No. 47149-3-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

PAMELA O'NEILL

Plaintiff/Appellant,

v.

CITY OF PORT ORCHARD

Defendant/Respondent

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 1

A. Statement of Procedure 1

B. Statement of Facts 2

ARGUMENT 6

A. The Trial Court did not err in excluding the expert testimony of Plaintiff's Expert 6

1. Standard of Review 7

2. Plaintiff's Expert's Declaration is Speculation and Lacks Adequate Foundation ... 8

3. Plaintiff's Expert is Not Qualified to Testify as an Expert Regarding Road Design or Human Facts 10

4. Portions of Plaintiff's Expert Testimony Offers Legal Conclusions and Should Be Stricken 11

5. Plaintiff Does Not Show James Couch is Qualified as an Expert 12

B. The Trial Court Did Not Err in Its Determination that the Defendant Owed No Duty to Plaintiff 14

1. Standard of Review 14

a. Summary Judgment Standard of Review at the Trial Court 14

b. Summary Judgment Standard of Review at Appellate Review 15

2. The City Has a Duty to Maintain It's Roadways in a Condition that is Reasonably Safe for Ordinary Travel 16

a. A Municipality's Duty Generally 16

b. The Evidence of Asphalt Repairs on Sydney Avenue Does not impute Actual or Constructive Notice to the City 18

3. The Trial Court did not Err in Finding Plaintiff Assumed the Risk When Riding Down a Steep Roadway 19

4. Plaintiff's Injury Was Not Proximately Caused by Any Act or Omission of Defendant 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Washington

Acord v. Pettit, 174 Wn.App. 95, 111, 302 P.3d 1265 (2013) 10

Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 142 (1971) 15

Better Fin. Solutions, Inc. v. Trans Tech Elec., Inc., 112 Wn.App. 697, 702-03 (2002) 15

Camicia v. Howard S. Wright Const. Co., 179 Wn.2d 684, 317 P.3d 987 (2014) 22

Claar ex rel. Claar v. Auburn School Dist. No. 408, 126 Wn. App. 897, 902-03, 110 P.3d 767 (2005) 24, 25

Crowe v. Gaston, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998) 24

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60 (1988) 15

Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985) 24

In re Marriage of Katare, 175 Wash.2d 23, 38, 283 P.3d 546 (2012) 7, 10

Iwai v. State, 129 Wn.2d 84, 88, 915 P.2d 1089 (2001) 15

Jankelson v. Sisters of Charity, 17 Wn.2d 631, 643, 136 P.2d 720 (1943) 24

Jessee v. City Council of Dayton, 173 Wn. App. 410, 414, 293 P.3d 1290 (2013) 20, 23

Jewels v. City of Bellingham, 180 Wn. App. 605, 608, 324 P.3d 700, review granted, 181 Wn.2d 1001, 332 P.3d 985 (2014) and aff'd, No. 90319-1, 2015 WL 3643478 (Wash. June 11, 2015). 13, 14

Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 352, 333 P.3d 388 (2014) 7

Keller v. City of Spokane, 146 Wn.2d 237, 254, 44 P.3d 845, 854 (2002) 16, 17
Kill v. City of Seattle, 183 Wn. App. 1008 (2014) 7
Kim v. Budget Rent-A-Car Systems, Inc., 143 Wn.2d 190, 204, 15 P.3d 1283 24
Kirk v. Washington State Univ., 109 Wn.2d 448, 746 P.2d 285 (1987) 21
Laguna v. Wash. State Dep't of Transp., 146 Wn.App. 260, 263, 192 P.3d 374 (2008) 17
Leroy v. State, 124 Wn.App. 65, 98 P.3d 819 (2004) 17
Lybbert v. Grant Cnty., State of Wash., 141 Wn.2d 29, 34, 1 P.3d 1124 (2000) 16
Marshall v. Bally's Pacwest, Inc., 94 Wn. App. 372, 381, 972 P.2d 475, 479 (1999) 15
McKee v. City of Edmonds, 54 Wn. App. 265, 268, 773 P.2d 434, 436 (1989) 17
Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) 7, 8, 9
Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010) 7
Nguyen v. City of Seattle, 179 Wn. App. 155, 164-65, 317 P.3d 518 (2014) 17
Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220, 1223 (2005) 16
Owens v. City of Seattle, 49 Wn.2d 187, 191, 299 P.2d 560, 562 (1956) 16
Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 103, 882 P.2d 703 (1994) 8
Rasmussen v. Bendotti, 107 Wn. App. 947, 959, 39 P.3d 56 (2001) 24
Roger Crain & Assocs., Inc. v. Felice, 74 Wn. App. 769, 778-79, 875 P.2d 705 (1994) 15
Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) 16
Scott By & Through Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 496, 834 P.2d 6, (1992) 20, 21
Seven Gables Corp. v. MGM/UA Entm't. Co., 106 Wn.2d, 1, 13 (1986) 15
State v. McPherson, 111 Wn. App. 747, 761, 46 P.3d 284 (2002) 8
Stout v. Warren, 176 Wn.2d 263, 279, 290 P.3d 972 (2012) 20
Taylor v. Baseball Club of Seattle, L.P., 132 Wn. App. 32, 130 P.3d 835 (2006) 21
Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 875 P.2d 621 (1994) 20
Tortes v. King Cnty., 119 Wn. App. 1, 12, 84 P.3d 252 (2003) 11, 12
W. v. Thurston Cnty., 168 Wn. App. 162, 184, n. 22, 275 P.3d 1200 (2012) 14, 23
Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 123 Wn.2d 891, 897, 874 P.2d 142 (1994) 16

Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 (1989) 15

Federal

Spence v. United States, 374 F. App'x 717 (9th Cir. 2010) 22

Other States

Buchan v. United States Cycling Fed'n. Inc., 227 Cal. App. 3d 134, 277 Cal. Rptr. 887 (Ct. App. 1991) 22

Childs v. Cnty. of Santa Barbara, 115 Cal. App. 4th 64, 8 Cal. Rptr. 3d 823 (2004) 23

Cole v. City of East Peoria, 201 Ill. App.3d 756, 559 N.E.2d 769 (1990) 14

Connelly v. Mammoth Mountain Ski Area, 39 Cal. App. 4th 8, 45 Cal. Rptr. 2d 855 (1995), as modified (Oct. 17, 1995) 22

