a large brush line that runs from the corner northbound along the west side of Avondale Rd[.] NE. This brush line causes somewhat of a site [sic] obstruction from vehicles stopped eastbound NE 159th St[.] at the stop bar looking north on Avondale Rd[.] NE. There is also a power light pole on the northwest corner of the intersection. However, if you move forward (east) to the intersection, the line of sight improves.

CP at 445. Based on his investigation, the officer concluded that "Wuthrich was approaching the intersection . . . when Christa Gilland started her turn from the area of the stop bar." CP at 450.

Further, in opposition to summary judgment, Wuthrich offered his own and Gilland's deposition testimony. In his deposition, Wuthrich stated that he was travelling down Avondale and did not see Gilland's car until seeing its bumper approximately a second before the accident. In Gilland's deposition, she again stated that she did not see Wuthrich until just before the collision. Gilland also repeatedly testified that she believed that she did not see Wuthrich because of the brush line and telephone pole.[4] When asked what she thought had caused the accident, Gilland testified that "[i]t's my best of my [sic] recollection of the events, there had to have been an outside source why I didn't see him. And the two things that are there are the pole and the bushes." CP at 427.

[4] The "brush line" refers to the bushes near the northwest corner of the intersection of NE 159th Street and Avondale Road in Woodinville. Photographs of the brush line are in the declaration of Detective James Leach, the lead investigator of this collision.

Wuthrich's accident reconstruction expert, Paul Olson, opined that depending on where Gilland actually stopped, "the sight line for drivers pulling up to this intersection was obstructed." CP at 439. Given that potential obstruction, Olson opined that it was possible that "'[w]hen [Gilland's] car began its acceleration, Mr. Wuthrich was too close and had too little time to be able to avoid this collision.'" CP at 438. Olson testified, although he could not say exactly what happened without knowing where exactly Gilland stopped, that Wuthrich's and Gilland's deposition testimony about their inability to see each other until just before the accident was consistent with Wuthrich's theory that Gilland began her turn from the stop line and that the brush line could have obstructed her view of Wuthrich from that point.

Wuthrich's transportation engineering expert, Edward Stevens, opined that the brush line at the intersection "obstructed drivers' view of traffic conditions on Avondale Road and 159th Street at the intersection." CP at 1265. Stevens also opined that the "sight obstructions" created by the brush line "created an inherently dangerous condition at the intersection" that prevented stopped drivers from seeing oncoming traffic in time to avoid a collision. CP at 1265. Stevens agreed that the County did not need to remove the brush line to create a safe intersection, but opined that it needed to take other corrective measures like reducing the speed limit to allow drivers time to react to possible collisions. Stevens also claimed that the County had not complied with the necessary sight distances required by various design manuals because of the way that it had used the stop line.

The trial court granted the County's summary judgment motion, concluding that "King County did not breach its duty of care and . . . King County was not a proximate cause of

[Wuthrich's] injuries." CP at 1280. The trial court stayed the action against Gilland, and this appeal followed.

ANALYSIS

Wuthrich contends that the trial court erred when it decided that the County had not breached its duty of care and was not a proximate cause of his accident as a matter of law. We disagree with Wuthrich and affirm summary judgment in the County's favor.

We review de novo a trial court's order granting summary judgment, performing the same inquiry as the trial court. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Summary judgment is appropriate where "'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Lowman v. Wilbur*, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013) (internal quotation marks omitted) (alteration in original) (quoting *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 22 (2003)). A material fact is one which affects the outcome of the litigation. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004). To determine if a genuine issue of fact exists, we view all the evidence and draw all reasonable inferences in the light most favorable to Wuthrich as the nonmoving party. *Lakey*, 176 Wn.2d at 922.

A successful negligence action requires the plaintiff to prove four elements: "'(1) the existence of a duty [owed] to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury.'" *Lowman*, 178 Wn.2d at 169 (quoting *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998)). Wuthrich's appeal concerns whether a genuine issue of material fact exists regarding whether the County breached a duty to him to either (1) eliminate inherently dangerous conditions on the roadways or (2) exercise ordinary care to

build and maintain its roadways in a reasonably safe manner for ordinary travel. Because our review is de novo, we do not concern ourselves with the reasons for the trial court's ruling. Instead, we look to the record as a whole to determine whether material facts are in genuine dispute and, if not, whether the County is entitled to summary judgment as a matter of law.

I. BREACH

Wuthrich argues that summary judgment was inappropriate because material issues of fact remain as to whether an inherently dangerous condition existed at the intersection where the accident occurred or whether the intersection was reasonably safe for ordinary travel under the totality of the circumstances.[5] We disagree and hold 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. We also hold that the County did not breach its duty to "build and maintain its roadways in a reasonably safe manner" that is reasonably safe for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002).

Because the legislature has waived sovereign immunity for municipalities, "municipalities are generally held to the same negligence standards as private parties."[6] *Keller*, 146 Wn.2d at 242-43. Municipalities are, therefore, "held to a general duty of care, that of a 'reasonable person under

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[5] Wuthrich also argues that the trial court applied the incorrect standard when it relied on *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2d 886 (1995), and not *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). Even granting that this was error, our review of a trial court's decision on a summary judgment motion is de novo and we, therefore, address Wuthrich's theories of liability as he raises them. *Lakey*, 176 Wn.2d at 922.

