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IN THE  
SUPREME COURT OF THE STATE OF WASHINGTON

GUY H. WUTHRICH,

Appellant,

KING COUNTY, a governmental entity,

Respondent,

CHRISTA GILLAND (PRICE),

Defendant.

Filed  
Washington State Supreme Court

OCT 06 2015

Ronald R. Carpenter  
Clerk

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BRIEF OF *AMICUS CURIAE*  
WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS

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 ORIGINAL

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (WSAMA), established in 1988, is composed of Washington attorneys engaged in representing Washington's 281 cities and towns. Many of its lawyers are engaged in municipal defense litigation and trial work; others assist with budgets, auditor and compliance issues, and the full spectrum of legal services required of a twenty-first century municipality in this State.

The purpose of WSAMA is to allow its members to associate together for the purpose of maintaining and encouraging friendly and cooperative relationships among the various municipal attorneys representing cities and towns within the State of Washington. One important way in which WSAMA represents its members is through amicus curiae submissions in cases that present issues of statewide concern to Washington municipal attorneys and their clients, which it does on a pro bono basis.

The Association of Washington Cities ("AWC") is a private non-profit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch and regulatory agencies. While membership in the AWC is voluntary, however the association includes 100% participation from Washington's 281 cities and towns. A

25-member board of directors oversees AWC's activities. Its mission is to serve its members through advocacy, education and services. It has provided from time to time amicus briefing to Washington courts on issues of significant importance to its members.

## II. STATEMENT OF THE CASE

Amicus relies upon the statement of the case as set forth by *Brief of Appellant* at 3-11; Defendant/Respondent King County's *Brief of the Respondent* at 7-24; and, Defendant/Respondent King County's *Answer to Petition for Review*.

The essential facts of this case are that, on June 20, 2009, Defendant Christa Gilland and Plaintiff Guy Wuthrich were involved in a vehicle accident at the intersection of Avondale Road and NE 159<sup>th</sup> Street in Woodinville, WA. The accident was a direct result of Defendant Gilland failing to follow remedial driving rules; namely, when Defendant Gilland approached the intersection, she looked left, then right, but she failed to look left again before pulling out into the intersection or to pull forward for the minimal distance necessary for her to see the off-road vegetation and thus caused the collision with the Plaintiff. More importantly, the alleged sight obstruction – completely wild blackberry bushes – was patent to the driver. Rather than move her car to a place where she could safely view the

approaching favored driver, she simply accelerated into the intersection blindly, with a predictable result.

Decades of precedent, and the weight of authority would indicate that the government is not liable for an accident occurring when a driver ignores a patent – if minor – sight distance obstruction created by temporary and naturally occurring vegetation. Appellants hope this Court will ignore long precedent, logic and common sense, and expand liability.

The trial court properly granted summary judgment in favor of Defendant King County, holding that the county did not breach its duty of care and was not a proximate cause of the accident. The Court of Appeals for Division II affirmed the trial court's decision, upholding decades-old precedent establishing that a reasonably safe road does not become "Inherently dangerous" just because a municipality does not hunt down and remove wild vegetation located off of the road which a driver might ignore.

Amicus agrees with Respondent King County that the Court of Appeals properly refused to decide the issue of a property owner's duty to maintain bushes (Issue 2), that King County did not breach its duty nor were its actions a proximate cause of Appellant's injuries (Issue 3), but will focus its analysis on Appellant's specific contention that municipalities have a duty to remove off-road bushes to accommodate seasonal growth (Issue 1).

### III. ANALYSIS

#### A. Municipality's General Duty Under Washington Law.

##### 1. Scope of Municipalities' Duty

It is well established in Washington that municipalities are “obligated to exercise ordinary care to keep [their] public ways in a **reasonably safe condition for persons using such ways in a proper manner[.]**” *Rathbun v. Stevens County*, 46 Wash.2d 352, 355 (1955) (citing *Berglund v. Spokane County*, 4 Wash.2d 309, 313, 103 P.2d 355 (1940); see also 7 McQuillin, *Municipal Corporations* (2d ed.), 27 et seq., § 2909; 43 C.J. 998, § 1785; 13 R.C.L 309 § 258) (emphasis added)<sup>2</sup>. While the duty as described in *Rathbun* has been modified to factor in Tort Reform (duty extends to persons not using due care for their own safety)<sup>3</sup>, no court in Washington has held that a municipality has a duty to seek out and cut back natural vegetation located off of the roadway. To the extent that the vegetation is blocking a device installed by the municipality that is meant

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<sup>2</sup> *Keller v. City of Spokane*, 146 Wash. 2d 237, 252, 44 P.3d 845, 853 (2002), does not say otherwise. That decision only addressed one clause in the pattern jury instruction.

