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SUPREME COURT OF THE STATE OF WASHINGTON

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GUY WUTHRICH,

Petitioner,

v.

KING COUNTY,

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER GUY WUTHRICH

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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 8<sup>th</sup> 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. 11<sup>th</sup> Ave.  
Vancouver, WA 98660  
(360) 258-1614

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## I. INTRODUCTION

Defendant King County placed a stop line 14-½ feet back from the intersection of Avondale Road and 159<sup>th</sup> Street for eastbound traffic on 159<sup>th</sup> Street. A wall of overgrown blackberries obstructed eastbound motorists' view of southbound traffic from the location of the stop line. After stopping and observing traffic, Defendant Christa Gilland pulled out to turn left onto Avondale Road and caused a collision with Plaintiff Guy Wuthrich, who was seriously injured.

The trial court granted summary judgment to King County on the basis that Christa Gilland was negligent, and therefore the County could not be at fault. The trial court relied on language in *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995), to the effect that, in designing and maintaining roads, governmental entities are entitled to presume that all drivers will be reasonably prudent. That language was overruled by this Court in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). The Court of Appeals therefore could not affirm the trial court on that basis.

In a split 2-1 decision, the Court of Appeals held that a dangerous condition must exist "in the roadway itself" for a road to be unreasonably dangerous, and because the overgrown vegetation was not in the roadway itself, it could not constitute an inherently dangerous condition. The Court of Appeals relied on *Barton v. King County*, 18 Wn.2d 573, 139 P.2d 1019 (1943).

This Court should reverse because the Court of Appeals' reasoning that a condition must be "in the roadway itself" for a road location to be inherently dangerous conflicts with numerous cases holding that conditions along the side of the roadway can also create a dangerous condition for drivers. Most recently, this Court recognized in *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013), that a municipality could be liable for placing a utility pole too close to a roadway.

This Court should also reverse because Defendant King County owned the land where the overgrown vegetation was located. A private landowner "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). Pursuant to RCW 4.96.010, King County is held to the same standard as a private landowner.

This Court should reverse and hold that Defendant King County's duty to maintain its roads in a reasonably safe condition for ordinary travel includes a duty to maintain vegetation so that it does not create a hazardous sight obstruction for motorists.

## **II. 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 miles per hour under the speed limit.<sup>1</sup> Defendant Christa Gilland, an off-duty Kirkland Police Officer,<sup>2</sup> approached the intersection traveling in an easterly direction on 159th Street, which is controlled by a stop sign and a stop line.

Ms. Gilland stopped at the stop line, looked both ways, did not see Mr. Wuthrich's motorcycle approaching, and started her left turn onto Avondale Road.<sup>3</sup> This put her directly and suddenly in the path of Mr. Wuthrich's southbound motorcycle, causing a collision.<sup>4</sup>

Mr. Wuthrich sustained severe injuries in the collision.

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

The stop line at 159th Street is 14-½ feet back from the intersection.<sup>5</sup> Due to a wall of overgrown blackberry bushes along Avondale Road, the available sight distance for a vehicle stopped at the

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<sup>1</sup> CP 1544 (*Wuthrich Dep.* at 8).

<sup>2</sup> As a police officer, Ms. Gilland has specialized training regarding driving and applies defensive driving principles. CP 1560 (*Gilland Dep.* at 30-31).

<sup>3</sup> CP 1564, 1581, 1583 (*Gilland Dep.* at 45-46, 114-116, 122). Defendant King County refers to Ms. Gilland changing a setting on her cell phone as she approached the intersection in order to suggest that Ms. Gilland was inattentive. *Answer to Petition for Review* at p. 7. Like many of the claims made by the County, this is misleading. Officer Gilland testified that she was not looking at her phone when she stopped at the intersection. She was looking at traffic. CP 1567 (*Gilland Dep.* at 58-60). Defendant King County also claims that "Gilland agreed that her failure to look left again prior to initiating her start was the cause of this accident," citing CP 265. *Answer to Petition for Review* at p. 8. In fact, Ms. Gilland merely acknowledged that not looking left again was "perhaps" *another possible* cause of the accident, in addition to the overgrown vegetation sight obstruction. This is at best a question of fact for a jury.

<sup>4</sup> CP 1564 (*Gilland Dep.* at 46).