Cotty v. Town of Southampton, 64 A.D.3d 251, 880 N.Y.S.2d 656 (2009) 23

Knight v. Jewett, 3 Cal. 4th 296, 834 P.2d 696 (1992) 22

Koffler v. City of Huntington, 196 W. Va. 202, 469 S.E.2d 645 (1996) 14

Moffat v. U.S. Foundry & Mfg. Corp., 551 So. 2d 592 (Fla. Dist. Ct. App. 1989) 14

Moser v. Ratinoff, 105 Cal. App. 4th 1211, 130 Cal. Rptr. 2d 198 (2003) 22

STATUTES AND COURT RULES

CR 56 .... 1, 15, 16

ER 702 12

ER 704 .... 11, 12

RCW 46.61.755 17

TREATISES

16 Wash. Prac., Tort Law And Practice § 9:11 (4th ed.) 20

Prosser & Keeton on the Law of Torts, 5th ed., § 68 20

Wash. Pattern Jury Instructions Civil WPI 13.03 (6th ed.) 20

Wash. Pattern Jury Instructions Civil WPI 13.03 WPI 140.02 (6th ed.) 18, 19

INTRODUCTION

Plaintiff Pamela O'Neill fell while riding her bicycle in the City of Port Orchard, Washington. Ms. O'Neill was riding down a steep road, lost control of her bicycle, and was injured in the fall. Ms. O'Neill brought action in the Superior Court of the State of Washington for the County of Kitsap claiming that Defendant City of Port Orchard was negligent.

Defendant moved for summary judgment under CR 56. The Superior Court properly granted Defendant's Motion for Summary Judgment Dismissal and this Court should affirm the dismissal of Plaintiff's Complaint.

STATEMENT OF THE CASE

A. Statement of Procedure

Plaintiff filed her complaint in the Superior Court of the State of Washington County of Kitsap on July 16, 2012. (CP 1-7). Defendant moved for summary judgment dismissal of Plaintiff's claims. (CP 13-14). On December 1, 2014, the Honorable Judge Jay B. Roof issued a Findings of Fact, Conclusions of Law and Order on Defendant's Motion for Summary Judgment. (CP 141-147). Judge Roof found that Plaintiff's expert witness, James Couch, provided no evidence he was "qualified to provide competent expert testimony regarding bicycle reconstruction, road design, or road signage requirements and how the human body reacts to such visual signage." (CP 144). Accordingly, Judge Roof excluded Mr. Couch's declaration and expert testimony. Id.

Judge Roof further found that without Mr. Couch's testimony, Plaintiff "failed to rebut the City of Port Orchard's initial showing of the absence of a genuine dispute to any materials of fact." Id. Judge Roof stated that Defendant's duty of ordinary care to all persons to build and maintain its roadways in a condition that is reasonably safe for ordinary travel is conditional on the City

having notice, and the opportunity to correct, any hazard that may present itself in the roadway. Id. Because the City had never received a complaint from a bicyclist regarding the conditions of its roadways, the City had no notice of any alleged hazards, and therefore, the City's duty of ordinary care was never invoked. Id.

Furthermore, the Judge stated that "the doctrine of primary implied assumption of risk operates as a complete bar to recovery by defining whether or not the defendant had a duty to the plaintiff in the first place." Id. It was found that Plaintiff "had a full understanding of the presence and nature of the risks involved in biking down a steep hill and biking over uneven ground or loose gravel, and chose to encounter these inherent risks of biking anyway." (CP 145). Defendant has no duty to protect a bicyclist from the "dangers which are inherent to and a normal part of the sport of biking." Id. Plaintiff impliedly consented to assume the duty of ordinary care when choosing to ride her bike, which in turn relieved Defendant of the duty to protect Plaintiff from the dangers inherent to the sport of biking. Id. Judge Roof ruled Plaintiff "assumed the risks inherent in biking when she chose to ride her bicycle down the steep hill on Sydney Avenue despite observing warning signs on the incline, and also observing the road conditions, and thus is completely barred from recovery as a matter of law." Id. Judge Roof ordered Defendant's Motion for Summary Judgment Dismissal granted and dismissed Plaintiff's claims with prejudice. (CP 146).

Plaintiff filed a Motion for Reconsideration, which was denied on December 18, 2014. See (CP 148, 161). Plaintiff then filed a Notice of Appeal to Court of Appeals on January 20, 2015. (CP 162). This brief is in response to the Brief of Appellant received by Defendant on June 12, 2015.

B. Statement of Facts

Plaintiff Pamela O'Neill was injured when she lost control of her bicycle while riding northbound on Sidney Avenue in Port Orchard, Washington as she headed home from work. (CP 34). Initially, Plaintiff reported that she fell while going down a hill and hitting loose gravel. (CP 30). Subsequently, in her deposition testimony, she changed her version of events, alleging that she was thrown from her bicycle because her front tire suddenly changed directions because of the uneven surface of the roadway. (CP 35). However, it is important to note that in the moments leading up to Plaintiff's fall, there were six to twelve vehicles in her vicinity, and the far right of the lane had vehicles legally parked next to the curb. Id. Plaintiff was traveling down Sidney Avenue between those parked cars on her right and the other motor vehicles sharing the roadway to her left. Id. In particular, there was a pickup truck to her left that was in the process of overtaking her when she fell. Id. Plaintiff concedes that riding her bike on the city streets is essentially a free for all with cars traveling on the same street. (CP 36). She further states that the driver of a motorized vehicle makes it scary for a cyclist because the cyclist cannot control what the cars do. Id.

Plaintiff is a skilled cyclist. (CP 36). She is familiar with the roads around Port Orchard as she rides her bike daily and sometimes multiple times per day. Id. On the day of the incident, it was the first time she had ridden her bike through the intersection where the fall occurred. (CP 37). Plaintiff had no prior knowledge of the street conditions of the intersection or any knowledge of whether this particular intersection had any reputation for an uneven street surface prior to her fall. (CP 38). In her deposition, Plaintiff was not clearly able to articulate what exact defect caused her fall. To illustrate this, Defendant points to the Plaintiff's Deposition:

> Q: Now can you describe what you remember happening specifically to your bicycle?
>
> A: It, the front tire, changed directions, and I was projected over the handle bars.

