

E RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 28, 2015, 1:02 pm
BY RONALD R. CARPENTER
CLERK

No. 91555-5

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

GUY WUTHRICH,

Plaintiff/Petitioner,

v.

KING COUNTY,

Defendant/Respondent.

PETITIONER'S ANSWER TO BRIEF OF *AMICUS CURIAE*
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

STRITMATTER KESSLER WHELAN

Keith L. Kessler, WSBA #4720
Brad J. Moore, WSBA #21802
Ray W. Kahler, WSBA #26171
Garth L. Jones, WSBA #14795
Co-counsel for Plaintiff/Petitioner
413 8th Street
Hoquiam, Washington 98550
(360) 533-2710

LAW OFFICE OF DAVID NORDEEN PLLC

David C. Nordeen, WSBA #7716
Co-counsel for Plaintiff/Petitioner
613 W. 11th Ave.
Vancouver, WA 98660
(360) 258-1614



ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT..... 1

 A. The limitation of municipal liability to conditions
 existing in the roadway itself was the result of the
 shadow of sovereign immunity..... 1

 B. Financial concerns are irrelevant to analyzing the
 scope of a municipality’s duty..... 3

III. CONCLUSION..... 4

TABLE OF AUTHORITIES

Cases

<i>Barton v. King County</i> , 18 Wn.2d 573, 139 P.2d 1019 (1943).....	1
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996).....	3
<i>Boeing Co. v. State</i> , 89 Wn.2d 443, 572 P.2d 8 (1978).....	2
<i>Bradshaw v. City of Seattle</i> , 43 Wn.2d 766, 264 P.2d 265 (1953).....	1
<i>Tanguma v. Yakima County</i> , 18 Wn. App. 555, 569 P.2d 1225 (1977).....	2
<i>Wojcik v. Chrysler Corp.</i> , 50 Wn. App. 849, 751 P.2d 854 (1988).....	3

Other Authorities

<i>Tardif & McKenna, Washington State's 45-Year Experiment in Government Liability</i> , 29 Seattle U. L. Rev. 1 (2005).....	2
--	---

I. INTRODUCTION

Petitioner Wuthrich submits this response to the Washington State Association for Justice Foundation's (WSAJ Foundation) amicus brief.

II. ARGUMENT

A. **The limitation of municipal liability to conditions existing in the roadway itself was the result of the shadow of sovereign immunity.**

Petitioner Wuthrich agrees with WSAJ Foundation that the results in *Barton*¹ and *Bradshaw*,² which limited a municipality's duty to provide reasonably safe roads to conditions existing in the roadway itself, were driven by the fact that sovereign immunity was the general rule at the time those cases were decided. Although this Court recognized liability on the part of municipalities for failure to maintain roads in reasonably safe condition before sovereign immunity was waived by the Legislature, it was a much narrower liability than this Court has recognized in the decades since sovereign immunity was abolished. *See, e.g., Bradshaw*, 43 Wn.2d at 775 ("In the absence of an express statute, a municipality cannot be held liable for failure to erect warning signs or barriers to apprise travelers of extraordinary or unusual conditions unless the danger existed in the highway itself." (emphasis added)).

Before sovereign immunity was abolished, municipal liability depended on whether the conduct at issue was considered to be

¹ *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943).

² *Bradshaw v. City of Seattle*, 43 Wn.2d 766, 264 P.2d 265 (1953).

“proprietary” or “governmental.” See, e.g., *Bradshaw*, 43 Wn.2d at 773 (discussing governmental vs. proprietary function distinction); *Tardif & McKenna, Washington State’s 45-Year Experiment in Government Liability*, 29 Seattle U. L. Rev. 1, 5-6 (2005). Because municipal liability for unsafe roads was an exception to the general rule of sovereign immunity, this Court took a narrow view of the scope of a municipality’s duty, as reflected in *Barton* and *Bradshaw*. The “proprietary function” lens permitted the Court to stop its analysis of duty at the edges of the roadway, because the municipality, in its “proprietary function,” had only “opened the road for use” to that extent.