<sup>5</sup> CP 469.

stop line was less than a third of the sight distance that Defendant King County concedes is required.<sup>6</sup>

The County had actual knowledge of the overgrown vegetation. County road crews photographed the overgrown vegetation nine months before the collision (CP 479) and had cut back the blackberries several times over the 20 years before this collision. CP 1166.

King County Detective James Leach took the following statement from Ms. Gilland just after the collision:

I was stopped at the intersection of Avondale and NE 159<sup>th</sup> *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.<sup>7</sup>

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.”<sup>8</sup> Ms. Gilland testified that the motorcycle appeared in front of her just as she started her left turn onto Avondale.<sup>9</sup>

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<sup>6</sup> CP 167 (685 feet of sight distance is required); CP 461 (there was only 191 feet of sight distance for a vehicle stopped at the stop line). The photo designated Figure 1 in the County's Answer to Petition for Review is misleading because it was not taken from eight feet behind the stop line, which is where a driver's eye would be in a vehicle stopped at the stop line. CP 704.

<sup>7</sup> CP 432 (emphasis added).

<sup>8</sup> CP 394; CP 396 (he had less than a second to react after he saw Gilland's car).

<sup>9</sup> 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:

[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.<sup>10</sup>

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.<sup>11</sup>

Ms. Gilland testified that she looked left and saw the bushes, but did not see Mr. Wuthrich's motorcycle.<sup>12</sup>

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<sup>10</sup> CP 440-441.

<sup>11</sup> CP 445. Photographs taken by the King County Sheriff's office at the scene demonstrate the sight-obstructing wall of overgrown vegetation. CP 1242-1243.

<sup>12</sup> CP 423-425; CP 403-404; CP 408; CP 414.

**C. The sight distance at the intersection was inadequate.**

A stop line is a traffic control device, which must comply with the Manual on Uniform Traffic Control Devices. In 2008, the 2003 MUTCD was the law in Washington. *See* WAC 468-95-010 (2007). Section 3B.16 stated that stop lines are supposed to be placed “at the desired stopping . . . point,” “the point behind which drivers are required to stop.” CP 485-486; WAC 468-95-220 (2007). The placement of stop lines at a particular location must be based on engineering judgment that drivers should stop at that position, rather than closer to the intersection. MUTCD Sec. 1A.09; Sec. 3B.16.

It is foreseeable that drivers will stop at the stop line to observe traffic, because the law requires them to stop there. RCW 46.61.190(2). If the County did not want drivers stopping that far back from the intersection, the County could have declined to paint a stop line or could have put it closer to the intersection. Presumably, the County determined based on an engineering analysis that drivers needed to stop that far back from the intersection in order to allow room for vehicles turning left from Avondale Road.

The MUTCD states that “[s]top lines should be placed to allow sufficient sight distance to all other approaches to an intersection.” WAC 468-95-220 (2007) (CP 488). Defendant King County’s claim that the sight distance at the intersection met the County’s sight distance standard (*Answer to Petition for Review* at p.5) ignores the fact that the County’s

sight distance standard does not address intersections with stop lines. It is a generic sight distance standard for intersections without stop lines.

King County's Road Design standards state that, except where the King County Standards provide otherwise, King County shall follow the Washington State Department of Transportation (WSDOT) Design Manual. CP 659. The WSDOT Design Manual states that a driver stopped and waiting to enter a roadway needs "obstruction-free sight triangles in order to see enough of the through roadway to safely complete all legal maneuvers before an approaching vehicle on the through roadway can reach the intersection" (CP 704), and that vegetation "large enough to be a sight obstruction" should be removed. CP 704. Where, as here, the stop line is placed more than 10 feet from the edge of the traveled way, the WSDOT Design Manual recommends that adequate sight distance be provided to a point eight feet back from the stop line.<sup>13</sup> Contrary to the County's claim, the sight distance at this intersection did not comply with state and federal road design standards because the sight distance was inadequate from the stop line.

Expert testimony confirmed that the sight distance at the intersection was substandard and unsafe. Transportation engineer Edward Stevens stated that "[t]hese sight obstructions in the northwest quadrant of the intersection created an inherently dangerous condition . . . ."<sup>14</sup>

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<sup>13</sup> CP 704. Eight feet back from the stop line is approximately where the driver's eye would be for a vehicle stopped at the stop line. CP 704.

<sup>14</sup> CP 1265.