<sup>3</sup> See, e.g., *Xiao Ping Chen v. City of Seattle*, 153 Wash.App. 890, 895, 223 P.3d 1230, 1233 (2009) (Holding that summary judgment was not appropriate where there was a question regarding whether the city failed to maintain a crosswalk located in the road.); *Keller v. City of Spokane*, 146 Wash.2d 237, 44 P.3d 845 (2002) (Holding, in relevant part, that a municipality could be liable for failing to install traffic-controlling devices in an intersection where they had notice that the intersection was dangerous.); *Sanchez v. Clark Cty.* (1988), 44 Ohio App.3d 97, 541 N.E.2d 471 (Held generally that a county may be liable for failure to remove tree branches that concealed a stop sign in the road.)

to regulate and control traffic safely, or a statute or ordinance imposes a duty to maintain vegetation at certain heights, those cases are distinguishable from, and inapplicable to, the issue here.

**2. Washington Precedent Has Been Consistent for 72 Years.**

The Court of Appeals' holding in this case is consistent with precedent that has been the rule since 1943. The Court in *Barton v. King County* found that a city may "prepare a way of a width which in its discretion will accommodate the public in the middle of a dedicated or platted street, *without assuming any duty or liability with respect to the portion of the street allowed to remain in a state of nature.*" 18 Wash.2d 573, 139 P.2d 1019 (1943) (emphasis added.)

Washington courts have affirmed this precedent in *Rathbun v. Stevens County* (1955), *supra*, *Bradshaw v. City of Seattle*, 43 Wash.2d 766, 774, 264 P.2d 265 (1953), and *McGough v. City of Edmonds*, 1 Wash.App. 164, 460 P.2d 302 (1969). Although these cases all date back roughly half of a century, they are still directly applicable to the facts at hand. Simply put, natural vegetation has grown next to roads and over fences for as long as such structures have been in place, and appellant's do not, and cannot, assert that anything has changed that would alter the way the Court should analyze these situations. Plaintiff concedes that the allegedly overgrown

natural vegetation is a transient condition. Brief of Appellant, p. 30. Being transient, natural, and off the roadway, this State's long precedent leads inexorably to a finding that cities and counties do not have a duty to seek out and cut back these bushes; rather, drivers have a duty to move to a place from which they have a good line of sight before crossing the road.

The long standing on which this Court's amicus relies addresses several policy concerns. First is the issue of making the government liable for something that is completely natural and a direct consequences of the environment of this State. We are the "Evergreen State" and grass, blackberry bushes and other natural vegetation grows here.

Second, the growth is a function of factors beyond the control of the government. The government does not control the wind, rain or sun. It does not control the soil conditions that may encourage or discourage growth like blackberries. The duty the plaintiff seeks to impose on municipalities in this State would require them to address with mathematical precision the moment a blackberry bush grows the incremental amount to impede the "sight triangle," wherever that might be in any particular case. Brief of Appellant, p. 27.

The existing precedent recognizes the folly of imposing such a duty of the government to control wild and free growing vegetation. The precedents on which your amicus relies properly places the duty on the party

in the best position to address the issue – the driver. The driver is there at the stop sign. She can see whether the wild blackberries have grown to a point where her sight distance is obscured or not. And she, not the government, is in the ideal position to address the limitation. All she has to do is position her car in a place where she can adequately see.

With all due respect, there is no logical reason to overturn this precedent. Appellant’s position makes government agencies insurers of matters well beyond their control.

