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SUPREME COURT OF THE STATE OF WASHINGTON

GUY WUTHRICH,

Petitioner,

v.

KING COUNTY AND CHRISTA GILLAND,

Respondents.

**RESPONDENT KING COUNTY'S ANSWER TO BRIEF OF
AMICUS CURIAE**

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 ORIGINAL

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I. INTRODUCTION

The Washington State Association for Justice Foundation (WSAJ) urges this Court to effectively read CR 56 out of tort cases by holding that the *legal* determination of a municipality's duty depends on *factual* determinations surrounding the "totality of the circumstances" – even things *outside* the roadway. The Court should reject this invitation and continue to recognize important legal limitations applicable to municipalities in road design and maintenance cases. The deep pockets of municipalities – funded by scarce tax dollars – do not make them "insurers against accidents nor the guarantors of public safety." *Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845, 853 (2002). Here, well-recognized legal limitations on a municipality's duty to control off-road vegetation require affirmance of summary judgment for King County.

II. ISSUE RAISED BY AMICUS

Whether the Court should adopt a "totality of surrounding circumstances" test where the trier of fact would define the nature and scope of a municipality's duty based on any "relevant" facts? No.

III. LEGAL ARGUMENT

A. **DUTY IS ALWAYS A LEGAL DETERMINATION WITH WELL-RECOGNIZED LEGAL LIMITATIONS**

Contrary to WSAJ's argument, the standard of care owed by a municipality in a road design case has always been a legal question.

Whether a municipality owes a duty in a particular situation is a question of law. *Keller*, 146 Wn.2d at 243. The court must not only decide (1) who owes the duty, but also (2) to whom the duty is owed and (3) the nature of that duty. *Id.* The answer to the second question defines the class protected and the answer to the third question defines the standard of care. *Id.*

WSAJ is incorrect that a municipality's duty depends on factual determinations regarding the "totality of the surrounding circumstances,"¹ which apparently includes, but is not limited to conditions off the defined roadway.² If this Court adopted WSAJ's "totality of the circumstances" approach to defining duty, it would be virtually impossible for a municipality to resolve a case through summary judgment. More importantly, duty would be an ever moving target that would vary from case-to-case, depending on the trier of fact. A municipality's duty would be unknowable, even to the municipality, until determined by a jury under

¹ The "totality of the circumstances" language is found nowhere in this Court's precedent, but is derived from the Court of Appeals decision in *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 900, 223 P.3d 1230, 1235 (2009). Although the Court in *Chen* acknowledged that duty is a legal question under this Court's precedent, *Id.* at 899-900, it then incorrectly delegates the determination of duty to the "trier of fact . . . based on the totality of the surrounding circumstances." *Id.* at 901.

² This Court long ago determined that the road corridor extends only to the outside edge of the graveled shoulders. *Bradshaw v. Seattle*, 43 Wn.2d 766, 273-74, 264 P.2d 265 (1953).

the facts of a given case. The Court should reject WSAJ's attempt to make the legal question of duty dependent on factual eccentricities.

As the Court has repeatedly recognized, "municipalities are not insurers against accidents nor the guarantors of public safety and are not required to 'anticipate and protect against all imaginable acts of negligent drivers.'" *Keller*, 146 Wn.2d at 252 (citing *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979)). In light of this important legal principle, this Court has articulated various limitations – both through legal determination of duty and the limits of legal proximate cause – on the scope of a municipality's liability in road design and maintenance cases. The Court should adhere to these limitations.

1. A municipality's duty is limited to complying with legally mandated design standards and statutes.

When setting the scope of a municipality's duty, the WSAJ "totality of the surrounding circumstances" approach would allow a plaintiff to look beyond road standards mandated by the legislative authority and propose other standards not in effect in the jurisdiction. In essence, this approach would allow newly created common law to establish duties in derogation of legislatively mandated road standards.

It is well-established that "the legislature has the power to supersede, abrogate, or modify the common law." *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008). Indeed, the

common law provides the appropriate decision rule only “so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state.” RCW 4.04.010.

