

MEMORANDUM

DATE: October 1, 2013

TO: Mayors, City Administrators, City Managers, Human Resources Directors, and Risk Managers

FROM: Jaime Drozd Allen, Office of the City Attorney

RE: Washington Supreme Court Case Increasing Potential Liability for Municipalities for Negligent Road Design and Maintenance

I. INTRODUCTION

On August 8, 2013, the Washington State Supreme Court issued a decision in the case *Lowman v. Wilbur*. In its decision the Court expanded the potential liability for cities and utility companies for negligent road design. Below is a summary of the case and suggestions for our firm's municipal clients.

II. BACKGROUND

The case stemmed from a 2005 motor vehicle accident. Jennifer Wilbur and her passenger, Nathan Lowman, had been drinking at a bar. Wilbur was driving and Lowman was in the passenger's seat when after speeding down a steep, windy hill, they crashed into a utility pole in Anacortes. Wilbur was intoxicated at the time. Lowman suffered disfiguring injuries to his arm. Lowman brought suit against Wilbur, Skagit County, Puget Sound Energy ("PSE"), and others alleging, among other things, that PSE's utility pole was misplaced because it did not have enough clearance space from the road. Lowman's expert said that a ten foot clearance between the road and the utility pole is required and that there was only a four and one-half foot clearance in this case.

PSE and Skagit County moved for summary judgment dismissal based on the fact that the placement of the utility pole was not the "legal cause" of Lowman's injuries. In order to establish negligence, a plaintiff must prove (1) duty; (2) breach of duty; (3) causation; and, (4) damages. Within the causation prong, there must be both legal causation and proximate causation. Proximate causation is best described as being "but for" causation – "but for" defendant's negligence, plaintiff would not be injured. Legal causation is a policy determination as to how far the consequences of a defendant's acts should extend.

The superior court dismissed Lowman's claims against PSE and Skagit County for lack of legal causation. The appeals court affirmed the dismissal.

It was legal causation that was the sole issue before the Supreme Court.

III. DISCUSSION

The Supreme Court overruled the superior and appellate courts' dismissals. In creating potentially new liability for cities, the Supreme Court held that a city and utility company could be liable for negligent roadway design *regardless* of if the driver was at-fault or fault-free, or if the driver committed a criminal act. In other words, reasonable care is owed by a city to the public for roadway design, and the resulting injury can be tied to the city's negligent design *even if* the driver commits a criminal act or is otherwise at-fault.

While the Supreme Court did not hold that PSE or Skagit County were liable – it only held that they *could be* liable if Lowman's injuries were actually caused by the placement of the utility pole too close to the roadway - the Court expressed a policy preference that, *regardless of the reason for a car's departure from the roadway*, municipalities and companies be charged with maintaining utilities in "a reasonable fashion, particular with regard to safe travel on public roads." Seven of the justices signed on to the majority opinion.

The concurring opinion, authored by Chief Justice Barbara Madsen, disagreed with the majority only to clarify that legal causation is a separate inquiry and not necessarily found if cause in fact and duty are found. Chief Justice Madsen also acknowledged the difficulty in allowing recovery for negligent road design from a city or utility when there is an intoxicated driver, but balanced this with the need for cities to safely design their roads and the ability of the legislature to change the policy with regards to an intoxicated driver, if it desired.

The dissent, authored by Justice Charles Johnson, disagreed with the decision because legal causation is a policy determination; he wrote that the better policy is to not hold cities or utilities liable for an accident with an at-fault, intoxicated driver. He argued that taxpayers should not ultimately be responsible for the criminal conduct of an intoxicated driver.

III. CONCLUSION AND RECOMMENDATIONS

The decision in *Lowman* represents an expansion of potential liability for negligent roadway designs by allowing for there to be legal causation to establish negligence against a municipality, even where there is an at-fault driver.

The decision suggests that, at a bare minimum, cities can be held liable for the misplacement of utility poles on their roads. Beyond the specific fact situation, a city may be liable for negligent

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road design and/or maintenance regardless of the driver's fault or criminal actions. While the other elements of negligence would not necessarily be proven at trial, the *Lowman* decision will make early dismissal of these claims difficult to obtain.

Please contact your City Attorney with any questions or concerns regarding the above.