[6] The word "municipality" "broadly includes a city, town, county, or the state." 16A DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 18:17, at 93 (4th ed. 2013).

the circumstances.'" *Keller*, 146 Wn.2d at 243 (quoting DAN B. DOBBS, THE LAW OF TORTS, § 228, at 580 (2000)). This duty of care requires a municipality to "exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the foreseeable acts of those using the roadways." *Keller*, 146 Wn.2d at 252 (citing *Berglund v. Spokane County*, 4 Wn.2d 309, 319-21, 103 P.2d 355 (1940)). The "overarching duty to provide reasonably safe road[ways]" also includes a duty to "eliminate an inherently dangerous or misleading condition." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). The duty to eliminate inherently dangerous conditions is only a specific aspect of a municipality's general duty of care and a plaintiff may show a municipality has breached its duty without showing a failure to eliminate an inherently dangerous condition. *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 909, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010). These two independent duties are the bases of Wuthrich's claim against the County. However, both are unpersuasive.

A. THE BRUSH LINE DID NOT CREATE AN INHERENTLY DANGEROUS CONDITION

Wuthrich's contention that the County's failure to maintain the brush line at the intersection created an inherently dangerous condition is meritless based on Supreme Court precedent. An inherently dangerous condition is one that exists in the roadway itself. *Barton v. King County*, 18 Wn.2d 573, 576-77, 139 P.2d 1019 (1943) (quoting *Leber v. King County*, 69 Wash. 134, 136-37, 124 P. 397 (1912)). Moreover, "where a road itself is reasonably safe for public travel, it is not rendered inherently dangerous to travelers exercising reasonable care, solely because a municipality fails to remove vegetation located off of the road, which tends to obstruct the view." *Rathbun v. Stevens County*, 46 Wn.2d 352, 356, 281 P.2d 853 (1955); *see also Bradshaw v. City*

of Seattle, 43 Wn.2d 766, 773-75, 264 P.2d 265 (1953); *Barton*, 18 Wn.2d at 576-78.[7] Here, to defeat summary judgment, Wuthrich relied on Stevens's declaration and Olson's deposition testimony. However, they both stated that only the brush line, rather than a defect in the road, created the inherently dangerous condition. Based on *Barton*, *Rathbun*, and their progeny, any visibility problems that the brush line may have created are irrelevant to this theory of breach, and summary judgment was proper.

B. THE COUNTY EXERCISED ORDINARY CARE TO BUILD AND MAINTAIN ITS ROADWAYS

Likewise, Wuthrich's contention that the County failed to build and maintain the intersection so that it was reasonably safe for ordinary travel is also not viable. While Wuthrich cannot show an inherently dangerous condition because of *Barton* and subsequent cases, he did not need to do so if, instead, a triable question of fact exists as to whether the County failed to build and maintain the intersection in a reasonably safe manner for ordinary travel given the totality of the circumstances. *Xiao Ping Chen*, 153 Wn. App. at 909-11.

In the light most favorable to him, Wuthrich's evidence established that Gilland stopped at the stop line, that the brush line obstructed the view of traffic on Avondale from the stop line, and that the County failed to remedy the danger created by the brush line through other measures, such

[7] Wuthrich responded to the County's citation to these cases by claiming that the County was raising issues properly addressed in review of a different summary judgment order, one related to the County's duty as a landowner. Wuthrich is incorrect that the County raises arguments not specifically relevant to his appeal. The County cited these cases as legal support for the argument that it had no duty to maintain the brush line, a central issue in Wuthrich's appeal. Because Wuthrich does not provide "reasoned argument," other than an attempt to incorporate arguments here from his motion for discretionary review and his reply in support of his motion for discretionary review, we hold that Wuthrich abandoned any arguments about the inapplicability of *Barton* and its progeny. *Cf. Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998).

as by requiring reduced speed through the intersection or by moving the stop line. Wuthrich's transportation engineering expert, Stevens, opined that the brush line at the intersection "obstructed drivers' view of traffic conditions on Avondale Road and 159th Street at the intersection." CP at 1265. Stevens agreed that the County did not need to remove the brush line to create a safe intersection, but opined that it needed to take other corrective measures, like reducing the speed limit to allow drivers more time to react to possible collisions. But Wuthrich does not point to any authority to suggest that taking corrective action in response to overgrown brush is part of the County's general duty, and we fail to see how a trier of fact could, based on the totality of this evidence, find that the County breached its duty to exercise ordinary care in building and maintaining its roadways in a manner reasonably safe for ordinary travel.

Wuthrich cites to *Xiao Ping Chen* in support of his position that we are to view the County's duty to exercise ordinary care in building and maintaining the roadways broadly and under the totality of the circumstances. However, *Xiao Ping Chen* does not change the result here. In *Xiao Ping Chen*, a woman sued the city for negligently maintaining one of its roads after her husband was killed crossing a busy downtown street in a crosswalk. 153 Wn. App. at 894-95. Division One reversed an order of summary judgment in the city's favor, explicitly rejecting its argument that its duty of care extended only to eliminating inherently dangerous conditions or complying with statutes, ordinances, or regulations governing the maintenance of the crosswalk. *Xiao Ping Chen*, 153 Wn. App. at 900-09. Instead, Division One held that the city's general duty of care required it to maintain its roadways in a manner reasonably safe for ordinary travel under the totality of the circumstances. *Xiao Ping Chen*, 153 Wn. App. at 900-01.