(CP 93, Deposition of Pamela O'Neill, pg. 19-20.)

Next, when looking at Exhibit 4 of the Plaintiff's Deposition, Plaintiff states:

Q: Please identify where you believe the point in the road where your tire changed direction causing you supposedly fall?
A: (witness complies)
Q: The record reflects she marked an X on Exhibit 4. Is it fair to say that point caused you to fall?
A: No.
Q: What caused you to fall?
A: The condition of the change of the road leading up to that area.

(CP 94, Deposition of Pamela O'Neill, pg. 23.)

Plaintiff appears unable to clearly identify a defect in the roadway and where such defect was located. Plaintiff again struggles with such identification later in the transcript, but does come to a belief it was now a single location:

Q: So it wasn't this particular spot marked by an X on Exhibit 4 that caused you to fall, it was the rough road condition?
A: At that intersection, the road conditions are damaged. The road prior to that intersection is smooth. At that intersection, it is uneven, lots of variation in the condition of the road.
Q: But it wasn't on specific point?
A: It was.

(CP 94, Deposition of Pamela O'Neill, pg. 24.)

While at first being unable to identify what caused her to fall in her deposition, Plaintiff changed her opinion and could identify a particular location. Nonetheless, Plaintiff again becomes indecisive in identifying what caused her to fall:

Q: I'm not trying to mischaracterize your testimony; I'm simply trying to understand. It was not one particular spot in the road that caused you to fall, it was the change that resulted from patch work that had been done on the intersection?
A: The conditions went from bad to worse going down towards downhill.
Q: Okay. So what was it particularly about the conditions that made them bad?
A: Uneven, loose gravel, wider space.

. . .

Q: Is it fair to say, though, that you cannot identify one specific defect in the road that caused you to fall?
A: I can say that there is the spot where my tire changed direction, causing me to fall on my bike.

(CP 95, Deposition of Pamela O'Neill, pg. 26-27.)

There is more evidence further in Plaintiff's deposition that shows Plaintiff is unable to identify what the alleged defect was in the roadway that caused her bike to suddenly turn. As an example, further in the deposition:

Q: You said your tire changed directions. How did this uneven condition cause your tire to change directions?
A: I don't know.

(CP 37, 95, Deposition of Pamela O'Neill, pg. 28-29.)

Finally, Plaintiff even admits at the time of the accident, she did not know what caused the fall. It was only after she returned to the scene of the accident, that she herself could perhaps speculate about what may have caused her bike to suddenly change directions:

Q: At the time you talked to the doctors, when they asked what you fell on, had you been back to the scene to see why you fell?
A: No.
Q: When did you go back to the scene to see why you fell?
A: A couple of weeks, a month; a couple of weeks.
Q: And why did you go back?
A: I had wanted to see why I fell.

(CP 101, Deposition of Pamela O'Neill, pg. 64-65.)

Plaintiff's own deposition testimony is indecisive and it appears that she cannot specifically point to what particular condition or defect in the roadway caused her bicycle to suddenly turn, other than the fact that she was traveling downhill, through an intersection, and something caused her bicycle to turn when she fell off her bicycle.

Plaintiff had previously been prescribed eyeglasses to wear full time but she was not wearing the eyeglasses at the time of her fall. (CP 39). Even without her eyeglasses, Plaintiff did

notice the warning sign indicating Sidney Avenue would be sloping downward as she approached and that she would need to use caution. (CP 40).

Defendant City of Port Orchard has never received a complaint from a bicyclist regarding the intersection of Sidney Avenue and Kitsap Street. (CP 44). In fact, the City has never received a single complaint from a bicyclist concerning its street conditions. (CP 45). The City does not have a specific bike maintenance program to maintain bike lanes, but does maintain streets and sidewalks as its resources allow. (CP 45, 114). Although there is a steeper grade on Sidney Avenue than the current building code allows, the Avenue's existence prior to the adoption of the current code allows it to be in compliance. (CP 47, 109, 112).

As will be discussed *infra* in this brief, all expert opinions and factual statements cited in Appellant's briefing derived from Plaintiff's expert James Couch should be stricken, because the trial court did not err in excluding his expert testimony as he was not qualified to make the statements and conclusions to which Plaintiff cites.

Plaintiff's fall on Sidney Avenue was not due to the City's negligence. Plaintiff has provided no evidence of negligence by Defendant. Plaintiff cannot point to a particular defect that caused her injury. Plaintiff does not provide any evidence that the City had notice of any defect in the intersection where the fall occurred. Accordingly, the trial court did not err in granting summary judgment for Defendant and dismissing Plaintiff's complaint.

ARGUMENT

A. The Trial Court did not err in excluding the expert testimony of Plaintiff's Expert

The trial court excluded the expert testimony and opinions of James Couch. The court found that Mr. Couch did not provide any evidence that he was qualified to provide competent expert testimony regarding bicycle accident reconstruction, road design, or road signage

requirements and how the human body reacts to such visual signage. (CP 114). The trial court did not err in the exclusion Mr. Couch's testimony contained in his declaration in opposition to Defendant's summary judgment motion.

1. **Standard of Review**

In her appellate briefing, Plaintiff argues the exclusion of Mr. Couch's declaration should be reviewed de novo. In support of that contention, Plaintiff cites Kill v. City of Seattle, 183 Wn. App. 1008 (2014). However, Kill, is an unpublished opinion, and pursuant to GR 14.1(a), "a party may not cite as an authority an unpublished opinion of the Court of Appeals." Plaintiff fails to identify that Kill is an unpublished opinion in her citation. See (Brief of Appellant pg. 32-33). Accordingly, this Court should not consider Plaintiff's argument that the exclusion of James Couch's testimony should be reviewed de novo because Plaintiff cites no binding legal authority.

Opposing Plaintiff's argument, this Court should review the exclusion of Mr. Couch's expert testimony at an abuse of discretion standard:

> Generally, expert testimony is admissible if: (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact. In applying this test, trial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion.

Johnston-Forbes v. Matsunaga, 181 Wn. 2d 346, 352, 333 P.3d 388 (2014) (citing In re Marriage of Katare, 175 Wash.2d 23, 38, 283 P.3d 546 (2012)), see also, Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (the court of appeals will not disturb the trial court's ruling if the reasons for admitting or excluding the opinion is fairly debatable), Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010) (expert opinions stricken on summary judgment were reviewed at the same standard as advanced in Miller, 109 Wn. App. at 148).

