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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 OF MUNICIPAL
ATTORNEYS

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I. INTRODUCTION

Petitioner Wuthrich submits this response to the Washington State Association of Municipal Attorneys' (WSAMA) amicus brief.

II. ARGUMENT

- A. In most cases, a plaintiff would be required to present evidence that a municipality had actual or constructive notice of overgrown vegetation before the municipality could be held liable.**

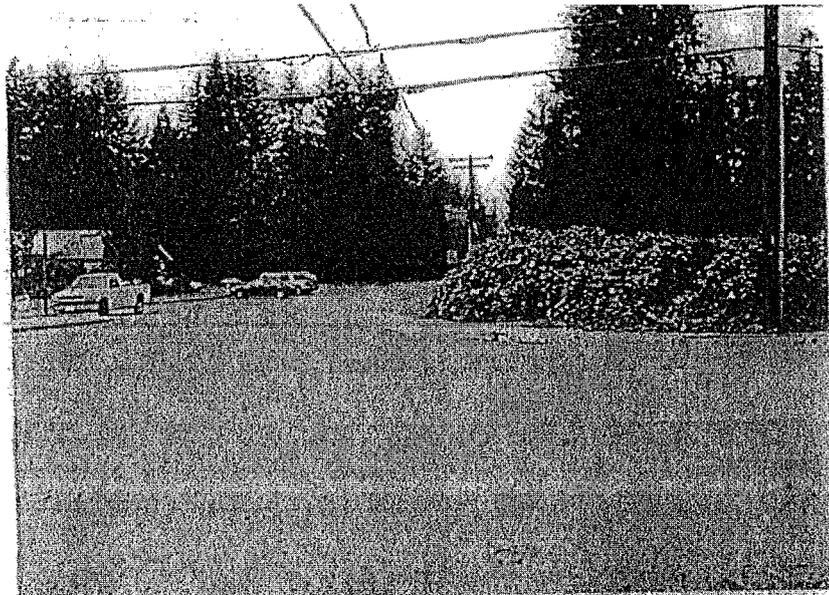
WSAMA's claim that Petitioner Wuthrich is asking the Court to recognize a duty on governmental entities to "seek out and cut back natural vegetation located off of the roadway" is incorrect. In most cases, liability for injuries caused by overgrown vegetation would require evidence of actual or constructive notice:

In order to find a [town] [city] [county] [state] liable for an unsafe condition of a [sidewalk] [street] [road] that was not created by its employees, [and that was not caused by negligence on its part,] [and that was not a condition which its employees or agents should have reasonably anticipated would develop,] you must find that the [town] [city] [county] [state] had notice of the condition and that it had a reasonable opportunity to correct the condition [or give proper warning of the condition's existence].

A [town] [city] [county] [state] is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

WPI 140.02. Whether the unsafe condition existed for a sufficient period for constructive notice is an issue for the jury.

In this case, the evidence shows that King County had *actual* knowledge of the vegetation overgrowth at the intersection. King County road maintenance personnel conducted a mowing operation at the intersection on October 5, 2007 (nine months before the collision) in response to a citizen's complaint about Scotch broom at another corner of the intersection. CP 455-456 (*Stevens Dep.* at 37-38); CP 477-482. County personnel photographed the overgrown vegetation at that time:¹



NW CORNER

CP 479. This October 2007 photo documenting the wall of blackberries in the northwest quadrant is direct evidence of King County's actual knowledge of the vegetation overgrowth and potential sight obstruction.

¹ In this photo of the overgrown blackberries at the northwest corner, Mr. Wuthrich's motorcycle would have been traveling southbound, from right to left. CP 479.

Further, according to a neighbor who lives near the intersection, the mass of blackberries had been a chronic problem for many years. CP 1166. A jury could readily conclude that the hazard of this thicket of blackberries had existed for a considerable period of time and was known to the County.

B. Governmental entities have a duty to anticipate and address foreseeable hazards in the design and maintenance of public roads.

Unlike *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943), which involved a gravel road and no stop lines, the intersection at issue in this case was not left in “a state of nature.” The road was paved, with a painted stop line. There were paved sidewalks. The overgrown vegetation in fact spilled out onto the paved sidewalk, as photographs of the intersection show. CP 234, CP 479.