Here, Wuthrich alleges that the brush line obstructed Gilland's view of the intersection. Unlike in *Xiao Ping Chen*, where it is reasonable to assume that the absence of a stop sign, pedestrian signals, or a stop light rendered the roadway unsafe, the brush line here is not part of the roadway itself nor does it regulate the traffic on the roadways. Wuthrich presents no evidence that the County failed to build or maintain its roadways in a manner reasonably safe for ordinary travel. The County had, in fact, improved the roadway in 2005, and Gilland's accident with Wuthrich in 2008 was only the third that had occurred since the improvements.

In *Owen*, the plaintiff's parents were killed in a railroad crossing when the gate trapped them in their vehicle on the tracks. 153 Wn.2d at 784-85. Our Supreme Court held that "the presence of traffic signals that cause vehicles to halt on multiple sets of tracks, and the alleged limited visibility of westbound drivers" could create a question of fact about whether Tukwila breached its duty to maintain the roads in a condition that was reasonably safe for ordinary traffic or if there was an inherently dangerous or misleading condition. *Owen*, 153 Wn.2d at 790.

Again, in *Owen*, the plaintiff based her claim on a problem with the roadway itself—that it regulated traffic unsafely when cars were required to stop on the tracks. Under Wuthrich's theory of breach, however, it was the brush line that allegedly obstructed the sight line and nothing about the roadway itself that rendered it unsafe for ordinary travel. The County owed no duty to maintain the brush line, and Wuthrich's theory of liability would impose a duty on the County to monitor, reevaluate, and move the stop line or change the posted speed limit whenever the brush line might seasonally grow to obstruct a driver's view. Wuthrich's theory of liability, assuming that any condition of the road itself could trigger the County's duty to maintain the roadways in a reasonably safe condition for ordinary travel, would also eliminate any distinction between this

broader, common law duty and a municipality's duty to remedy inherently dangerous or misleading conditions. Wuthrich, therefore, has failed to point to a breach of the County's duty to build and maintain its roadways in a reasonably safe condition for ordinary travel.

Wuthrich also argues that the County breached its general duty to build and maintain the roadways in a manner reasonably safe for ordinary travel when it failed to move the stop line at the intersection. The County argues that summary judgment was appropriate because statutory provisions define its duty to design and maintain the intersection and that it complied with those statutory provisions. We agree with the County.

As noted above, the County's duty of care is defined primarily by the common law. *Keller*, 146 Wn.2d at 243. Compliance with roadway statutes, ordinances, or regulations is relevant to whether a municipality has breached its common law duty to provide roadways reasonably safe for ordinary travel. *Owen*, 153 Wn.2d at 787. A municipality may breach its duty to provide reasonably safe roadways even if it complies with relevant statutes or safety standards; evidence of compliance is therefore only relevant to, but not determinative of, a determination that a municipality has breached its duty. *Xiao Ping Chen*, 153 Wn. App. at 894, 900-01.

Stevens, a transportation engineer, claimed that the County had not complied with the necessary sight distances required by various design manuals because of the way that it had used the stop line. Specifically, Stevens's deposition stated that because of the overgrown brush line, the sight distance from the stop line was less than a third of the required sight distance. Gilland also testified that the blackberry bushes obstructed her view of traffic on Avondale Road. CP at 417 ("I do know that I've been through the intersection and thought that those bushes are

overgrown and it makes it hard to see down the roadway. . . . [F]rom what I recall, it completely blocked out my ability to see between the bushes and the power line.").

Wuthrich's argument about the sight line from the stop line is also distinguishable from *Xiao Ping Chen* and *Owen* because, again, he only alleges that the brush line obstructed the sight line and not any failure to build or maintain the roadway itself. Because the brush line is not part of the roadway, the County has no duty to maintain or to manage the brush line or to regularly monitor and adjust the stop line based on the growth of the brush line. Therefore, we hold that the County has not breached its duty to maintain the roads in a reasonably safe condition for ordinary travel.[8]

Because the evidence establishes that the brush line may have obstructed Gilland's line of sight and the condition of the brush line does not create an inherently dangerous condition nor does it trigger the County's duty to maintain the roadways in a reasonably safe condition for ordinary

[8] The County advances several other arguments to support its position that summary judgment was proper, including that (1) it cannot have breached its duty to provide reasonably safe roadways unless it had notice that the roadway was unsafe and failed to take corrective measures, (2) it could not have breached any duty because it had no duty to make the intersection safer and, therefore, no duty to adopt the sight lines Wuthrich claims applied, (3) it did not breach its duty of care because that duty only required it to provide roadways reasonably safe for the foreseeable uses of travelers and Gilland's negligence was unforeseeable, and (4) that Wuthrich has failed to show that the placement of the stop line was a cause in fact of his accident because he failed to show that Gilland stopped there. Because we agree with the County that it did exercise ordinary care to build and maintain its roadways in a reasonably safe manner, we do not reach the County's additional arguments.

travel, we hold that there is no genuine issue as to any material fact and the County is entitled to judgment as a matter of law.[9] We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

I concur:

Melnick, J.
MELNICK, J.