**B. The Majority of States Agree With Washington State’s Current Precedent.**

In addition to the long tradition of Washington case law holding that municipalities are not liable for obstructions located off of the road that are created by natural vegetation, there is a plethora of case law from around the country supporting this assertion.<sup>4</sup> While many states approach the topic

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<sup>4</sup> See *Bohm v. Racette*, 118 Kan. 670, 236 P. 811, 812 (1925) (Holding that a county or township is not liable for damages on the roadway caused by obstruction of view by high hedges growing along the highway.); *Owens v. Town of Booneville*, 206 Miss. 345, 40 So.2d 158, 159 (1949) (Holding that a city is not liable for damages where a collision in an intersection at which the view of the intersection is obscured by high grass, weeds, and bushes would not have resulted in the persons involved were exercising reasonable care for their own safety.); *Elder v. Nephi City ex rel. Brough*, 164 P.3d 1238, 1244, 580 Utah Adv. Rep. 3 (2007) (“A governmental entity does undertake a duty to remove vegetation from private land that may obstruct the vision of motorists utilizing its roadways.”); *City Council of Augusta v. Shields*, 108 Ga.App. 790, 134 S.E.2d 481 (1963) (Referencing states reluctance to hold municipalities liable for negligence for failure to remove vegetation in support of its holding.); *State and Local Governmental Liability for Injury or Death of Bicyclist Due to Defect or Obstruction in Public Roadway or Sidewalk*, 12 A.L.R.6th 645 (Originally published in 2006) analyzing *Coburn v. City of Tucson*, 143 Ariz. 76, 691 P.2d 1104 (Ct. App. Div. 2 1984) (Court rejected plaintiff’s argument that there was a general

from different perspectives, the result is the same: there is no common law duty requiring municipalities to seek out and clear away vegetation that any driver, following the law, common sense, and keeping a proper lookout would see around, from an appropriate vantage point.

For example, the Arizona appellate court in *Hidalgo v. Cochise County* held that “in the absence of a statute[,] a highway authority is not liable for personal injuries because it has allowed the view of an intersection to be obscured by high grass, weeds or bushes which have grown up in a portion of the street or along its boundary.” 13 Ariz. App. 27, 28, 474 P.2d 34, 35 (1970). The Court of Appeals for Indiana also addressed the issue of the nexus between a county’s statutory duty and common law duty to clear vegetation from roads. The Court found that although a statute requiring “hedges or live fences” to be below a certain height was applicable<sup>5</sup>, there was no evidence that the statute had been violated. *Harkness v. Hall*, 684 N.E.2d 1156, 1162 (Ind. Ct. App. 1997). Subsequently, the Court found that “Orange County had *no common law*

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duty to maintain unobstructed visibility at intersection, which included clearing vegetation that obstructed a young biker’s view.); *Board of Com’rs of Monroe County v. Hatton*, 427 N.E.2d 696 (Ind. Ct. App. 1981).

<sup>5</sup> The statute required “‘hedge or live fences’ or ‘any other natural growths, except trees,’ which grow ‘at a highway intersection, or adjacent to any curve where the view of the highway may be intercepted’ to be annually ‘cut and trimmed down to a height of not to exceed five (5) feet.’” *Harkness*, 684 N.E.2d at 1162.

*duty* to clear vegetation that might have obscured Mrs. Harkness' view of the bridge and roadway." *Id.* (emphasis added.)

This principle is so well established that Courts have applied it to individual homeowners as well. For example, the New York court in *Lubitz v. Village of Scarsdale* found that, absent evidence that Petringa (a homeowner) had violated the relevant statute, "[a] homeowner such as Petringa has no common-law duty to prevent vegetation growing on his or her property from creating a visual obstruction to users of a public roadway." 31 A.D.3d 618, 620, 819 N.Y.S.2d 92, 94 (2006).<sup>6</sup> While obviously not controlling, these cases are instructive; the burden on homeowners, like the burden on municipalities, compared to the modest effort required of drivers to pull up to a point from which they can see clearly, is such that it makes no sense to hold the homeowners, much less the municipalities, liable for vegetation growing off the road.

**C. Imposing Such a Duty is Inconsistent with Public Policy.**

**1. Imposing Liability Would Open the Municipality to Almost Unlimited Risk.**

Washington is often referred to as (and its unofficial nickname is) the "Evergreen State," which references the state's abundant forests and

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<sup>6</sup> See also *Noller v. Peralta*, 94 A.D.3d 833, 834, 941 N.Y.S.2d 703, 705 (2012)

vegetation. It is common knowledge that much of the state is covered in vegetation that is constantly growing and changing throughout the year. It should be against the policy of this State to require the government to provide around-the-clock vigilance of this wild vegetation, much less find the resources required to respond to a problem area if one is found.