Here, this Court should review the exclusion of James Couch's declaration at an abuse of discretion standard. However, assuming, *arguendo*, this Court does elect to review the exclusion of James Couch's expert opinion at a de novo standard, this Court should find that the trial court did not err in excluding his opinion because Mr. Couch is not qualified to provide the testimony and opinions stated in his declaration.

2. Plaintiff's Expert's Declaration is Speculation and Lacks Adequate Foundation

Plaintiff submits the "Declaration of James Couch" as evidence from an expert witness. Washington Rules of Evidence state "a witness is qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. The court asks two questions when applying this rule: "(1) does the witness qualify as an expert, and (2) would the witness's testimony be helpful to the trier of fact." State v. McPherson, 111 Wn.App. 747, 761, 46 P.3d 284 (2002). "Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded." Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 103, 882 P.2d 703 (1994). As the Court of Appeals has stated, "[i]t is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." Miller v. Likins, 109 Wn.App. 140, 148, 34 P.3d 835 (2012).

For example, in Miller, an expert's opinion about where the actual accident occurred was properly stricken from the record. See 109 Wn.App. at 149. The Miller court found that his opinion was speculative and lacked an adequate factual basis because the expert did not "perform a quantitative analysis to support his version of the facts of the accident." Id. The expert "testified that he had no way of determining where the point of impact in this accident occurred." Id.

Here, Mr. Couch makes the factual conclusion that Plaintiff's bicycle engaged the defect between two concrete slabs that ran parallel to Plaintiff's direction of travel. See (CP 124D). Upon this happening, the Declaration continues that Plaintiff's bike was turned to the side and she fell. Id. This opinion is in conflict with testimony provided by Plaintiff in her deposition. (See CP 94). Plaintiff believes it was the changes in the road condition that caused her fall. Id. She never states in her deposition that her tire became caught in a void, gap, or separation between any concrete slabs. Further, Plaintiff cannot provide a clear identification of what defect actually caused her to fall, as was discussed in this brief's Statement of Facts. Mr. Couch's inferences in his report on what caused Plaintiff to fall are not supported by any factual statement made by Plaintiff. Also, similar to Miller, Mr. Couch performed no quantitative analysis as to what may have caused Plaintiff's fall nor does Mr. Couch have the training or expertise to perform such quantitative analyses.

Additionally, Mr. Couch makes factual statements that are not supported by any evidence in the record. Mr. Couch states that "the slabs in question are separated from each other by a distance that varies, from 2 to 6 inches, and one as wide as 11 inches." See (CP 124C). Mr. Couch provides no supplemental exhibits to support such statement. In contrast, photographs in Plaintiff's declarations only show, at best, differences in the elevation of the slabs in the amount of one inch, and separation in the amount of approximately two, possibly three inches. See (CP 122-124). In fact, James Couch provides none of this own exhibits showing the distance between any concrete slabs with any sort of measuring tool in his declaration. The distance between the concrete slabs appears to be overstated and not quantitatively determined with an accurate measuring tool.

Mr. Couch also states that Defendant "was aware, or should have been aware, of this defect as evidenced by some prior attempts to repair the defect." See (CP 125D). Mr. Couch again is making a factual statement of what notice the City may have been provided regarding the condition of the roadway. This statement is pure speculation by Mr. Couch.

Mr. Couch's factual statements and his conclusion gleamed from them are purely speculative in nature and should be stricken by this Court.

3. Plaintiff's Expert is Not Qualified to Testify as an Expert Regarding Road Design or Human Facts

In order to be an expert witness, the expert must be qualified to offer the opinion. See Acord v. Pettit, 174 Wn.App. 95, 111, 302 P.3d 1265 (2013). "An expert may not testify about information outside his area of expertise." Katare v. Katare, 175 Wn.2d 23, 38, 283 P.3d 546 (2012).

Here, Plaintiff's expert Mr. Couch offers conclusory statements that are outside the purview of a bicycle expert witness. The first is Mr. Couch's statements regarding road design. Mr. Couch states that "there is no signage warning cyclists that there are significant risks along this route." (CP 125D). Mr. Couch also states that "in my entire career as a bicycle expert, I have seen only a few hazards as pernicious as the pavement defect located near the intersection of Sidney Avenue and Kitsap Boulevard in Port Orchard, WA." Besides the fact that his statement regarding the absence of roadway signs is factually inaccurate, Mr. Couch's statement could only be made by a road design expert. See (CP 40.) Mr. Couch has no training in roadway design, construction, or maintenance, or training on required road signage, or how a person might perceive the road signage. He is not qualified to make such statements as they are outside his area of expertise. Any statement regarding his opinion of City of Port Orchard's roadways, conditions of the roadways, and signage of the roadways should be stricken.

Secondly, Mr. Couch makes statements regarding human factors and what defects a person may be able, or unable, to see and the difficulties of seeing such defects. Mr. Couch states, "moreover, the defect is difficult for a cyclist to see." Defects that run nearly parallel to the direction of travel as opposed to those that run perpendicular to the direction of travel such as pot holes, for example, are very difficult for a cyclist to see while they are cycling." See (CP 124C-D). Mr. Couch has no expertise on what a person can and/or cannot see and how the direction of a defect might affect a person's visual sensory abilities. Mr. Couch has no training or experience as a human factors expert. Again, he is also speculating on what Plaintiff may or may not have seen as she rode her bicycle.

Finally, Mr. Couch provides no quantitative analysis to show what Plaintiff saw. These statements regarding how orientation of a defect affects a person's visual sensory ability are best left for a human factors expert and are outside Mr. Couch's area of expertise.

For the above reasons, while Mr. Couch may be an expert in bicycle retail shop ownership, Mr. Couch's statements are clearly outside his area of expertise and the trial court did not err in striking his entire declaration from the record.

4. Portions of Plaintiff's Expert Testimony Offers Legal Conclusions and Should Be Stricken

Washington Rule of Evidence, ER 704 states: "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. However, "experts may not offer opinions of law in the guise of expert testimony." Tortes v. King Cnty., 119 Wn. App. 1, 12, 84 P.3d 252 (2003). The expert's opinion must be applicable to the specific facts of the case. Id.