[9] We do not reach the issue of proximate cause because we hold that there is no breach of duty.

BJORGEN, J. (dissenting) — I dissent, because genuine issues of material fact remain to be decided before the County's liability for these unsafe conditions can be determined. For this reason, the superior court's grant of summary judgment was improper under CR 56 and should be reversed.

Turning first to the governing standards, the majority is correct that *Barton v. King County*, 18 Wn.2d 573, 577, 139 P.2d 1019 (1943) (quoting *Leber v. King County*, 69 Wash. 134, 136, 124 P. 397 (1912)), held that an inherently dangerous condition is one that exists in the roadway itself. The 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.

In *Rathbun v. Stevens County*, 46 Wn.2d 352, 356, 281 P.2d 853 (1955) (citing *Barton*, 18 Wn.2d at 577), our Supreme Court held that "[w]here a road itself is reasonably safe for public travel, it is not rendered inherently dangerous to travelers exercising reasonable care, solely because a municipality fails to remove vegetation located off of the road, which tends to obstruct the view." By its terms, this holding is restricted to situations where "[the] road itself is reasonably safe for public travel," allowing an interpretation that the failure to remove obstructing vegetation could create an inherent danger if the road were unsafe as a result. At most, the *Rathbun* holding means that the failure to remove obstructing vegetation by itself does not create an inherently dangerous condition.

Subsequent case law, though, has shown that the duty to eliminate inherently dangerous conditions is only one aspect of a municipality's general duty of care and that a municipality may

be liable without showing a failure to eliminate an inherently dangerous condition. *Chen v. City of Seattle*, 153 Wn. App. 890, 909, 223 P.3d 1230 (2009). Specifically, the court held that

> In determining whether a dangerous condition exists at a roadway and whether a municipality has breached its duty to maintain a roadway in a safe condition, the trier of fact may infer that a breach has occurred based on the totality of the relevant surrounding circumstances, regardless of whether there is proof that a defective physical characteristic in the roadway rendered the roadway inherently dangerous or inherently misleading.

Chen, 153 Wn. App. at 909.

Contrary to these principles, the majority concludes that because the brush line is not part of the roadway, the County has no duty to maintain or to manage it, or to regularly monitor and adjust the stop bar based on the growth of the brush line. *Chen*, however, makes clear that even if the obstructing brush is not an inherently dangerous condition, the trier of fact may still hold the municipality liable "based on the totality of the relevant surrounding circumstances." *Chen*, 153 Wn. App. at 909.

Among those relevant circumstances in this appeal are the placement of the stop bar on 159th Street and the presence of signs on Avondale Road warning traffic to slow down. Edward Stevens, Wuthrich's transportation engineer, opined that the brush line at the intersection "obstructed drivers' view of traffic conditions on Avondale Road and 159th Street" and that the "sight obstructions" created by the brush line "created an inherently dangerous condition at the intersection" that prevented stopped drivers from seeing oncoming traffic "in time to avoid a collision." Clerk's Papers (CP) at 1265. Stevens also testified in his deposition that because of the overgrown brush, the sight distance from the stop bar was less than a third of the required sight distance. Stevens was further asked at his deposition whether he noticed "any deficiencies

in signage" at the intersection of Avondale and 159th Street. CP at 454. He responded by stating:

> Well, it depends on how the county should have rectified the sight distance deficiency. If it was their desire to leave the blackberry bushes where they were, then there would be speed reduction called for through the intersection. If they decided to cut all the blackberries down, let's say, to provide adequate sight visibility, then the signing that's there would have been appropriate.

CP at 454.

Christa Gilland testified that the blackberry bushes obstructed her view of traffic on Avondale Road. Further, the investigating officer's accident report stated that

> [o]n the northwest corner of the intersection there is a large brush line that runs from the corner northbound along the west side of Avondale Rd[.] NE. This brush line causes somewhat of a site [sic] obstruction from vehicles stopped eastbound NE 159th St. at the stop bar looking north on Avondale Rd[.] NE. There is also a power light pole on the northwest corner of the intersection. However, if you move forward (east) to the intersection, the line of sight improves.

CP at 445.

The County argues that it cannot have breached its duty to provide reasonably safe roadways unless it had notice that the roadway was unsafe and failed to take corrective measures. The County, however, "is no more entitled to one free accident than a dog is entitled to one free bite." *Tanguma v. Yakima County*, 18 Wn. App. 555, 562, 569 P.2d 1225 (1977). A municipality "may not find refuge in a 'long history of good fortune,'" *Tanguma*, 18 Wn. App. at 563 (quoting *Butler v. L. Sonnenborn Sons, Inc.*, 296 F.2d 623, 626 (2d Cir. 1961)), if an accident resulted from its failure to "exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the foreseeable acts of those using the roadways." *Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002). The claimed absence of notice plays no role in this analysis.