By statutory law, municipalities are mandated to follow adopted road standards within the municipality’s jurisdiction:

Upon the adoption of uniform design standards the legislative authority of each county *shall apply the same to all new construction within, and as far as practicable and feasible to reconstruction of old roads comprising, the county primary road system. No deviation from such design standards as to such primary system may be made without the approval of the state aid engineer for the department of transportation.*

RCW 36.86.080 (emphasis added). In accord with this statutory provision, this Court has held that a municipality’s duly adopted road standards establish the standard of care required in designing and constructing roadways. *Ruff v. King County*, 125 Wn.2d 697, 705-06, 887 P.2d 886 (1995). The Court has also held that municipalities are not required to follow standards outside those adopted by legislation, including non-mandated road design manuals. *Id.* (holding that the County does not have to follow AASHTO - the federal design manual).

Here, by ordinance authorized under RCW 36.96.080, the King County Council adopted the 1993 King County Road Standards (“1993 Road Standards”). CP 177-191. The 1993 Road Standards, which were in

effect when the intersection in this case was redesigned, required a sightline for entering the roadway of 685 feet of visibility, when measured 10 feet back from the edge of the fog line. *Id.* The sight line does not vary with the existence of a stop line, which is designed to force drivers to check for the existence of pedestrians at the intersection *before* proceeding to enter the intersection from a point where road visibility is adequate 10 feet behind the fog line.³ *Id.* The record is undisputed that King County exceeded this requirement by providing over 730 feet of unobstructed visibility when measured 10 feet back from the edge of the traveled way. *Id.* See also King County Supp. Br. at 1-3; CP 226, 234, 551.

The folly of proceeding beyond a legislatively mandated standard to define duty by a fact-based “totality of surrounding circumstances” approach is well-illustrated under the facts of this case. Rather than evaluating the King County’s compliance with the 1993 Road Standards – which was not open to dispute – Wuthrich’s expert proposed his own road sightline that cannot be found in any known design manual and has never been tested for its safety.⁴ CP 307-308. The expert’s proposed sightline

³ As pointed out in King County’s Supplemental Brief at 7-10, in accord with the clear stretch of the road doctrine, ordinary travel mandates that a stop line is merely a place to stop, not the “start line” to enter an intersection without first obtaining an adequate view point 10 feet back from the fog line.

⁴ Summary judgment should also be affirmed because Wuthrich's expert never testified that the bushes or pole obstructed Officer Gilland's view,

was derived from a MUTCD "guidance" provision that was not adopted until seven months *after* the intersection was constructed. CP 964. The expert then combined the MUTCD "guidance" provision with a sight distance from the inapplicable WSDOT road design manual.⁵ CP 964. The ability of a municipality to obtain summary judgment based on duty or legal proximate cause in a road case should not be hostage to an expert's ability to imagine a sightline that varies from the legislatively adopted 1993 Road Standards. Consistent with tort law principles, a municipality should be able to determine its duty with certainty and comply with that duty regardless of how a later expert might seek to recast it based on a post hoc "totality of the circumstances" approach.⁶

that the intersection was inherently dangerous to Officer Gilland, or that his self-created sightline would have prevented this accident. *Ruff*, 125 Wn.2d at 706-707 (court refuses to speculate that lack of guardrail was negligence where expert could not say the guardrail would have prevented injury).

⁵ Wuthrich's expert relied on the WSDOT design manual for his proposed sightline even though he conceded that King County did not have to comply with either the federal AASHTO or WSDOT design manuals when designing and constructing this intersection. CP 967.

⁶ As this case illustrates, depending on timeframe and source, there are a number of conflicting sightlines found in the King County, WSDOT, and AASHTO road design manuals. *See* King County's Response Br. at 34-35; CP 702-707 (WSDOT) and CP 303 (AASHTO). Any holding that the "totality of the surrounding circumstances" required King County to meet all of these varying sightlines would establish an impossible standard of care for municipalities. More importantly, it would fail to give full effect to the deciding voice of the King County Council, which was authorized by RCW 36.86.080 to settle the conflict between sightline standards by adopting the 1993 Road Standards.