In Tortes, an expert witness claimed to be an expert on security and law enforcement. Id. at 13. The witness never claimed to have any expertise regarding the standard of care owed by

public transit drivers. Id. The appeals court found that the opinions he gave pertaining to the foreseeability of events and whether the transit authority took proper measures was outside the "area of expertise." Id. Further, the court found that his "statements [were] conclusions of law, which offer legal opinions on the ultimate legal issue, and therefore were not proper testimony under ER 702 and 704." Id.

Similarly here, Mr. Couch is offering legal opinions on the ultimate legal issue, whether Defendant was negligent in its maintenance of its roadways. While Mr. Couch never makes a conclusory statement regarding whether it is his belief the City was negligent, his Declaration makes such inferences. For instance:

> 23. Once the front tire of Plaintiff Pamela O'Neill bicycle engages the defect, the defect in essence steers the bike, causing a loss of control and crash.
>
> . . .
>
> 25. The City of Port Orchard was aware, or should have been aware of this defect as evidenced by some prior attempts to repair the defect.
>
> . . .
>
> 30. In my entire career as a bicycle expert, I have seen only a few hazards as pernicious as the pavement defect located near the intersection of Sidney Avenue and Kitsap Boulevard in Port Orchard, WA.

(CP 124D).

Besides making factual determinations in which Mr. Couch has no personal knowledge, such as how Plaintiff fell and what notice the City of Port Orchard had of the condition of the roadway, Mr. Couch cannot comment on the ultimate legal issue as to whether the City of Port Orchard was negligent. Here, Mr. Couch makes such inference that the City of Port Orchard was negligent in the maintenance of its roadways. For this reason, his opinion on the ultimate legal issue should be stricken.

5. Plaintiff Does Not Show James Couch is Qualified as an Expert

Plaintiff goes to great lengths in her briefing to attempt to show James Couch's seventeen years in the bicycle industry qualifies him to provide the testimony in his declaration. Defendant has no reason to dispute that he has training in selling and fitting bicycles, coaching bicyclists, and providing support to organized rides. However, none of this training qualifies him to offer opinions on road maintenance and design, human factors, or bicycle accident reconstruction.

Further, Plaintiff even concedes that Mr. Couch does not provide the nature of his testimony in his given list of previous retainage as an expert. See (Appellant's Brief pg. 31). The fact that Mr. Couch personally observed the site of the incident would not provide a finder of fact any additional information that could not be observed by any layperson. The facts remain that Mr. Couch has no engineering training whatsoever, nor does his report use any of his measurements to show how the accident might have occurred with mathematical probability or mechanisms. Mr. Couch is not qualified to provide the opinions found in his report.

Additionally, Plaintiff's cited cases are either distinguishable or have no legal precedent in Washington Courts. In Jewels v. City of Bellingham, a bicyclist was injured when he struck a water diverter that had been constructed in a roadway next to a speed bump. Jewels v. City of Bellingham, 180 Wn. App. 605, 608, 324 P.3d 700, review granted, 181 Wn.2d 1001, 332 P.3d 985 (2014) and aff'd, No. 90319-1, 2015 WL 3643478 (Wash. June 11, 2015). The case did not turn on whether the roadway was reasonably maintained for a bicyclist but rather whether the city was immune because of the recreational land use statute and whether the city had actual knowledge of any dangerous latent condition. Id. at 612. The Jewels court answered both questions in the negative, and the city was found not at fault. Id. The Jewels case is also distinguishable because the defect in the roadway, the water diverter, was affirmatively placed there by the city to divert storm water. Here, there is no evidence that Defendant affirmatively placed anything on Sidney

Avenue that would be hazardous to a user of the roadway. Because of this distinction, the Jewels decision is not informative to the case at hand.

Plaintiff continues to cite cases that have no legal binding precedent on Washington Courts. Plaintiff cites cases from an Illinois[1] court, West Virginia[2] court, and a Florida[3] court, but none have precedent on Washington Courts and are all factual distinguishable as they deal with sewer drain grates and not the pavement condition of the roadway's surface. See (Appellant's Brief pg. 35); see also W. v. Thurston Cnty., 168 Wn. App. 162, 184, n. 22, 275 P.3d 1200 (2012) (citations omitted) ("But other states' decisions are not binding on us"). Also, none of these authorities demonstrate how Mr. Couch may be a qualified expert to provide testimony in this particular matter.

In sum, Plaintiff expert, James Couch, is not qualified to provide the testimony in his declaration because he has no expertise in the areas of his opinions. Plaintiff does not provide any legal authority to demonstrate why Mr. Couch may be qualified to offer such opinions. Because of these facts, the trial court did not err in finding that he was not "qualified to provide competent expert testimony regarding bicycle reconstruction, road design, or road signage requirements and how the human body reacts to such visual signage." (CP 144).

B. The Trial Court Did Not Err in Its Determination that the Defendant Owed No Duty to Plaintiff

1. Standard of Review

a. Summary Judgment Standard of Review at the Trial Court

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[1] Cole v. City of East Peoria, 201 Ill. App.3d 756, 559 N.E.2d 769 (1990), court determined whether a city was aware of a danger condition created by a storm water grate (emphasis added).

[2] Koffler v. City of Huntington, 196 W. Va. 202, 469 S.E.2d 645 (1996), bicyclist brought suit against city for personal injuries received when bicycle tire dropped between slats of storm drain grate in center of alley (emphasis added).

[3] Moffat v. U.S. Foundry & Mfg. Corp., 551 So. 2d 592 (Fla. Dist. Ct. App. 1989) a products liability case where a mother of injured bicyclist brought action against a manufacturer of drainage grate which child was trying to avoid when struck by automobile while crossing bridge (emphasis added).

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 (1989). The burden is on the moving party for summary judgment to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him. Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 142 (1971). The facts required by CR 56(e) are evidentiary in nature, and ultimate facts or conclusions of facts are insufficient. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60 (1988). A non-moving party in a summary judgment cannot rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the non-moving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. Seven Gables Corp. v. MGM/UA Entm't. Co., 106 Wn.2d, 1, 13 (1986). Summary judgment is proper when the only question before the Court is one of law. Better Fin. Solutions, Inc. v. Trans Tech Elec., Inc., 112 Wn.App. 697, 702-03 (2002).