Stevens's and Gilland's testimony and the accident report raise genuine issues of material fact as to whether, under the totality of the circumstances test announced in *Chen*, the County breached its duty to design and maintain reasonably safe roadways with respect to signage on Avondale and placement of the stop bar on 159th Street. The same evidence also raises genuine issues of material fact under the test in *Chen* as to whether the County's breach of duty was a cause-in-fact and legal cause of Wuthrich's injuries. *Lowman v. Wilbur*, 178 Wn.2d 165, 169-72, 309 P.3d 387 (2013). For these reasons, summary judgment was improper under CR 56(c) and should be reversed.

Bjorgen, J.

BJORGEN

Appendix B

Appendix C

Appendix D

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

GUY H. WUTHRICH, Plaintiff, v. KING COUNTY, a governmental entity; and CHRISTA GILLAND, Defendants.	No. 11-2-10263-2 **NOTICE OF APPEAL TO DIVISION II OF THE COURT OF APPEALS**

Plaintiff Guy Wuthrich, by and through his counsel of record, Stritmatter Kessler Whelan Coluccio, hereby gives notice that he seeks review by Division II of the Court of Appeals of the following decisions by the trial court, copies of which are attached:

1. Order Granting King County's Motion for Summary Judgment (Exhibit A);
2. Order Denying Plaintiff's Motion for Partial Summary Judgment Striking Affirmative Defense of Contributory Fault (Exhibit B);
3. Order Denying Plaintiff's Motion for Partial Summary Judgment – Property Owner's Duty to Eliminate Unsafe Conditions on Land Abutting Street (Exhibit C);
4. Order Denying Plaintiff's Motion for Reconsideration Re: Property Owner's Duty (Exhibit D);
5. Order Denying Plaintiff's Motion for Reconsideration Re: Defendants' Affirmative Defense of Contributory Fault (Exhibit E); and
6. Order Denying Plaintiff's Motion for Reconsideration of This Court's Order Granting King County's Motion for Summary Judgment (Exhibit F).

STRITMATTER KESSLER WHELAN COLUCCIO
413 -8th Street
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The trial court entered final judgment as to Defendant King County, certified this case for appeal pursuant to CR 54(b), and stayed the case as to Defendant Christa Gilland pending resolution of the appeal. *See* Exhibit G (Order Directing Entry of Final Judgment as to Defendant King County and Staying This Matter as to Defendant Gilland Pending Resolution of Appeal). This appeal is therefore proper under RAP 2.2(d).

DATED this 1st day of October, 2012.

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CERTIFICATION

I hereby certify that on September 17, 2012, I provided a copy of the document to which this certification is attached for delivery to all counsel of record as follows:

Cindi S. Port, WSBA #25191 Senior Deputy Prosecuting Attorney 900 King County Administration Bldg. 500 Fourth Avenue Seattle, WA 98104 **Counsel for Defendant King County**	☒ U.S. Mail ☐ Fax ☐ Legal messenger ☐ Electronic Delivery
Richard Lockner, WSBA #19664 Krilich, LaPorte, West & Lockner 524 Tacoma Avenue South Tacoma, WA 98402 **Counsel for Defendant Gilland**	☒ U.S. Mail ☐ Fax ☐ Legal messenger ☐ Electronic Delivery
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Appendix E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GUY WUTHRICH,

Petitioner,

v.

KING COUNTY, a governmental entity; and CHRISTA GILLAND (PRICE),

Respondents.

No. 44019-9-II

RULING DENYING REVIEW

Guy Wuthrich seeks discretionary review of the trial court's denial of his motions for partial summary judgment. Concluding that Wuthrich has not shown that discretionary review is warranted, this court denies review.

On June 20, 2008, Wuthrich was injured when his motorcycle collided with a car being driven by Christa Gilland. He sued Gilland and sued King County, alleging that it failed to maintain a wall of blackberries on its land that obstructed Gilland's view of approaching traffic. King County moved for summary judgment, arguing that it did not breach its duty of care. The trial court granted King County's motion and made findings under CR 54(b) that there was no just reason for delay of an entry of judgment. The trial court entered a judgment dismissing King County, which Wuthrich has appealed.

Wuthrich brought two motions for partial summary judgment. In the first, he asked the trial court to rule that King County, as the property owner where the wall of blackberries stood, had a duty to maintain its property in such a condition that adjacent roads are not rendered unsafe for ordinary travel. In the second, he asked the trial court to strike the affirmative defense of contributory fault because he, as the favored driver, did not have sufficient time to react to Gilland's negligence and avoid the collision. The trial court denied both motions and denied Wuthrich's subsequent motions for reconsideration. Wuthrich included these orders in his notice of appeal from the dismissal of King County. However, the trial court did not make CR 54(b) findings or certify the orders denying partial summary judgment for review under RAP 2.3(b)(4). This court ruled that those orders were not appealable as a matter of right, converted the notice of appeal as to those orders to a notice of discretionary review and directed Wuthrich to file a motion for discretionary review.[1]

Wuthrich seeks discretionary review of the trial court's denial of his motions for partial summary judgment. This court may grant discretionary review only when:

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[1] King County argues that the motion for discretionary review is time-barred because Wuthrich did not file a notice of discretionary review within 30 days of the denial of his motions for reconsideration of the orders denying his motions for partial summary judgment. But he did include those orders in his timely notice of appeal. An improperly designated notice of appeal is given the same effect as a notice of discretionary review. RAP 5.1(c). Thus, because the notice of appeal was timely filed, this court deems it to be a timely notice of discretionary review. Wuthrich's motion for discretionary review is not time-barred.