The issue was perhaps best analyzed by the Supreme Court of Wisconsin. In a case with facts nearly identical to those presented to this Court, the Wisconsin Supreme Court held:

[A]s a matter of public policy, municipalities should not be exposed to common law liability under the circumstances present in this case. Exposure to such liability would, we feel, place an unreasonable and unmanageable burden upon municipalities..., not only in terms of keeping areas adjacent to every highway intersection clear of visual obstructions at whatever intervals are necessitated by the vicissitudes of Wisconsin's climate, but also in terms of the potential for significant financial liability owing to the unfortunate propensity of motorists to have intersection accidents.

*Walker v. Bignell*, 100 Wis.2d 256, 266, 301 N.W.2d 447 (1981).

The Court in *Barton* similarly found that to uphold Plaintiff's contention that a road is inherently dangerous to travelers exercising reasonable care simply by virtue of natural vegetation that may obscure one's view would "impose an imponderable responsibility upon counties." *Barton*, 18 Wash.2d at 576. The Court called Plaintiff's contention "untenable" and added that "[t]o allow it would be to hold, literally, that

thousands of county road intersections are inherently dangerous.” *Id.* The Texas Court of Appeals similarly concluded that “[t]o require counties ... to continually be responsible for policing the overgrowth of vegetation which may obscure certain rural traffic signs on its roadways, even after notice, would ‘impose an imponderable responsibility upon counties.’”<sup>7</sup> *Anderson v. Anderson County*, 6 S.W.3d 612, 617 (Tex. App. 1999) (citing *Hamric v. Kansas City S. R.R. Co.*, 718 S.W.2d 916, 919-20 (Tex. App. 1986)). The inevitable result of holding the county liable here is that municipalities would become the insurer against all accidents, which courts around the country, including in Washington, have repeatedly ruled against. *Ruff v. County of King*, 125 Wash.2d 697, 705, 887 P.2d 886, 890 (1995) (citing *Stewart v. State*, 92 Wash.2d 285, 299, 597 P.2d 101 (1979)) (The duty to maintain all roads in a reasonably safe condition “does not, however, require a county to update every road and road structure to present-day standards. Nor does the duty require a county to ‘anticipate and protect against all imaginable acts of negligent drivers’ for to do so would make a county an insurer against all such acts.”)<sup>8</sup>

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<sup>7</sup> See also *Walker*, 100 Wis.2d at 266. (“In addition, because the height and density of vegetation would become a factor in nearly every intersection accident case, municipalities would inevitably be drawn into considerably more litigation, with its attendant costs and demands.”)

<sup>8</sup> See also *Berglund*, 4 Wash.2d at 313. (“The rule is well-nigh universal in this country that ... a municipality is not an insurer against accident nor a guarantor of the safety of travelers.”); *Rathbun*, 46 Wash.2d at 355.; *City of Staunton v. Kerr*, 160 Va. 420, 420, 168

The *Barton* Court went on to compare the intersection with a hill, which has “no extraordinary condition or unusual hazard of the road.” *Barton*, 18 Wash.2d at 577 (citing *Leber v. King County*, 69 Wash. 134, 136, 124 P. 397 (1912)).

“The same hazard may be encountered a thousand times in every county of the state[,] ... and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them ... would be to put a burden upon the public that it could not bear.”

*Id.* While this language is antiquated, its message still rings true today. The inevitable result of allowing such liability would be that municipalities could no longer build for fear of increasing their own liability. *Id.* (“It would prohibit the building of new roads, and tend to the financial ruin of the counties undertaking to maintain the old ones.”)

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S.E. 325 (1933) (“Municipalities are not insurers of the safety of pedestrians using their streets and sidewalks.”); *Peters v. Riggs*, 392 Ill.Dec. 49, 70, 32 N.E.3d 49, 70 (2015) (citing *Thien v. City of Belleville*, 331 Ill.App. 337, 345, 73 N.E.2d 452, 456 (1947) (“Municipal corporation are not insurers against accidents, and the only duty cast upon the city is that it shall maintain the respective portions of the street in reasonably safe condition considering the use to be made of such area.”); *Van Pelt v. Town of Clarksburg*, 24 S.E. 878, 879, 42 W.VA 218 (1896); *Schumacher v. City and Borough of Yakutat*, 946 P.2d 1255, 1257 (Alaska 1997); 16A Wash. Prac., Tort Law And Practice § 18:17 (4th ed.) (“Since a municipality is not an insurer against all harm arising from use of public property, its duty is limited to those persons using them in a proper manner and exercising ordinary care for their own safety.”); *Davison v. Snohomish County*, 149 Wash. 109, 115-16, 270 P. 422, 424 (1928).