Accident reconstruction expert Paul Olson testified that “clearly the sight line for drivers pulling up to this intersection was obstructed.”<sup>15</sup>

### III. ARGUMENT

#### A. The trial court dismissed Defendant King County based on an erroneous legal standard.

Defendant King County has a duty to exercise reasonable care to keep its public roads in a reasonably safe condition for ordinary travel, even if the driving is imperfect. *Lowman v. Wilbur*, 178 Wn.2d 165, 169-171, 309 P.3d 387 (2013).<sup>16</sup>

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*, 125 Wn.2d at 704 (emphasis added).<sup>17</sup> Based on this language, the trial court ruled that the County had no duty to provide a reasonably safe road because Ms. Gilland was not a “prudent” driver.<sup>18</sup>

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<sup>15</sup> 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).

<sup>16</sup> It is not necessary to prove a violation of a statute or ordinance for a governmental entity to be liable for an unsafe road. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005); *Chen v. City of Seattle*, 153 Wn. App. 890, 901, 223 P.3d 1230 (2009).

<sup>17</sup> VRP 60 (7/27/12).

<sup>18</sup> VRP at 60-61 (7/27/12). The trial court used this same rationale to rule that Ms. Gilland’s negligence was the sole proximate cause of the collision. *See* VRP at 65, 67 (7/27/12).

The legal basis for the trial court's ruling was rejected by this Court 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 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." *Keller*, 146 Wn.2d at 249.<sup>19</sup>

**B. This Court should reverse because the Court of Appeals erroneously held that a condition must exist "in the roadway itself" for a road to be unreasonably dangerous.**

The Court of Appeals acknowledged that the trial court applied an incorrect legal standard,<sup>20</sup> but then compounded 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 that blocked drivers' view of each other was not in the roadway itself, the Court of Appeals held that the County did not breach its duty to maintain the road in a reasonably safe condition. *Slip Opinion* at 12.

The Court of Appeals' limitation of a municipality's duty to the confines of the asphalt conflicts with case law recognizing that a municipality's duty to provide reasonably safe roads extends to conditions 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

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<sup>19</sup> *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).

<sup>20</sup> *Slip Opinion* at p.5, fn.6.

tumbled down a cliff. The plaintiff claimed that the highway was inherently dangerous due to inadequate guardrail. Expert testimony showed that a guardrail would have deflected the vehicle back onto the highway at speeds as high as 48 miles per hour, and that the lack of guardrail was hazardous. The jury returned a verdict in favor of the plaintiff, and the State then appealed.

The Court of Appeals affirmed, 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 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); *see also Provins v. Bevis*, 70 Wn.2d 131, 422 P.2d 505 (1967) (county held liable where car hit stump just beyond a dead-end gravel road where signage was misleading); *Prybysz v. City of Spokane*, 24 Wn. App. 452, 601 P.2d 1297 (1979) (inadequate guardrail on a bridge).

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

inches off the 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 “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 (2013), this Court held that municipalities may be liable for placing a utility pole too close to a 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 evidence presented by Mr. Wuthrich established that the overgrown brush at the intersection obstructed motorists' vision and thereby created an inherently dangerous 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.”<sup>21</sup>

Mr. Stevens testified 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

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<sup>21</sup> CP 1265; *see also* CP 1501-1502.

inherently dangerous condition at the intersection” that prevented drivers stopped at the stop line from seeing oncoming traffic “in time to avoid a collision;”<sup>22</sup> and (2) because of the overgrown brush, the sight distance from the stop line was significantly less than the required sight distance.<sup>23</sup> Similarly, both Ms. Gilland and the investigating officer noted that the brush line obstructed Ms. Gilland’s view of traffic.

In response to the question whether he noticed “any deficiencies in signage” at the intersection, 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.<sup>24</sup>

Despite this evidence, the Court of Appeals ruled that, because the brush line was not within the roadway itself, the County did not have a duty. But as discussed above, 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.*

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<sup>22</sup> CP at 1265.

<sup>23</sup> CP 461.

<sup>24</sup> CP 454.

*Chen v. City of Seattle*, 153 Wn. App. 890, 909, 223 P.3d 1230 (2009) (emphasis added). As pointed out in Judge Bjorgen’s dissent, “[a]mong those relevant circumstances in this appeal are the placement of the stop bar on 159<sup>th</sup> Street and the presence of signs on Avondale Road warning traffic to slow down.”<sup>25</sup>

In *Chen*, a pedestrian was killed while trying to cross a busy downtown street in a crosswalk. 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 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.

Similarly, *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 108 P.3d 1220 (2005), 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.