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Wuthrich seeks discretionary review pursuant to RAP 2.3(b)(1).

First, Wuthrich argues that the trial court committed obvious error in denying his motion for partial summary judgment to establish that King County, as the property owner where the wall of blackberries stood, had a duty to maintain its property in such a condition that adjacent roads are not rendered unsafe for ordinary travel. He contends that since the State waived sovereign immunity in 1967, in situations where the governmental entity owns property that is adjacent to a roadway, it has the same duty to maintain its property as a private owner. Thus, he contends that the trial court obviously erred in relying on a pair of pre-1967 opinions, *Barton v. King County*, 18 Wn.2d 573, 577, 139 P.2d 1019 (1943), and *Bradshaw v. City of Seattle*, 43 Wn.2d 766, 774, 264 P.2d 265 (1953), which hold that "[w]here a street itself is reasonably safe for public travel, it is not rendered inherently dangerous solely because a municipality fails to cut down natural vegetation which tends to obstruct the view of an intersection." *Bradshaw*, 43 Wn.2d at 774. But, as he acknowledges in his reply brief,

"[w]hether a governmental entity has the same duty to maintain its property as a private landowner after the waiver of sovereign immunity is an issue of first impression that the appellate courts need to resolve." Reply to Resp. to Mot. for Disc. Rev. at 9-10. If an issue is one of first impression, a trial court cannot commit *obvious* error in deciding the issue. Thus, Wuthrich fails to show that discretionary review of this order is warranted under RAP 2.3(b)(1).[2]

Second, Wuthrich argues that the trial court committed obvious error in denying his motion to strike the affirmative defense of contributory fault because he, as the favored driver, did not have sufficient time to react to Gilland's negligence and avoid the collision. He contends that the defendants did not present evidence of the "point of notice"[3] when Wuthrich would have had time to react to Gilland's negligence and so, as a matter of law, he cannot be found to have contributed to the fault that resulted in his damages. *Sanchez v. Haddix*, 95 Wn.2d 593, 597, 627 P.2d 1312 (1981). He contends that the evidence as to when he first would have been able to notice that Gilland was not going to yield the right-of-way to him is undisputed. Of course, the defendants dispute that that evidence is undisputed. Wuthrich does not demonstrate that the trial court obviously erred in declining to strike the defense of Wuthrich's contributory fault

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[2] In both his motion and his reply, Wuthrich urges this court to grant discretionary review in the interests of judicial economy because his appeal from the order dismissing King County is already before this court. But RAP 2.3(b) does not provide that judicial economy is a basis for discretionary review.

[3] *See Channel v. Mills*, 77 Wn. App. 268, 890 P.2d 535 (1995).

on summary judgment. And even if that ruling was obvious error, he does not demonstrate that the error "render[s] further proceedings useless." RAP 2.3(b)(1). If he believes that Gilland and King County fail to present evidence of the "point of notice" at trial, he can renew his motion to strike the defense of contributory fault. And even if the trial court instructs the jury on contributory fault, he retains the opportunity to convince the jury that he did not contribute to the fault that led to his damages. Wuthrich fails to show that discretionary review of this order is warranted under RAP 2.3(b)(1). Accordingly, it is hereby

ORDERED that Wuthrich's motion for discretionary review is denied.

DATED this 15TH day of May, 2013.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: David C. Nordeen
Ray W. Kahler
Keith L. Kessler
Brad J. Moore
Garth L. Jones
Richard Lockner
Cindi S. Port
Hon. Garold E. Johnson

Appendix F

NO. 44019-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GUY WUTHRICH,

Appellant,

v.

KING COUNTY and CHRISTA GILLAND,

Respondents.

Appeal from the Superior Court of Pierce County
Honorable Garold E. Johnson
NO. 11-2-10263-2

PETITION FOR DISCRETIONARY REVIEW

STRITMATTER KESSLER WHELAN COLUCCIO

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1. Defendant King County is liable in its capacity as a land owner for the sight obstruction created by the overgrown wall of blackberries on its property.

Defendant King County owned the property on which the overgrown wall of blackberries was located. CP 1625; CP 939-940 (*Stevens Dep.* at 44-45). Plaintiff Wuthrich moved for a partial summary judgment to establish the duty of a property owner to eliminate an unsafe condition on land that abuts a street and presents a potential hazard for traffic. CP 1659-1663.

Plaintiff did not ask the trial court to rule that the County breached this duty. Plaintiff merely asked the trial court to adopt the duty set forth by common law and Restatement (Second) of Torts §840(2) as applicable in this case – that a property owner must maintain its property in such a condition that adjacent roads are not rendered unsafe for ordinary travel.