WSAMA’s claim that recognizing a duty on the part of municipalities “would require them to address with mathematical precision the moment a blackberry bush grows the incremental amount to impede the ‘sight triangle’” and would require “around-the-clock vigilance” is hyperbole. Not only would the duty in most cases require evidence of actual or constructive notice of the overgrown vegetation, but the duty is one of reasonable care, not strict liability. A jury would determine under the facts of a specific case whether the governmental entity exercised reasonable care.

This Court held in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), that a municipality has a duty 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 (emphasis added); CP 1392. Whether or not it was foreseeable that a driver would stop at a designated stop line where sight obstructions interfered with drivers’ ability to see approaching traffic, and then enter the intersection and collide with a previously unseen approaching vehicle, is a question of fact for a jury. Ms. Gilland’s negligence in this case was no worse than the negligence of the drivers involved in *Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009) (driver hit pedestrian in crosswalk); *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940) (driver crossed center line on bridge and struck pedestrian); *Keller* (plaintiff motorcyclist may have been traveling as fast as 80 mph in a 30 mph zone); or *Unger v. Cauchon*, 118 Wn. App. 165, 73 P.3d 1005 (2003) (high rates of speed, swerving, crossing center lines, and turning headlights on and off), all of which were found to present questions of fact for a jury to decide. This is not a situation in which Ms. Gilland was drunk and simply drove into the intersection without stopping and looking. Ms. Gilland, an off duty police officer, testified that she stopped and believed that she had exercised appropriate care in looking for traffic. CP 1564 (*Gilland Dep.* at 45-46).

WSAMA argues that governmental entities should not be liable for road locations that are dangerous due to overgrown vegetation because vegetation growth is beyond the control of the government. In fact, vegetation control is the very purpose of King County’s Roadside

Vegetation Management Program. CP 502. Drivers being inattentive or otherwise acting negligently are beyond the control of the government; snow and ice are beyond the control of the government; but Washington courts have repeatedly recognized that governmental entities can have liability in these situations if a road location is dangerous because it lacks an adequate roadside barrier (*Raybell v. State*, 6 Wn. App. 795, 596 P.2d 559 (1972)), because of dangerous objects too close to the roadway (*Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013)), or when a governmental entity has notice of snow and ice on the road and an opportunity to address the hazard but fails to do so (*Bird v. Walton*, 69 Wn. App. 366, 848 P.2d 1298 (1993)). It is well-established that there can be more than one proximate cause of an injury. *See, e.g., Jonson v. Chicago, M., St. P. & P. R. Co.*, 24 Wn. App. 377, 601 P.2d 951 (1979). A driver's negligence can combine with a governmental entity's negligence in failing to provide a reasonably safe road to cause a plaintiff's injuries in a collision.

WSAMA's "blame the driver" approach ignores the fact that King County placed a stop line on 159th Street to designate the place where drivers are required to stop. Officer Gilland simply stopped at the stop line, where the County directed her to stop. It was clearly foreseeable that drivers would stop at the stop line, as they are required to do by law. RCW 46.61.190.

WSAMA's claim that drivers should ignore stop lines and pull forward so that they can see better ignores the fact that applicable highway

safety standards require that stop lines be placed based on an engineering analysis. CP 469-470; MUTCD Sec. 1A.09 (2003 edition)/WAC 468-95-017 (“The decision to use a particular [traffic control] device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment.”). The stop line on 159th Street was presumably placed 14.5 feet back from the intersection based on an engineering analysis that determined that that particular location was the proper place for motorists to stop. If an engineering analysis did not require the stop line to be so far back from the intersection for safety reasons, the County should have placed the stop line closer to the intersection.² But having determined that the stop line should be placed at that location, the County should have maintained the vegetation at the corner of the intersection to provide adequate sight distance from the location of the stop line. MUTCD (2003 Edition) Section 3B.16 (CP 485-486) (“Stop lines should be placed to allow sufficient sight distance to all other approaches to an intersection.”); *see also* WAC 468-95-220 (2007) (same) (CP 488).