To raise a genuine issue for trial, evidentiary facts as to "what took place, an act, an incident, a reality as distinguished from supposition or opinion" must be alleged. Roger Crain & Assocs., Inc. v. Felice, 74 Wn.App. 769, 778-79, 875 P.2d 705 (1994). The non-moving party must provide more than uncorroborated statements in a complaint. See, e.g., Iwai v. State, 129 Wn.2d 84, 88, 915 P.2d 1089 (2001). "A claim of liability resting only on a speculative theory will not survive summary judgment." Marshall v. Bally's Pacwest, Inc., 94 Wn.App. 372, 381, 972 P.2d 475, 479 (1999).

b. Summary Judgment Standard of Review at Appellate Review

On an appeal of a summary judgment, the standard of review is de novo. Lybbert v. Grant Cnty., State of Wash., 141 Wn.2d 29, 34, 1 P.3d 1124 (2000) (citations omitted). The appellate court performs the same inquiry as the trial court. Id. When ruling on a summary judgment motion, the appellate court views all facts and reasonable inference therefrom most favorably toward the nonmoving party. Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 123 Wn.2d 891, 897, 874 P.2d 142 (1994). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Lybbert, 141 Wn.2d at 34 (citing Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); see also CR 56(c)).

2. The City Has a Duty to Maintain It's Roadways in a Condition that is Reasonably Safe for Ordinary Travel

a. A Municipality's Duty Generally

Generally, a city has a duty to exercise ordinary care in its construction, repair, and maintenance of its public roads to keep them in a reasonably safe condition for ordinary travel. Keller v. City of Spokane, 146 Wn.2d 237, 254, 44 P.3d 845, 854 (2002). However, this duty is not one of strict liability. Governmental entities are held to the same negligence standard as private individuals. Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220, 1223 (2005). The duty of care owed by a municipality does not require streets to be maintained "in ideal traveling condition, nor to guard the traveling public from such normal hazards as small depressions in the surface of the roadway or ordinary puddles of water in the street." Owens v. City of Seattle, 49 Wn. 2d 187, 191, 299 P.2d 560, 562 (1956). It follows:

> Municipalities are responsible for maintaining thousands of miles of public highways and roads which have great social utility and are absolutely indispensable to the best interests of the public at large. It is impossible for these roads and highways to be maintained in perfect condition, and the fact that there are potholes and defects in roadways are matters widely known to the public.

McKee v. City of Edmonds, 54 Wn. App. 265, 268, 773 P.2d 434, 436 (1989).

Additionally, the duty to maintain streets in a condition that is reasonably safe for ordinary travel is conditional. Leroy v. State, 124 Wn.App. 65, 98 P.3d 819 (2004). The duty arises only when the municipality has notice, and time to correct the hazard. Id. In short, the state "'must have (a) notice of a dangerous condition which it did not create, and (b) a reasonable opportunity to correct it before liability arises for negligence from neglect of duty to keep the streets safe.'" Nguyen v. City of Seattle, 179 Wn. App. 155, 164-65, 317 P.3d 518 (2014) (quoting Laguna v. Wash. State Dep't of Transp., 146 Wn. App. 260, 263, 192 P.3d 374 (2008).

Bicyclists are granted the rights to use and are subject to all duties that drivers of vehicles must abide by:

> Every person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this chapter . . . .
>
> RCW 46.61.755.

However, this statute refers to the traffic laws of the state and the responsibilities that drivers must follow when using the roadways. Bicyclists must use the roadway and follow the traffic laws as any other vehicle using the roadway would be required to follow. See RCW 46.61.755. This statute should not be interpreted to create an additional duty for municipalities to maintain roadways in a reasonably safe condition specifically *for a bicyclist*. A municipality's duty should extend only to the rule advanced in Keller: a city has a duty to exercise ordinary care in its construction, repair, and maintenance of its public roads to keep them in a reasonably safe condition for ordinary travel. See Keller, 146 Wn.2d at 254.

Here, Plaintiff does not provide any legal authority of any duty owed by Defendant beyond the general duty to keep roadways reasonably safe for ordinary travel. Sydney Avenue is traveled by cars, trucks, motorcycles, and bicyclists every day.

Plaintiff provided no evidence that anyone has ever notified the Defendant that there were alleged hazards on Sydney Avenue near the site of the incident that made the road unsafe for ordinary travel regardless of the mode of transportation. There is no evidence to establish that the street Plaintiff was riding her bike on was unreasonably dangerous. The fact that Plaintiff fell and suffered a resulting injury does not impute liability on Defendant. Her conclusion that the street was somehow unreasonably dangerous amounts to nothing more than speculation. Because the City had no notice of any defective condition of the roadway where Plaintiff fell, and there is no evidence that the street was not reasonably safe for ordinary travel, the trial court did not err in its findings.

b. The Evidence of Asphalt Repairs on Sydney Avenue Does not impute Actual or Constructive Notice to the City

Despite Plaintiff's contentions that evidence of repairs on Sydney Avenue imputes notice to the City of the roadway's defective condition, it is an undisputed fact that the City has never received a complaint regarding the roadway near where the incident occurred nor has the City ever received a complaint from a bicyclist regarding the conditions of its roadways.

Plaintiff argues that evidence of asphalt repairs on Sydney Avenue is evidence that the City had actual or constructive notice of the defective roadway. See (Appellant's Brief pg. 30). In support of this contention, Plaintiff cites WPI 140.02:

> In order to find a city liable for an unsafe condition of a street 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 city 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 city 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.

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 140.02 (6th ed.)

Here, other than the expert testimony advanced by Plaintiff (which this Court should strike), there is no evidence that the City or its employees or agents had any notice of an unsafe condition of the roadway. While Plaintiff's photographs demonstrate the road is no longer in a perfectly smooth condition, the evidence in the record also demonstrates that no one has ever complained about its condition or complained they felt unsafe using the roadway. There is no evidence that the City "should have discovered" any defective condition. Plaintiff advances the proposition that "constructive notice may be inferred from the lapse of time a dangerous condition is permitted to continue," however, Plaintiff cannot establish any evidence the roadway was maintained in a dangerous condition. Finally, Plaintiff provides no evidence from any other qualified expert that the road was maintained or constructed in an unsafe manner.