2. A municipality's duty is limited by that fact they are not required to update roadways to present-day standards.

Another limitation to a municipality's duty not accounted for in WSAJ's proposed "totality" test is that a municipality's duty to maintain roadways does not require it to update every road and roadway structure to present-day standards. *Ruff, 125 Wn.2d at 706*. There is nothing in this record establishing that King County violated the 1993 Road Standards when it re-designed the intersection. As noted above, the MUTCD "guidance" provision relied upon by Wuthrich's expert was not in effect when King County redesigned the intersection in 2005.⁷ This Court should not allow a "totality of the circumstances" test that operates to effectively create a duty to re-build roads by allowing a municipality's duty to be re-defined by later adopted road manuals – tort law does not require municipalities to build to standards not yet adopted.⁸

⁷ Wuthrich concedes that the MUTCD "guidance" provision relied on by his expert was not enacted until *seven months after* the intersection's re-design was complete. *See* App. Reply Brief at 15, fn. 13. In any event, the MUTCD makes a clear distinction between "standards" and "guidance" provisions – declaring that "guidance" provisions are "not mandatory." CP 674, 677-78.

⁸ It would be error to cite *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005) for the broad proposition that the current version of the MUTCD defines a municipality's duties, even for roads built prior to the effective date of the current MUTCD. In *Owens*, there is no indication in either the Supreme Court or the Court of Appeals opinion that the City of Tukwilla availed itself to RCW 36.86.080 by adopting local road standards. *See Id.* *See also Owen v. Burlington N. Santa Fe R.R., Inc.*, 114 Wn. App. 227, 56 P.3d 1006 (2002). Indeed,

3. A municipality's duty is limited because liability cannot attach unless the municipality has notice and an opportunity to correct an inherently dangerous or misleading condition.

Another legal limitation to a municipality's duty that is not accounted for in the WSAJ "totality" test is that such a duty is conditional and only arises when the municipality has notice of, and time to correct, an inherently dangerous or misleading road. *See e.g. Nibarger v. City of Seattle*, 10 Wn.2d 228, 229, 332 P.2d 463 (1958); *Leroy v. State*, 124 Wn. App. 65, 69, 98 P.3d 819 (2004); *Laguna v. State*, 146 Wn. App. 260, 263, 192 P.3d 374 (2008). "A county's liability to the users of its roads is predicated upon its having notice, either actual or constructive, of the dangerous condition which caused injury, unless the danger was one it should have foreseen and guarded against." *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 748, 375 P.2d 487, 489 (1962). Here, after examining all the evidence, plaintiff's expert testified that he did not believe King County received any relevant notice prior to the accident that an inherently dangerous or misleading condition existed at the intersection. CP 298. The Court should reject the WSAJ "totality"

neither opinion indicates any dispute regarding the applicability of the MUTCD to define applicable standards for the City of Tukwilla, which would be appropriate under the default Washington DOT standards in situations where Tukwilla did not adopt its own roads standards. In the current case, however, the standard of care applicable to King County is found exclusively in the 1993 Road Standards, which were adopted pursuant to RCW 36.86.080.

approach because it would preclude summary judgment even where plaintiffs have no evidence of notice.

4. **A municipality's duty is limited because it has no duty to make a safe road safer.**

Another legal limitation to a municipality's duty not accounted for in the WSAJ "totality" test is that a municipality has no duty to make a safe road safer. *Ruff*, 125 Wn.2d at 707. Here, Wuthrich's expert testified it would take at least three to five accidents in a 12-month period to place King County on notice that the intersection was inherently dangerous. CP 296-97. It is undisputed that accident statistics demonstrate that the intersection as designed, constructed and maintained was operating safely. Even if the one dissimilar accident is to be considered out of the 15-20 million cars entering this intersection, only .00000005 to .000000067 cars had an accident during the 37 months after the intersection was redesigned.⁹ Thus, contrary to the WSAJ "totality" approach, current law dictates that King County had no duty to alter the sightline because the intersection was operating safely.

⁹ During the 37-month period the sightline did not change, because the power pole existed at the same location for this entire period.

B. A MUNICIPALITY HAS NO LEGAL DUTY TO CLEAR OFF-ROAD VEGETATION, WHICH IS A LONG-STANDING LEGAL PRINCIPLE UNRELATED TO THE WAIVER OF SOVEREIGN IMMUNITY

Under *Barton v. King County*, 18 Wn.2d 573, 576-77, 139 P.2d 1019 (1943) and its progeny,¹⁰ it is well-established that a municipality does not have a duty to remove vegetation located off the roadway that tends to obstruct the view. The Court should reject WSAJ's efforts to replace this rule with an uncertain "totality of surrounding circumstances" approach.