² The fact that the County put the stop line so far back from the intersection conflicts with WSAMA’s argument that drivers should move forward from the location of the stop line. Why did the County direct motorists to stop so far back from the intersection if it was safe for motorists to be two feet from the edge of traveled way? Why didn’t the County simply paint no stop line at all or put the stop line two feet from the edge of traveled way if that was where drivers needed to stop to have adequate sight distance? The fact that drivers are required to yield to pedestrians does not explain the existence or location of the stop line, because drivers are already required by law to yield to pedestrians (RCW 46.61.235) and do not need a stop line to inform them of that obligation.

By placing a stop line at the intersection, the County directed Officer Gilland to stop at that location. And by failing to provide adequate sight distance from the location of the stop line, the County violated applicable highway safety standards. MUTCD (2003 Edition) Section 3B.16 (CP 485-486); WAC 469-95-220 (2007).

C. Recognizing the duty of governmental entities to maintain vegetation so that it does not endanger drivers on adjacent roads is consistent with their actual practices, as well as modern highway safety standards.

The fact that vegetation needs to be maintained because it can create dangerous conditions for drivers is well-recognized in current-day road safety standards. The means of controlling vegetation have also progressed significantly in the past 70 years since *Barton* was decided. Governmental entities are no longer limited to hand tools. We now have ditch mowers, gas-powered weed whackers and trimmers, and a variety of herbicides.³

The Federal Highway Administration's (FHWA) Vegetation Control for Safety report states that "vegetation, if not controlled, can present a safety hazard for several reasons," including by obscuring "a driver's view of the road ahead, traffic control devices, approaching

³ See WSDOT Maintenance Manual, Ch. 6, Roadside Maintenance, published at <http://www.wsdot.wa.gov/publications/manuals/fulltext/M51-01/Chapter6.pdf> at p.6-7 – 6-9, 6-13 – 6-17 (discussing methods of vegetation control, including the use of herbicides and mowing); Vegetation Control for Safety, published at http://safety.fhwa.dot.gov/local_rural/training/fhwasa07018/vegetationfv1108.pdf at p.2.

vehicles, wildlife and livestock, and pedestrians and bicycles.”⁴ The FHWA recognizes the need for adequate sight distance at intersections:

Safe and efficient vehicle movement through an intersection requires good visibility. As drivers approach an intersection, they need to check each quadrant of the intersection for the presence of entering vehicles. Similarly, drivers pulling out from a STOP sign need a clear view of oncoming traffic. A clear vision triangle at each corner of an intersection helps drivers avoid problems.⁵

* * *

Drivers approaching an intersection need a clear line of sight to the intersection and along the crossroads early enough to see any conflicting vehicles, bicyclists and pedestrians to avoid a collision. Together these sight lines provide a sight triangle. These sight triangles can be limited by the presence of horizontal and/or vertical curves, buildings and other physical objects, and vegetation. *Providing adequate clear sight triangles is critical for safety of all road users, so you want to make sure that vegetation overgrowth is not limiting the sight distance at intersections.*⁶

The FHWA in fact acknowledges that vegetation obstructing an intersection or sign “can be considered negligence in failing to maintain the streets in reasonably safe condition.”⁷

⁴ See http://safety.fhwa.dot.gov/local_rural/training/fhwasa07018/vegetationfv1108.pdf at p.i, p.1.

⁵ Vegetation Control for Safety, http://safety.fhwa.dot.gov/local_rural/training/fhwasa07018/vegetationfv1108.pdf at p.7.

⁶ Vegetation Control for Safety, http://safety.fhwa.dot.gov/local_rural/training/fhwasa07018/vegetationfv1108.pdf at p.20 (emphasis added); see also *id.* at 22 (“If a driver is stopped at the intersection, then there is also a need for sight distance to vehicles approaching from either direction of the opposing road so that the stopped driver can safely turn left, turn right or proceed across the intersection. Of the three options, the sight distance needed to turn left is the longest . . .”).

⁷ Vegetation Control for Safety, http://safety.fhwa.dot.gov/local_rural/training/fhwasa07018/vegetationfv1108.pdf at p.29.