For the above reasons, the trial court did not err in finding that City's duty to maintain its roadways in a reasonable safe condition for ordinary travel was conditional on having notice of a defective condition—and there was no evidence that a defective condition ever existed.

3. The Trial Court Did Not Err in Finding Plaintiff Assumed the Risk When Riding Down a Steep Roadway

Assuming this Court finds there is a question of fact regarding whether the City was negligent in its maintenance of its roadways, the doctrine of assumption of risk bars Plaintiff from recovery. Assumption of risk in its simplest form means that prior to the incident, a plaintiff gave her consent to relieve the defendant of an obligation of conduct toward her; a plaintiff agrees to

assume "a chance of injury from a known risk arising from the obligation for which the defendant has been relieved." 16 Wash. Prac., Tort Law And Practice § 9:11 (4th ed.) (citing Prosser & Keeton on the Law of Torts, 5th ed., § 68).

The traditional assumption of risk doctrine is divided into four categories: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable. Scott By & Through Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 496, 834 P.2d 6 (1992). Express assumption of risk occurs when both parties, in advance, agree neither is under any obligation to use reasonable care for the benefit of the other. Id. Implied primary assumption of risk occurs when the plaintiff, often in advance, impliedly consents to relieve the defendant of a known and appreciated risk. Id. The last two categories of assumption of risk have been subsumed into comparative negligence. Id. If there is either express or implied primary assumption of risk, it is a complete bar to recovery. Stout v. Warren, 176 Wn.2d 263, 279, 290 P.3d 972 (2012) (citing Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 875 P.2d 621 (1994)).

Here, the Court is faced with the question of implied primary assumption of the risk. The question is whether the plaintiff appreciated the risk of injury and, nonetheless, voluntary chose to encounter that risk. Jessee v. City Council of Dayton, 173 Wn. App. 410, 414, 293 P.3d 1290 (2013); see also Wash. Pattern Jury Instructions Civil WPI 13.03 (6th ed.).[4] Further, it is well established that "one who participates in sports 'assumes the risks' which are inherent in the sport." Scott By & Through Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 498, 834 P.2d 6, 13 (1992).

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[4] WPI 13.03:

> It is a defense to an action for personal injury that the person injured impliedly assumed a specific risk of harm.
>
> A person impliedly assumes a risk of harm if that person knows of the specific risk associated with an activity, understands its nature, voluntarily chooses to accept the risk by engaging in that activity, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.

In this case, Plaintiff voluntarily chose to accept the risks involved in riding a bicycle. She was aware of the signage providing warning of the steep grade. She knowingly traveled on a route she was unfamiliar with. She is a skilled rider and understands road conditions are never perfect. She rode her bicycle almost every day and was aware she shared the road with other motor vehicles.

Because Plaintiff affirmatively chose this route with a steep grade, was aware that this was a previously untraveled route, was familiar with her bicycle and the risks (including falling) inherent in the activity, she assumed the risk of riding down Sidney Avenue and is solely responsible for the injuries resulting from her fall.

Plaintiff attempts to distinguish this incident from other analyses done in similar implied primary assumption cases by stating that in Taylor v. Baseball Club of Seattle[5], Kirk v. Washington State University[6], and Scott By and Through Scott v. Pacific West Mountain Resort[7] there was some agreement between the defendant and the plaintiff before the injury occurred, demonstrated by the defendant giving permission to the plaintiff to do or perform the conduct that subjected plaintiff to assuming the risk. However, this Court should find that such a granting of permission by the Defendant is not necessary. Nothing in the existing case law requires this, and it is unnecessary for this Court to modify the existing rule of implied primary assumption of risk to require such.

[5] Taylor v. Baseball Club of Seattle, L.P., 132 Wn.App. 32, 130 P.3d 835 (2006) (spectator at baseball game who was injured by ball errantly thrown into stands during team's pregame warm-up brought negligence action against team).
[6] Kirk v. Washington State Univ., 109 Wn.2d 448, 746 P.2d 285 (1987) (college cheerleader, who sustained permanent injury to elbow during unsupervised cheerleading practice, brought personal injury action against university, its board of regents, and student organization).
[7] Scott By & Through Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992) (minor who sustained severe head injuries while attempting to ski on slalom race course, and his parents, filed tort claims against ski resort and ski school).

Further, the trial court found that bicycle riding is a sport. See (CP 145). Plaintiff disputes the trial court's finding that bicycle riding is a sport and attempts to argue that Plaintiff was only using her bicycle as a mode of transportation. While it may be true that bicycles have many natures of use (sport, leisure, and transportation for instance), the argued fact that Plaintiff was using her bicycle primarily for transportation on the day of the incident should not mean that she is free from her own duty to use reasonable care when traveling on a roadway. Regardless of the mode of transportation a traveler uses, the traveler will always face some risk and many times has a choice to encounter or assume that risk.

Here, Plaintiff rode her bike almost daily in Port Orchard and knew there were other routes she could take. See (CP 92). She noticed the warning sign and chose to encounter the steep grade on Sydney Avenue. (CP 100). It is not determinative that her use of her bicycle that day was allegedly for transportation. The fact remains, she still chose to encounter the risk when she knew it existed.

Again, in attempts to show the trial court erred when applying assumption of risk principles, Plaintiff cites case law that is either factually distinguishable or has no legal precedent in Washington courts to support her contentions. For instance, Camicia v. Howard S. Wright Const. Co.[8] turned on the recreational use statute. The list of cases[9] cited by Plaintiff showing instances where assumption of risk was applied are all outside Washington's jurisdictional bounds,

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[8] Camicia v. Howard S. Wright Const. Co., 179 Wn.2d 684, 317 P.3d 987 (2014) (bicyclist brought negligence action against city after bicyclist was thrown from her bicycle after colliding with a wooden post on portion of bicycle trail located in city).

[9] Spence v. United States, 374 F. App'x 717 (9th Cir. 2010) (California's primary assumption of the risk doctrine barred bicyclist's claim); Knight v. Jewett, 3 Cal. 4th 296, 834 P.2d 696 (1992) (the doctrine of assumption of risk partially survived the adoption of comparative fault principles); Moser v. Ratinoff, 105 Cal. App. 4th 1211, 130 Cal. Rptr. 2d 198 (2003) (primary assumption of risk doctrine applied to the long-distance, recreational group bicycle ride); Buchan v. United States Cycling Fed'n, Inc., 227 Cal. App. 3d 134, 277 Cal. Rptr. 887 (Ct. App. 1991) (the release constituted an express assumption of the risks inherent in bicycle racing); Connelly v. Mammoth Mountain Ski Area, 39 Cal. App. 4th 8, 45 Cal. Rptr. 2d 855 (1995), as modified (Oct. 17, 1995) (defendant owed no duty of care to plaintiff under the primary assumption of the risk doctrine).

and fail to show how assumption of risk should not apply to the case at hand. See (Appellant's Brief pgs. 23, 24).