The trial court denied Plaintiff's motion, in part because of its confusion regarding the language from *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995) that was the basis for its erroneous ruling granting summary judgment in favor of Defendant County:

> First, certainly in *Ruff* the county was the owner of the adjacent property. I don't know if I'm just drawing conclusions because you're not going to build a [guard]rail on somebody else's property but – and it's slightly different because it's a block of vision versus providing a safety barrier. More than slightly. I guess considerably different.[17] But nevertheless, ***the [Ruff] court tells us that***

[17] The trial court clearly erred in relying on *Ruff* in the context of Plaintiff's motion to establish a landowner's duty. *Ruff* involved a claim against a county for failing to install guardrail. It had nothing to do with the duty of a landowner to maintain property abutting

> ***the county's liability, under any analysis . . . depends upon [whether] the roadway was inherently dangerous or deceptive to a . . . prudent driver. That is not – that's not limited in its application, whether you own the land or not.*** I don't think that makes any difference. . . .

VRP 67 (7/27/12).[18]

On reconsideration, the trial court added a second erroneous basis for denying Plaintiff's motion – that if Defendant King County was not the owner of the property, it would be a "big time" "breach of due process" for the court to make a ruling regarding the duty of the property owner without the property owner being before the court. VRP 23 (8/24/12). The trial court failed to recognize that the statute of limitations in this case ran on June 20, 2011, and therefore, if someone other than King County owns the property where the wall of blackberries was located, they would simply be an "empty chair" under RCW 4.22.070 because they could not be sued given the running of the statute of limitations.

The determination of whether a defendant owes a duty to a plaintiff is a question of law. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824

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a road.

[18] As discussed in Plaintiff's Opening Brief, the legal basis for the trial court's summary judgment ruling in favor of King County was rejected in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), which held that the characterization of a governmental entity's duty with regard to providing reasonably safe roads as stated in *Ruff* was incorrect because it could wrongly be interpreted as "limit[ing] the scope of a municipality's duty to only those using the roads and highways in a non-negligent manner." *Id.* at 249. Instead, under the correct legal standard in highway safety cases, "a municipality owes a duty to all persons, ***whether negligent or fault-free***, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel." *Ibid.* (emphasis added). *Keller* requires that the fault of a governmental entity be analyzed independent of and without regard to the fault of other persons who may have been involved in a collision.

P.2d 483 (1992). Issues of law are a proper subject for summary judgment. *Imperato v. Wenatchee Valley College*, 160 Wn. App. 353, 358, 247 P.3d 816 (2011).

Under well-established Washington common law, "a property owner must use and keep his premises in a condition so adjacent public ways are not rendered unsafe for ordinary travel." *Re v. Tenney*, 56 Wn. App. 394, 396-397, 783 P.2d 632 (1989). This duty applies to any condition on the owner's property over which the owner has control. *Tenney*, 56 Wn. App. at 396-397.

As explained by our Supreme Court in *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 802 P.2d 1360 (1991), an "occupier of land generally owes a duty of reasonable care to prevent activities and conditions on his land from injuring persons or property outside his land." *Hutchins*, 116 Wn.2d at 223. This includes keeping the property in a condition that does not render the adjacent way unsafe:

> While it is the law that one whose property abuts a street is not a guarantor or an insurer of the absolute safety of the sidewalk, it is nevertheless his duty, as between himself and the public using that street, to exercise at least reasonable care in keeping his property and in conducting his business thereon in a safe and prudent manner. . . .
>
> If one fails to perform that duty and that failure is the effectual factor in doing injury to one using the street, even though the act of a third party may be the immediate cause of the injury, still that failure to fulfill the duty mentioned may constitute actionable negligence.

Collais v. Buck & Bowers Oil Co., 175 Wash. 263, 266-267, 27 P.2d 118 (1933).

Washington law is consistent with Restatement (Second) of Torts § 840(2):

> A possessor of land who knows or has reason to know that a public nuisance caused by natural conditions exists on his land near a public highway, is subject to liability for failure to exercise reasonable care to prevent an unreasonable risk of harm to persons using the highway.

Restatement (Second) of Torts § 840(2).

In the trial court, Defendant County argued that the cases discussed above "are irrelevant to the case at bar because they all involve the duties of private entities who own property next to a municipal roadway." CP 584. But the County's attempt to draw a distinction between private and public landowners completely ignores our State's waiver of sovereign immunity, pursuant to which a municipality is liable for its tortious conduct "to the same extent as if it were a private person or corporation." RCW 4.96.010.

Under Washington common law, landowners have a duty to keep their property in such a condition that it does not render an adjacent public road unsafe. Given the waiver of sovereign immunity in RCW 4.96.010, Defendant King County has the same duty regarding this parcel as the parcel's former owners, Ronald and Margaret Wipf, had before they sold it to the County.[19] If the Wipfs still owned this parcel, there is no question

[19] CP 1624-1625; CP 1629.

that this duty would apply to them. Given the waiver of sovereign immunity, there is also no question that the same duty applies to King County as the owner of the property. The fact that it is a governmental entity does not relieve the County of its common law duties regarding land that it owns.[20]

In the trial court, the County claimed that two cases, *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943), and *Bradshaw v. City of Seattle*, 43 Wn.2d 774, 264 P.2d 265 (1953), relieve it of any duty with regard to conditions on the subject property. However, *Barton* and *Bradshaw* have no continuing validity because both cases were decided before the State waived sovereign immunity in 1967.