The Washington State Department of Transportation's Maintenance Manual likewise recognizes the importance of having a vegetation maintenance program.⁸ The WSDOT Maintenance Manual recognizes five major elements of roadside maintenance, including "noxious weed control," "nuisance vegetation control," and "control of vegetation obstructions."⁹ The Maintenance Manual recognizes that roadside vegetation must be maintained to "provide sight distance for passing, stopping, at interchanges and at intersections."¹⁰

King County itself has a roadside vegetation maintenance program because it recognizes that "vegetation management is necessary to maintain a safe right-of-way by providing clear sight distance for vehicles, bicyclists and pedestrians and other road users, to clear signs and fixtures of vegetation for visibility and functionality, to provide adequate drainage in roadway ditches, to reduce fire hazards, and to provide snow drift control." CP 502. King County's Road Services Division schedules annual roadside vegetation control to "help reduce safety hazards for pedestrians, motorists, and bicyclists," including for the specific reason

⁸ See WSDOT Maintenance Manual, Ch. 6, Roadside Maintenance, published at <http://www.wsdot.wa.gov/publications/manuals/fulltext/M51-01/Chapter6.pdf> at p.6-1 ("This chapter addresses roadside maintenance issues primarily as they relate to vegetation management."), p.6-2 ("Roadside maintenance is a unique element within the highway maintenance program because much of the work involves caring for and/or controlling vegetation.").

⁹ See WSDOT Maintenance Manual, Ch. 6, Roadside Maintenance, published at <http://www.wsdot.wa.gov/publications/manuals/fulltext/M51-01/Chapter6.pdf> at p.6-4.

¹⁰ See WSDOT Maintenance Manual, Ch. 6, Roadside Maintenance, published at <http://www.wsdot.wa.gov/publications/manuals/fulltext/M51-01/Chapter6.pdf> at p.6-6.

that “uncontrolled vegetation and overgrowth . . . can cause accidents due to reduced visibility.”¹¹

Recognizing a duty on the part of governmental entities to maintain vegetation so that it does not create sight obstructions at intersections is consistent with governmental entities’ current practices and modern day road maintenance standards. Governmental entities already recognize the need to maintain roadside vegetation and have programs in place to do so.

III. CONCLUSION

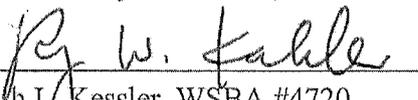
Recognizing governmental entities’ duty to maintain vegetation so that it does not endanger drivers on adjacent roads would not, as claimed by WSAMA, expose governmental entities to an “enormous burden” and “almost unlimited risk.” As discussed above, governmental entities, including King County, already have vegetation maintenance programs in place because they recognize the danger that can be created by overgrown vegetation at intersections. WSAMA’s claim that maintaining vegetation is an undue burden on governmental entities rings hollow in light of the evidence of what governmental entities, including King County itself, are already doing with regard to vegetation control. Most governmental entities are exercising reasonable care to maintain vegetation at intersections so that it does not create sight obstructions and endanger road users. King County simply failed to exercise reasonable care at the

¹¹ See <http://www.kingcounty.gov/depts/transportation/roads/road-maintenance.aspx#weedcontrol>.

particular intersection involved in this case, even with first-hand knowledge of the vegetation hazard.

The law should reflect current practices in road maintenance, not antiquated conditions of 75 years ago. Sight obstructions at intersections are a well-recognized hazard, and governmental entities have adopted programs to maintain vegetation to prevent such hazards. Recognizing the duty on the part of governmental entities to maintain roadside vegetation such that it does not create dangerous conditions for road users is essential in reflecting actual current road maintenance practices and standards. The recognition of this aspect of the duty to make roads reasonably safe for all road users will encourage governmental entities to use reasonable care in maintaining roadside vegetation. King County has already recognized the need to maintain vegetation in order to provide reasonably safe roads through its roadside vegetation management program. This Court should likewise recognize a duty on the part of governmental entities to maintain vegetation such that it does not create dangerous conditions at intersections.

Respectfully submitted this 27th day of October, 2015.



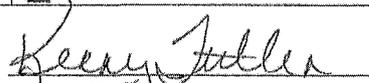
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