Furthermore, this Court should not consider Plaintiff's use of authorities[10] with no legal precedent in Washington to bar assumption of risk principles from applying. See (Appellant's Brief pg. 24, 25), see also Thurston Cnty., 168 Wn. App. at 184, n. 22. There is no reason for this Court to make a distinction between how a bicycle is being used when considering whether assumption of risk principles should apply. The rule in Washington is broad enough to encompass a bicycle's multiple uses. The application of implied primary assumption of risk does not require a person to be engaged in a sport for the doctrine to apply. See Jessee, 173 Wn. App. at 412 (plaintiff, while not engaged in any sport, voluntarily assumed the risk of injury when walking down a staircase that was built prior to current building codes).

The trial court did not err in applying the doctrine of assumption of risk to bar Plaintiff's claim of negligence against the City. Although the trial court classified Plaintiff's use of her bicycle as a sport, that should not be determinative in applying the doctrine. The existing rule in Washington encompasses all uses of a bicycle. Additionally, Plaintiff does not demonstrate that Plaintiff was solely using her bike for transportation and not also for sport or leisure as she commuted to and from work. The above facts demonstrate that Plaintiff was a skilled cyclist, she was familiar with riding different routes in Port Orchard, and she knew Sydney Avenue was a steep grade and had not traveled it before. Plaintiff affirmatively chose to accept the risk of travelling this route and because of this, the trial court did not err in finding she is barred from

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[10] Cotty v. Town of Southampton, 64 A.D.3d 251, 880 N.Y.S.2d 656 (2009) (riding a bicycle on a paved public roadway normally does not constitute a sporting activity for purposes of applying the primary assumption of risk doctrine); Childs v. Cnty. of Santa Barbara, 115 Cal. App. 4th 64, 8 Cal. Rptr. 3d 823 (2004) (triable issue of material fact existed as to whether child was riding scooter in such a manner that she was engaged in a sport or recreational activity covered by doctrine of primary assumption of risk).

claiming negligence on behalf of the City. Accordingly, this Court should affirm the trial court's findings.

4. Plaintiff's Injury Was Not Proximately Caused by Any Act or Omission of Defendant

In addition to producing evidence that Defendant breached a duty of care to Plaintiff on the date of the incident, Plaintiff must also demonstrate that the breach was "the proximate cause of the injury." Crowe v. Gaston, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998). Proximate cause has two elements: "[c]ause in fact and legal causation." Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). "Legal causation is one of the elements of proximate causation and is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." Crowe, 134 Wn.2d at 518. In determining legal causation, a court considers "logic, common sense, justice, policy, and precedent." Hartley, 103 Wn.2d at 779. See also Kim v. Budget Rent-A-Car Systems, Inc., 143 Wn.2d 190, 204, 15 P.3d 1283 (noting "legal causation is a much more fluid concept [than cause in fact]," and is "grounded in policy determinations as to how far the consequences of a defendant's acts should extend"). Generally, legal causation is a question of law for the court to determine. Kim, 143 Wn.2d at 204.

"[S]peculation is not sufficient to establish proximate cause." Rasmussen v. Bendotti, 107 Wn.App. 947, 959, 39 P.3d 56 (2001) (*citing* Jankelson v. Sisters of Charity, 17 Wn.2d 631, 643, 136 P.2d 720 (1943) ("The cause of an accident may be said to be speculative when, from a consideration of all of the facts, it is as likely that it happened from one cause as another.")). Also, producing evidence of cause in fact without also demonstrating legal causation is insufficient to survive summary judgment as well. Claar ex rel. Claar v. Auburn School Dist. No. 408, 126 Wn. App. 897, 902-03, 110 P.3d 767 (2005).

Here, Plaintiff's speculation of what may have caused her to fall is not sufficient to establish proximate cause. The testimony of Plaintiff states she suspects it was the uneven surface of the roadway or spaces between the concrete that caused her fall. Nonetheless, she also testifies that she was sharing the road with other vehicles and on the date of the incident, she was unaware what caused her wheel to suddenly turn. It can be equally hypothesized that it was Plaintiff's traveling too fast on her bicycle, being startled by the pickup truck overtaking her bicycle, or her being distracted by the parked cars. Plaintiff has produced no more than mere speculation as to what caused her fall. This is too attenuated for Defendant to be held liable for her injuries.

Should Plaintiff produce evidence of cause in fact, she must also support a finding of legal causation. Simply offering evidence of the accident itself is insufficient. See Claar ex rel. Claar, 126 Wn. App. at 902-903. Assuming Plaintiff can even identify and support a duty/breach by Defendant, she must also demonstrate legal cause. Holding Defendant responsible for an injury that it could neither have foreseen nor prevented defies logic, common sense, and justice. Plaintiff has failed to demonstrate that any act or omission of the Defendant was the cause in fact and legal cause of her injuries. Without evidence to support proximate cause, her claim of negligence against Defendant necessarily fails.

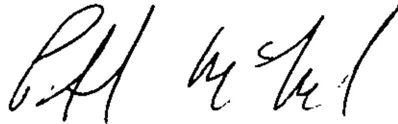
CONCLUSION

Plaintiff does not provide any evidence that Defendant was negligent in its maintenance or design of its roadways. Plaintiff cannot clearly articulate what caused her to fall off her bicycle. Plaintiff's expert is not qualified to offer the statements and opinions stated in his declaration. There is no evidence Defendant had any actual or constructive notice of a defective street condition. The doctrine of assumption of risk also operates to bar recovery by the Plaintiff. For

the above reasons, the trial court did not err in granting Defendant's Motion for Summary Judgment Dismissal.

RESPECTFULLY SUBMITTED this 8th day of July, 2015.

CARLSON, McMAHON & SEALBY, PLLC



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