**2. Allowing Liability Discourages Individuals From Fulfilling Their Duty of Due Care.**

In addition to overburdening municipalities, allowing liability could essentially give drivers a “free pass” in any accident. The reasoning behind this argument is that there will always be something, whether it is a building, a fence, vegetation or the curve of the earth that obstructs a driver from having a completely unobstructed line of sight. The *Barton* Court recognized this issue and reasoned, in support of their holding that the county was not liable, that:

[S]uch a holding would tend to relieve the operators of vehicles approaching such an intersection of their statutory duty “to operate the same in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account \*\*\* *freedom of obstruction to view ahead and consistent with any and all conditions existing at the point of operation* \*\*\*.”

*Barton*, 18 Wash.2d at 577 (citing Rem.Rev.Stat. (Vol. 7A), § 6360-64(1)).

In holding that natural obstructions to a driver’s view caused by trees, underbrush and grass did not constitute a “dangerous condition which endangered the safe movement of traffic,” a New Jersey Superior Court found that “the limited ability to make observations on either side of the road caused by trees and vegetation simply served as a warning that due

care must be maintained.” *Johnson v. Southampton TP., Burlington County*, 157 N.J.Super. 518, 523, 385 A.2d 260 (1978).

**3. The Learned Hand Formula Militates Against Imposing Such a Duty on Municipalities.**

In *United States v. Carroll Towing Co.*, 159 F.2d 169 (2<sup>nd</sup> Cir. 1947), Judge Learned Hand devised a common-sense way to determine whether a duty of care should be imposed. When the burden on the defendant to take steps to avoid a given harm is greater than the likelihood of harm times the severity of resulting harm, there should be no duty imposed. 159 F.2d at 173.

Here, the burden on municipalities to seek out off-road vegetation and remove it before anyone can claim the vegetation interfered to any degree with their line of sight, is obviously an enormous burden. By contrast, simply requiring drivers to pull up to a point from which they can clearly see a safe, long way, does not impose a burden at all — the Legislature has already imposed this duty.

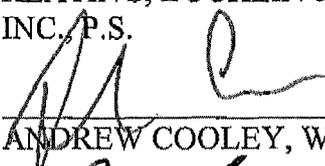
**IV. CONCLUSION**

In summary, the Court of Appeals decision should be affirmed, in part, on the basis that a contrary holding would fly in the face of decades of sound precedent without any logical reason for changing the precedent,

such as an obstruction to the intersection that was not and could not have been contemplated in the past. In addition, the majority of courts that have addressed this issue are in agreement that no common law duty exists that would impose liability on the county under these circumstances. Finally, allowing liability in this case would violate public policy by placing an unreasonable burden on municipalities and counties while simultaneously relieving drivers of the need to exercise their duty of due care while on the roadway.

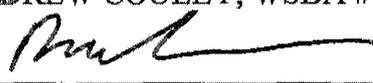
Respectfully submitted this 25<sup>th</sup> day of September 2015.

KEATING, BUCKLIN & MCCORMACK  
INC., P.S.



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<sup>9</sup> Mr. Chen was sworn in September 22, 2015.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on September 25, 2015, I caused the foregoing *Brief of Amicus Curiae* Washington State Association of Municipal Attorneys and The Association of Washington Cities to be served via Email and U.S. Mail, postage prepaid, on the parties identified below:

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Dated this 25<sup>th</sup> day of September, 2015 at Seattle, Washington.

KEATING, BUCKLIN & MCCORMACK,  
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Supreme Court Cause No. 91555-5  
**WUTHRICH v. KING COUNTY, et al.**  
Filed by Andrew G. Cooley, WSBA #15189 and  
Derek Chen, WSBA #Pending  
Attorneys for Amicus Washington State Assn. of Municipal Attorneys and the Assn. of WA Cities

Greetings:

Attached for filing in the Supreme Court of the State of Washington please find the following:

- Motion for Permission to File an Amicus Curiae Brief;
- Brief of Amicus Curiae – Washington State Assn. of Municipal Attorneys.

Thank you.

Shelly Ossinger, Legal Assistant  
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