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<sup>25</sup> *Slip Opinion* at 16.

The Court of Appeals' holding that the scope of a municipality's duty is limited to eliminating inherently dangerous conditions existing within the roadway itself conflicts with the cases cited above and therefore requires reversal.

**C. This Court should hold that governmental landowners have the same duty as private landowners 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.<sup>26</sup> Thus, the County had an independent duty, as the owner of the land where the brush was located, to eliminate an unsafe condition on land that abuts a street and presents a hazard for motorists.<sup>27</sup>

The Court of Appeals ruled 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 the County of any duty to maintain vegetation adjacent to a road. The Court of Appeals' distinction between private and public landowners ignores our State's waiver of sovereign immunity (RCW 4.96.010), which makes a municipality liable for its tortious conduct "to the same extent as if it were a private person or corporation."<sup>28</sup>

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<sup>26</sup> CP 939-940 (*Stevens Dep.* at 44-45) ("the blackberry vines in question . . . were on county property"); CP 1625 ("The topographic survey 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.").

<sup>27</sup> *Re v. Tenney*, 56 Wn. App. 394, 396, 783 P.2d 632 (1989).

<sup>28</sup> *Barton* (1943) and *Bradshaw* (1953) were decided before the Legislature waived sovereign immunity in 1967. RCW 4.96.010.

The Court of Appeals relied on *Barton*,<sup>29</sup> *Bradshaw*, and *Rathburn v. Stevens County*, 46 Wn.2d 352, 281 P.2d 853 (1955) in holding that “the brush line did not create an inherently dangerous condition”<sup>30</sup> because “[a]n inherently dangerous condition is one that exists in the roadway itself.”<sup>31</sup> The Court of Appeals’ 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.<sup>32</sup> RCW 4.96.010.

Under well-established Washington common law,

. . . 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 Wash.2d 221, 386 P.2d 415 (1963), or responsibility, as in *Groves v. Tacoma*, 55 Wash. App. 330, 777 P.2d 566 (1989) and *Stone v. Seattle*, 64 Wash.2d 166, 391 P.2d 179 (1964).

*Re v. Tenney*, 56 Wn. App. 394, 396-397, 783 P.2d 632 (1989) (*citing Collais v. Buck & Bowers Oil Co.*, 175 Wash. 263, 27 P.2d 118 (1933)).<sup>33</sup>

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<sup>29</sup> *Barton* in turn relied on *Leber v. King County*, 69 Wash. 134, 136, 124 P. 397 (1912). As Judge Bjorgen noted in his dissent, “[t]he present validity of a legal definition of dangerousness developed under the road and traffic conditions of a century ago is precarious at best.” *Slip Op.* at 14.

<sup>30</sup> See *Slip Opinion* at 7.

<sup>31</sup> *Ibid.*

<sup>32</sup> CP 939-940 (*Stevens Dep.* at 44-45); CP 1625.

<sup>33</sup> 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”).

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);<sup>34</sup> *see also Whitt v. Silverman*, 788 So.2d 210 (Fla. 2001) (recognizing trend in other jurisdictions that conditions on a landowner's property resulting in injuries to a plaintiff off the premises should be evaluated by the established principles of negligence law).

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 adjacent public roadway unsafe. The same duty applies to King County as the owner of the property where the overgrown vegetation existed. It makes no sense that overgrown vegetation can be a hazardous condition that supports liability on the part of a private landowner but not if the

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<sup>34</sup> The modern rule is that landowners have a duty to protect people off their premises from harm caused by natural vegetation on their land. *See Jones, Trains, Trucks, Trees and Shrubs: Vision-Blocking Natural Vegetation and a Landowner's Duty to Those Off the Premises*, 39 Vill. L. Rev. 1263, 1277, 1294 (1994) ("The preferable approach is taken by the jurisdictions that recognize that landowners are like other tortfeasors, and thus have a duty to act reasonably, regardless of the type of condition on their property that causes an injury. . . . The traditional no duty rule has outlived its usefulness, and should be replaced by a rule that treats all landowners the same regardless of the type of condition on their property that harms those off the premises.").

overgrown vegetation is on a governmental entity's property. The fact that the County is a governmental entity does not relieve the County of its common law duties regarding land that it owns.<sup>35</sup> The County is responsible for maintaining its land in such a manner that it does not present a hazardous condition for persons using the adjacent roadway.