After the Legislature waived sovereign immunity, the scope of municipalities’ liability for unsafe roads gradually broadened, taking into consideration transportation engineering standards and expert testimony. *Tardif & McKenna*, 29 Seattle U. L. Rev. at 22 (“In the late 1970s, several cases expanded the bases for liability for traditional highway claims and permitted new claims on broader theories of liability.”). For example, potential liability was found for (1) failure to post a sign warning of a narrow bridge, even though there was no defect in the surface of the bridge itself (*Tanguma v. Yakima County*, 18 Wn. App. 555, 569 P.2d 1225 (1977)), (2) failure to install special warning devices to alert truck drivers to a low underpass over a highway, despite the presence of a sign stating the clearance (*Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978)), and (3) a shoulder that was too steep and too narrow to allow a

driver to regain control of their vehicle if it went off the road (*Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 751 P.2d 854 (1988)).

It is particularly significant that *Wojcik* and other cases recognized municipal liability for unsafe conditions existing on the shoulder and beyond the edge of a roadway, because *Barton* and *Bradshaw*, and the Court of Appeals' decision in this case, suggest that municipalities have no duty for unsafe conditions outside the confines of the roadway itself. After sovereign immunity was abolished, courts were no longer encumbered by the proprietary vs. governmental distinction and no longer analyzing municipal liability in the shadow of sovereign immunity. *Barton* and *Bradshaw* are products of the era of sovereign immunity and are at odds with jurisprudence in the area of governmental liability for unsafe road conditions over the last several decades.

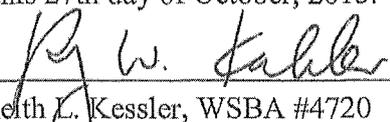
B. Financial concerns are irrelevant to analyzing the scope of a municipality's duty.

Petitioner agrees with WSAJ Foundation that *Barton's* reliance on a concern about potential adverse financial effects on municipalities as a basis for refusing to apply the duty to provide reasonably safe roads to conditions outside the edges of the roadway itself is no longer valid. This Court recognized in *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d 240 (1996), that a "poverty defense" has no place in a negligence action. *Bodin*, 130 Wn.2d at 742 (Alexander, J., concurring) & 743-744 (Johnson, J., dissenting) (constituting 5-justice majority on this point of law).

III. CONCLUSION

As WSAJ Foundation correctly notes, the lens of sovereign immunity colored the results in *Barton* and *Bradshaw*. The fact that governmental immunity was the general rule at the time those cases were decided resulted in a narrower analysis of a municipality's duty to provide reasonably safe roads than has prevailed in more recent decades. Given the fact that sovereign immunity has been abolished, the narrow analysis of a municipality's duty set forth in *Barton* and *Bradshaw*, which limited a municipality's duty to provide reasonably safe roads to conditions within the edges of the roadway itself, is no longer valid. This Court should hold that a municipality's general duty to exercise reasonable care to provide reasonably safe roads requires consideration of the totality of the circumstances, including conditions beyond the edges of the roadway itself that can make a road location inherently dangerous or misleading.

Respectfully submitted this 27th day of October, 2015.



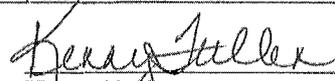
Keith L. Kessler, WSBA #4720
Garth L. Jones, WSBA #14795
Ray W. Kahler, WSBA #26171
Brad J. Moore, WSBA #21802
Stritmatter Kessler Whelan
Co-counsel for Petitioner Guy Wuthrich

David C. Nordeen, WSBA #7716
Law Office of David C. Nordeen, PLLC
Co-counsel for Petitioner Guy Wuthrich

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2015, I served the foregoing to the Clerk's Office of the Washington State Supreme Court via Electronic Mail Service and provided a copy of the document to all counsel of record as follows:

<p>Cindi S. Port, WSBA #25191 cindi.port@kingcounty.gov David J. Hackett, WSBA #21236 david.hackett@kingcounty.gov John R. Zeldenrust, WSBA #19797 john.zeldenrust@kingcounty.gov Senior Deputy Prosecuting Attorney 900 King County Administration Bldg. 500 Fourth Avenue Seattle, WA 98104 Counsel for Defendant King County</p>	<p><input type="checkbox"/> Fed Ex <input type="checkbox"/> Fax <input type="checkbox"/> Legal messenger <input checked="" type="checkbox"/> E-mail</p>
<p>Richard Lockner, WSBA #19664 lockner@524law.com Lockner & Crowley 524 Tacoma Avenue South Tacoma, WA 98402 Counsel for Defendant Gilland</p>	<p><input type="checkbox"/> Fed Ex <input type="checkbox"/> Fax <input type="checkbox"/> Legal messenger <input checked="" type="checkbox"/> E-mail</p>
<p>David C. Nordeen, WSBA #7716 dn@lawofficeofdavidnordeenpllc.com 613 W. 11th Ave. Vancouver, WA 98660 Co-Counsel for Plaintiff Wuthrich</p>	<p><input type="checkbox"/> Fed Ex <input type="checkbox"/> Fax <input type="checkbox"/> Legal messenger <input checked="" type="checkbox"/> E-mail</p>
<p>Brad J. Moore, WSBA #21802 brad@stritmatter.com 200 Second Avenue West Seattle, WA 98119 Co-Counsel for Plaintiff Wuthrich</p>	<p><input type="checkbox"/> Fed Ex <input type="checkbox"/> Fax <input type="checkbox"/> Legal messenger <input checked="" type="checkbox"/> U.S. Mail</p>
<p>Andrew Cooley, WSBA #15189 acooley@kbmlawyers.com Derek Chen, WSBA #49723 dchen@kbmlawyers.com 800 Fifth Avenue, Suite 4141 Seattle, WA 98104</p>	<p><input type="checkbox"/> Fed Ex <input type="checkbox"/> Fax <input type="checkbox"/> Legal messenger <input checked="" type="checkbox"/> E-mail</p>
<p>Bryan P. Harnetiaux, WSBA #5169 517 E. 17th Avenue Spokane, WA 99203 bryanpharnetiauxwsba@gmail.com</p>	<p><input type="checkbox"/> Fed Ex <input type="checkbox"/> Fax <input type="checkbox"/> Legal messenger <input checked="" type="checkbox"/> E-mail</p>
<p>George M. Ahrend, WSBA #25160 gahrend@ahrendlaw.com 16 Basin Street SW Ephrata, WA 98823</p>	<p><input type="checkbox"/> Fed Ex <input type="checkbox"/> Fax <input type="checkbox"/> Legal messenger <input checked="" type="checkbox"/> E-mail</p>



 Kerry Fuller
 Legal Assistant
kerryf@stritmatter.com

OFFICE RECEPTIONIST, CLERK

To: Kerry Fuller
Subject: RE: For Filing ~ Wuthrich v. King County ~ PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Received 10-28-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kerry Fuller [mailto:kerryf@stritmatter.com]
Sent: Wednesday, October 28, 2015 12:54 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: For Filing ~ Wuthrich v. King County ~ PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

No. 91555-5

SUPREME COURT OF THE STATE OF WASHINGTON

GUY WUTHRICH,

Plaintiff/Petitioner,

v.

KING COUNTY,

Defendant/Respondent.

PETITIONER'S ANSWER TO BRIEF OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

STRITMATTER KESSLER WHELAN

Keith L. Kessler, WSBA #4720
Brad J. Moore, WSBA #21802
Ray W. Kahler, WSBA #26171
Garth L. Jones, WSBA #14795
Co-counsel for Plaintiff/Petitioner

413 8th Street
Hoquiam, Washington 98550
(360) 533-2710

LAW OFFICE OF DAVID NORDEEN PLLC

David C. Nordeen, WSBA #7716
Co-counsel for Plaintiff/Petitioner
613 W. 11th Ave.
Vancouver, WA 98660

(360) 258-1614