This Court should accept review and hold that a landowner – whether a private party or a governmental entity -- has a duty to eliminate conditions on its land that present a potential hazard for traffic on an adjacent roadway, including the removal of sight-obstructing vegetation, where to do otherwise would subject motorists to the risk of injury.

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[20] *See, e.g., Oberg v. Department of Natural Resources*, 114 Wn.2d 278, 283, 787 P.2d 918 (1990) (State has same common law duty to prevent the spread of fire from its property as private landowners have); *see also Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, 888, 288 P.3d 328, 337 (2012) (Chambers, J., concurring, joined by four Justices, forming a majority of five on this issue) ("all possessors of land owe the same duties to those who enter, whether the landowners are public or private entities").

NO. 44019-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GUY WUTHRICH,

Appellant,

v.

KING COUNTY and CHRISTA GILLAND,

Respondents.

Appeal from the Superior Court of Pierce County
Honorable Garold E. Johnson
NO. 11-2-10263-2

APPELLANT WUTHRICH'S REPLY IN SUPPORT OF DISCRETIONARY REVIEW

STRITMATTER KESSLER WHELAN COLUCCIO

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Wuthrich had in his system at the time of the crash. There is no evidence that Methadone or Gabapentin impaired Mr. Wuthrich's ability to safely operate his motorcycle in any way. Nor is there any evidence that Mr. Wuthrich was sleep-deprived on the day of the collision. Dr. Darby relies on nothing more than speculation in concluding that Mr. Wuthrich was impaired.

More importantly, the issue of impairment only arises after the County establishes (1) Mr. Wuthrich's point of notice, and (2) that he had a reasonable reaction time, both of which the County has failed to do. Without first establishing the point of notice, there is no basis for determining whether or not any alleged impairment on the part of Mr. Wuthrich impacted his ability to react to the disfavored driver's negligence and avoid a collision.

C. The question of whether or not the County has the same duty as a private owner of land adjacent to a public roadway is an issue of first impression that should be decided by this Court.

Plaintiff Wuthrich presented clear evidence proving that the County owns the property with the overgrown vegetation that caused a sight obstruction. The declaration of Henry Borden is uncontested. CP 1624-1625. The County did not submit any evidence contesting that it owns the property. Instead, the County merely asked for more time to

review Mr. Borden's survey. Plaintiff submitted undisputed proof that the County owns the property, and the County did not rebut this evidence.

The County's duty as a landowner is an issue that will come up in trial. It makes sense to address this issue now, when the case is already before this Court, rather than spending a significant amount of time and money trying the case and then bring it back for another appeal on this issue, the outcome of which may require a second expensive trial.

With the sole exception of *Collais v. Buck & Bowers Oil Co.*, 175 Wash. 263, 27 P.2d 118 (1933), the cases relied upon by the Plaintiff were decided ***after*** the two cases cited by Defendant County -- *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943) and *Bradshaw v. City of Seattle*, 43 Wn.2d 774, 264 P.2d 265 (1953). The cases cited by the Plaintiff make it clear that private land owners have a duty to maintain their property in such a condition that it does not create hazards to people using the abutting roads. *See Re v. Tenney*, 56 Wn. App. 394, 396-397, 783 P.2d 632 (1989); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 802 P.2d 1360 (1991) ("occupier of land generally owes a duty of reasonable care to prevent activities and conditions on his land from injuring persons or property outside his land").

Whether a governmental entity has the same duty to maintain its property as a private landowner after the waiver of sovereign immunity is

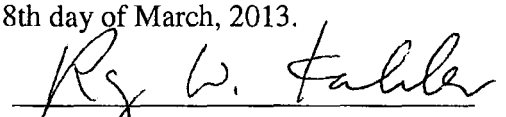
an issue of first impression that the appellate courts need to resolve. This case provides the Court with the opportunity to clarify whether or not, after the waiver of sovereign immunity under RCW 4.96.010, the County should be held to the same legal duty as a private person.

III. CONCLUSION

Not only would further proceedings based on rulings by the trial court that are clear error be useless, but further proceedings based on clear error would be a waste of judicial resources, jury time, and the parties' time and money. If this Court refuses to decide whether the trial court committed error now, there will be a second appeal after a trial. Everyone's time and money could be conserved by deciding these issues now, as part of the pending appeal.

For the foregoing reasons, Plaintiff's Petition for Discretionary Review should be granted.

Respectfully submitted this 18th day of March, 2013.



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State of Washington

Court of Appeals, Division II
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April 3, 2015

Court of Appeals-Division II
950 Broadway, Suite 300
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Re: Wuthrich v. King County and Christa Gilland, NO. 44019-9

Clerk of the Court ~

Enclosed for filing, please find a Petition for Review, along with a check in the amount of $200.

Thank you.

Regards,

Kerry McKay
Legal Assistant

:klm
Enclosures