In addition to being invalid due to the subsequent waiver of sovereign immunity by the State and its municipalities, *Barton* and *Bradshaw* were also based on the same erroneous legal standard that the trial court used in this case, limiting a governmental entity's duty to maintain reasonably safe roads to drivers exercising reasonable care.<sup>36</sup> This Court should overrule *Barton* and *Bradshaw* both for that reason, and on the basis of the waiver of sovereign immunity, which makes municipalities liable to the same extent as private landowners, and hold that a landowner – whether a private party or a governmental entity – has a duty to exercise reasonable care to prevent conditions on its land from

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<sup>35</sup> See, e.g., *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”); *Oberg v. Department of Natural Resources*, 114 Wn.2d 278, 283-284, 787 P.2d 918 (1990) (State has same common law duty to prevent the spread of fire from its property as private landowners have).

<sup>36</sup> “The city had the right to assume that locomotives operating over this crossing would proceed without negligence and with due regard to the rights of users of the street.” *Bradshaw*, 43 Wn.2d at 270-271. See also *Barton*, 18 Wn.2d at 577 (liability on municipality for sight obstruction caused by overgrown vegetation would relieve drivers of their duty to be careful and prudent); *Rathbun*, 46 Wn.2d at 356 (road is not unsafe for “travelers exercising reasonable care” because vegetation causes a sight obstruction).

causing a hazard for traffic on an adjacent road, including the removal of sight-obstructing vegetation.

The Court's concern in *Barton* that such a duty would impose an "imponderable responsibility" on municipalities is belied by the fact that Defendant King County has a vegetation maintenance program and acknowledges that "vegetation maintenance is necessary to maintain a safe right-of-way by providing clear sight distance for vehicles." CP 502. The County had, in fact, cut the blackberries back several times over the years. CP 1166. And here, the County had actual knowledge of the overgrown vegetation. County road crews actually photographed the wall of overgrown blackberries nine months before the collision involved in this case. CP 479.

*Barton* was decided over 70 years ago. It involved an intersection of gravel roads with no stop sign or painted stop line. *Bradshaw* was decided over 60 years ago and involved a paved road 19 feet wide with gravel shoulders at a railroad crossing. This case involves an intersection with paved sidewalks, stop signs, and painted stop lines. The intersection in this case was not left in a "state of nature" like the intersection involved in *Barton*. Over the past 70 years, governmental entities have recognized the importance of maintaining vegetation to prevent sight obstructions from creating dangerous conditions at intersections.<sup>37</sup> Transportation engineering standards recognize the importance of adequate sight distance

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<sup>37</sup> CP 704 (WSDOT Design Manual); CP 502 (discussing King County's vegetation maintenance program).

so that drivers can cross through intersections without colliding with unseen approaching vehicles.<sup>38</sup>

The scope of governmental entities' duty to maintain reasonably safe roads has evolved over time as engineering standards and technologies have evolved. At one time, governmental entities had no obligation to provide guardrail at locations with steep drop offs. *See, e.g., Leber v. King County*, 69 Wash. 134, 124 P. 397 (1912). But this Court recognized that the law must change as engineering standards and technologies change:

We do not consider the ideas of the court, expressed 40 years ago, as necessarily authoritative on the engineering and financial phases of the same problem today. We are satisfied that the parties should have the opportunity of presenting their evidence as to the practicality (cost wise or otherwise) of guardrails or barriers on dangerous or misleading roadways to stop slow-moving vehicles.

*Bartlett v. Northern Pacific Railway Co.*, 74 Wn.2d 881, 883, 447 P.2d 735 (1968).

Like the Supreme Court of Florida, this Court should recognize a duty on the part of private and governmental landowners alike to remove (or in the case of governmental landowners, also to warn of) sight-obstructing vegetation on their property. *See Bailey Drainage Dist. v. Stark*, 526 So.2d 678, 682 (Fla. 1988) ("The relevant inquiry is whether the brush and weeds, wherever located, obstruct the view of motorists,

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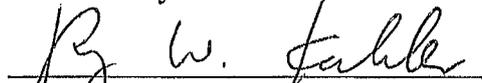
<sup>38</sup> MUTCD Section 3B.16 (2003), WAC 468-95-220 (2007) (CP 488).

creating a danger which is not readily apparent. If the brush and weeds are located on the entity's right-of-way, the entity may either warn of the danger or remove the obstruction. If the brush and weeds are located on privately owned property so that removal is not an option, the entity still has a duty to warn of the danger.”).