Citing the 1961 waiver of sovereign immunity in RCW 4.92.090, WSAJ claims that "municipalities are generally held to the same negligence standards as private parties" in road design and maintenance cases. WSAJ Br. at 5. It urges the court to reject King County's citation to *Barton* and its progeny, which pre-date the 1961 statute. However, the legal rule that municipalities will not be held liable for vegetation outside the road corridor is separate from sovereign immunity and thus survived the 1961 waiver.¹¹

As explained in King County's Supplemental Brief, the 1961 waiver of sovereign immunity is irrelevant because sovereign immunity

¹⁰ These include *Bradshaw v. Seattle*, 43 Wn.2d 766, 264 P.2d 265 (1953) and *Rathbun v. Stevens County*, 46 Wn.2d 352, 356, 281 P.2d 853 (1955).

¹¹ In *Bradshaw*, 43 Wn.2d 766, this legal principle was extended to both cities and counties.

has never been an issue in road cases. See King County Supp. Br. at 12-13. There is no cogent argument that adoption of the 1961 statute legislatively overruled this Court's road precedents because those decisions were not based on sovereign immunity principles.¹²

In *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 9, 882 P.2d 157, 161 (1994), this Court specifically rejected the argument that municipalities are held to the same negligence standards as private parties in road cases. As *McCluskey* held, nothing in the 1961 sovereign immunity statute "alters the State's common law defenses regarding highways, which are unique to the state and not shared by private parties." *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 9, 882 P.2d 157, 161 (1994). Among other things, these common law defenses include the consideration of financial burdens in determining the reasonableness of a

¹² The claim by amicus WSAJ that sovereign immunity was "woven into the fabric of the common law" applicable to road cases is invented out of whole cloth. See WSAJ Br. at 8. The lack of support for this argument is readily apparent on page 10 of the WSAJ brief, where WSAJ claims that the reason a municipality's liability for its proprietary road functions ends at the edge of the road was somehow due to the function of sovereign immunity. No cases are cited for this point, nor is the logic apparent. To the contrary, the *Barton* approach of limiting liability to the edge of the road corridor is consistent with other analogous situations, like the well accepted notion that an apartment owner's premises liability extends only to common areas used by the public. See *Mucsi v. Graoch Associates Ltd. P'ship No. 12*, 144 Wn.2d 847, 855, 31 P.3d 684, 687 (2001) (duty extends only to common areas). Regardless of sovereign immunity, there is no purpose for extending liability for the road beyond the roadway itself.

public entity's conduct. *Id.* Roads precedent recognizes the heightened role that notice plays when a road has been built to legally mandated roads standards and there is no substantial accident history. These unique defenses and limitations on duty in road cases recognize the general idea that a municipality has "only the limited duty of care to act reasonably within the framework of the laws governing the municipality and the economic resources available to it."¹³ *McCluskey*, 125 Wn.2d at 10 (quoting *Bailey v. Forks*, 108 Wash.2d 262, 271, 737 P.2d 1257 (1987)).

One of the primary cases cited by this Court in *McCluskey* points out that the unique defenses developed for municipalities in the case law are separate from the waiver of sovereign immunity, survived the waiver, and ensure a proper allowance for the role of legislative standards in road design and maintenance. In *Weiss v. Fote*, 7 N.Y.2d 579, 584, 167 N.E.2d 63, 65, 200 N.Y.S.2d 409, 411 (1960) (cited by *McCluskey*), New York's highest court explained that the limitations on municipal liability

¹³ In an effort to impose equivalency between municipalities and private individuals in tort actions, WSAJ cites a composite holding from the concurrence and dissent in *Bodin v. City of Stanwood*, 130 Wn.2d 726, 743, 927 P.2d 240, 249 (1996). WSAJ Br. at 5. The *Bodin* case, however, did not involve road design and maintenance and therefore did not alter the applicable common law. The other case cited by WSAJ, *Keller*, does not purport to abandon *sub silencio* the developed case law establishing municipal defenses in road design cases. It means very little to claim that municipalities are generally held to the same liability standards as private parties in *road* cases because municipalities alone operate public roads, highways, and freeways.

recognized in the case law sprang not from sovereign immunity, but from the need to uphold the fidelity of regulations and standards mandated by the Legislative and Executive process:

Lawfully authorized planning by governmental bodies has a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability. It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government for instance, the garden variety injury resulting from the negligent maintenance of a highway but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question. . . . *To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts.* Acceptance of this conclusion, far from effecting revival of the ancient shibboleth that 'the king can do no wrong', serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.