#### IV. CONCLUSION

For the reasons set forth above, this Court should reverse the Court of Appeals and trial court. The Court should clarify that a roadway can be inherently dangerous even though nothing “in the roadway itself” is defective; hold that Defendant King County is held to the same standard as a private landowner with regard to maintaining its property in such condition that it does not create a hazard for motorists on adjacent roads; and remand this case for trial.

Respectfully submitted this 6th 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 6, 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  <a href="mailto:cindi.port@kingcounty.gov">cindi.port@kingcounty.gov</a>                  David J. Hackett, WSBA #21236  <a href="mailto:david.hackett@kingcounty.gov">david.hackett@kingcounty.gov</a>                  John R. Zeldenrust, WSBA #19797  <a href="mailto:john.zeldenrust@kingcounty.gov">john.zeldenrust@kingcounty.gov</a>                  Senior Deputy Prosecuting Attorney                  900 King County Administration Bldg.                  500 Fourth Avenue                  Seattle, WA 98104  <b>Counsel for Defendant King County</b></p>	<p><input type="checkbox"/> Fed Ex  <input type="checkbox"/> Fax  <input type="checkbox"/> Legal messenger  <input checked="" type="checkbox"/> U.S. Mail and E-mail</p>
<p>Richard Lockner, WSBA #19664  <a href="mailto:lockner@524law.com">lockner@524law.com</a>                  Lockner &amp; Crowley                  524 Tacoma Avenue South                  Tacoma, WA 98402  <b>Counsel for Defendant Gilland</b></p>	<p><input type="checkbox"/> Fed Ex  <input type="checkbox"/> Fax  <input type="checkbox"/> Legal messenger  <input checked="" type="checkbox"/> U.S. Mail and E-mail</p>
<p>David C. Nordeen, WSBA #7716  <a href="mailto:dn@lawofficeofdavidnordeenpllc.com">dn@lawofficeofdavidnordeenpllc.com</a>                  613 W. 11<sup>th</sup> Ave.                  Vancouver, WA 98660  <b>Co-Counsel for Plaintiff Wuthrich</b></p>	<p><input type="checkbox"/> Fed Ex  <input type="checkbox"/> Fax  <input type="checkbox"/> Legal messenger  <input checked="" type="checkbox"/> U.S. Mail and E-mail</p>
<p>Brad J. Moore, WSBA #21802  <a href="mailto:brad@stritmatter.com">brad@stritmatter.com</a>                  200 Second Avenue West                  Seattle, WA 98119  <b>Co-Counsel for Plaintiff Wuthrich</b></p>	<p><input type="checkbox"/> Fed Ex  <input type="checkbox"/> Fax  <input type="checkbox"/> Legal messenger  <input checked="" type="checkbox"/> U.S. Mail and E-mail</p>
<p>Andrew Cooley, WSBA #15189  <a href="mailto:acooley@kbmlawyers.com">acooley@kbmlawyers.com</a>                  Derek Chen, WSBA #  <a href="mailto:dchen@kbmlawyers.com">dchen@kbmlawyers.com</a>                  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"/> U.S. Mail and E-mail</p>
<p>Bryan P. Harnetiaux, WSBA #5169  <a href="mailto:bryanpharnetiauxwsba@gmail.com">bryanpharnetiauxwsba@gmail.com</a>                  517 E. 17<sup>th</sup> Avenue                  Spokane, WA 99203</p>	<p><input type="checkbox"/> Fed Ex  <input type="checkbox"/> Fax  <input type="checkbox"/> Legal messenger  <input checked="" type="checkbox"/> U.S. Mail and E-mail</p>
<p>George M. Ahrend, WSBA #25160  <a href="mailto:gahrend@arendlaw.com">gahrend@arendlaw.com</a>                  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"/> U.S. Mail and E-mail</p>

  
 Kerry Fuller  
 Legal Assistant  
[kerryf@stritmatter.com](mailto:kerryf@stritmatter.com)

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Supreme Court No. 91555-5

SUPREME COURT OF THE STATE OF WASHINGTON

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GUY WUTHRICH,

Petitioner,

v.

KING COUNTY,

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER GUY WUTHRICH

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**Filed by:** Kerry Fuller, Legal Assistant, [kerryf@stritmatter.com](mailto:kerryf@stritmatter.com)

**On behalf of:** Ray W. Kahler, WSBA #26171  
Co-counsel for Plaintiff/Petitioner