7 N.Y.2d at 585-86 (emphasis added). The waiver of sovereign immunity was not "designed to override the well-defined and carefully reasoned body of law governing the measure of the State's responsibility for highway safety," but the preservation of those defenses is supported by the "sound principles of government administration and a respect for the expert judgment of agencies *authorized by law* to exercise such judgment." *Id.* at 588 (emphasis added).

The determination in *Barton* and its progeny that a municipality's duty to provide reasonable safe roads for ordinary travel does not require the removal of vegetation beyond the roadway, even when it "tends to obstruct the view," remains good law. These cases were not legislatively abrogated in 1961. Neither Wuthrich, nor amicus WSAJ make any argument to abandon stare decisis now. Because these cases directly control the outcome of this case, WSAJ's arguments should be disregarded and this Court should affirm summary judgment for King County.¹⁴

¹⁴ The WSAJ "totality of the circumstances" approach also would appear to support municipal liability for roads that were never built, or existing roads that were never widened to the full extent of the right-of-way. Even with the limited waiver of sovereign immunity, however, the doctrine of discretionary immunity continues to preclude WSAJ's argument to broadly increase the scope of municipal liability. Discretionary immunity generally protects decisions on how to allocate resources through the construction or improvement of roads. *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101, 106 (1979) ("The decisions to build the freeway, to place it in this particular location so as to necessitate crossing the river, the number of lanes-these elements involve a basic governmental policy, program or objective."). Both before and after the limited waiver of sovereign immunity, municipalities have never had a duty to maintain roads beyond the roadway – *i.e.* locations where the road ends and nature begins. Indeed, in situations where the municipality does not own or control property off the roadway, a municipality's decision to remove trees or shrubs in that area would potentially violate the treble damages trespass statute (RCW 64.12.030), constitute an illegal taking under the Fifth Amendment, or an illegal seizure under the Fourth Amendment.

Even if WSAJ was correct that a municipality enjoys no special defenses in roads cases and that this Court should thus overturn many decades of precedent that carefully craft municipal liability, King County would still not be subject to liability in this case. First, as pointed out in King County's supplemental brief, the question of whether King County has a separate duty as the purported owner of the property adjacent to the intersection is not properly before the Court. *See* Supp. Br. of King County at 17-19. The record does not establish the owner and the Court should not decide such an important issue absent a proper record and the appropriate parties before the Court. *Id.*

If these substantial hurdles were somehow overcome, this Court's precedents do not impose broad liability on landowners who are adjacent to a public roadway based on a nebulous "totality of the circumstances" test. When property is maintained in its natural condition, there is "no duty to inspect and no liability so far as the owner was concerned (absent knowledge of a hazardous condition)." *Albin*, 60 Wn.2d at 752. For adjacent landowners, "[a]ctual or constructive notice of a 'patent danger' is an essential component of the duty of reasonable care. *Lewis v. Krussel*, 101 Wn. App. 178, 186, 2 P.3d 486, 491 (2000). Because Wuthrich's expert acknowledges that King County had no relevant notice in this case, and the defendant driver had an available and safe sightline 10 feet back

from the fog line in accord with the 1993 Road Standards, this Court should reject WSAJ's invitation to extend King County's duty beyond the well-understood confines of current precedent.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the grant of summary judgment for King County. The decisions of the trial court and the Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of October, 2015.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Maggie Flickinger, Legal Secretary
Done in Seattle, Washington

10/25/2015

Date

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Good afternoon,

Attached please find the following document for filing:

- Respondent King County's Answer to Brief of Amicus Curiae

Case Name: Guy Wuthrich v. King County and Christa Gilland

Case Number: 91555-5

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Thank you,

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