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SUPREME COURT

The Supreme Court of the State of Washington – No. 93580-7
Court of Appeals State of Washington Division II – No.: 47149-3-II
Kitsap County Superior Court No. 12-2-01544-1

CITY OF PORT ORCHARD,

Petitioner/Defendant,

vs.

PAMELA O'NEILL,

Respondent/Plaintiff.

REPLY TO RESPONDENT'S ANSWER TO
PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, the City of Port Orchard, the Defendant below, respectfully replies to the Respondent's Answer to its Petition for Discretionary Review.

II. COURT OF APPEALS' DECISION

The Superior Court of Kitsap County granted Defendant's motion for summary judgement on December 1, 2014. Reconsideration was denied on December 19, 2014. On June 28, 2016, the Appellate Court reversed the trial court's decision. Defendant moved for reconsideration, which was denied on August 10, 2016. Defendant then timely filed a Petition for Discretionary Review on September 9, 2016.

III. ISSUES PRESENTED FOR REVIEW

Whether Discretionary Review is warranted under RAP 13.4 when the Court of Appeals:

- 1) held that bicycles are a form of "ordinary travel," thus effectively expanding the statewide duty to maintain roads;
- 2) considered certain portions of Mr. Couch's testimony, which include speculative and inadmissible statements; and
- 3) found proximate cause when the Plaintiff was unable to identify what road defect caused her to fall or that a road defect caused her to fall at all, an issue the Defense brought before the trial court.

IV. STATEMENT OF THE CASE

a. Statement of Facts

On July 18, 2009, 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, O'Neill reported that she fell while going down a hill and hitting loose gravel. (CP 30). However, in her deposition

testimony, she alleged that she was thrown from her bicycle because her front tire suddenly changed directions because of the uneven surface of the roadway. (CP 35). Moments before the 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. Respondent 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.

Respondent 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).

b. Statement of Procedure

Plaintiff's Complaint was filed in the Kitsap County Superior Court 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.

The Plaintiff filed a Motion for Reconsideration, which was denied on December 18, 2014. See (CP 148-150, 161). The Plaintiff then filed a Notice of Appeal to the Court of Appeals on January 20, 2015. (CP 162-165). In a published opinion, the Appellate Court held that:

...the superior court erred by (1) excluding most of the bicycle expert's testimony under ER 702, (2) granting summary judgment regarding the City's duty, because there are genuine issues of material fact as to whether the City had constructive notice of the roadway defect, and (3) finding that implied primary assumption of risk barred O'Neill from any recovery."

O'Neill v. City of Port Orchard, 194 Wn. App. 759, 763 (2016)

The Appellate Court then reversed and remanded the case to the Superior Court. The City filed a Motion for Reconsideration, which was denied on August 10, 2016. (CP 148-150, 159-161). The City then timely filed a Petition for Discretionary Review on September 9, 2016.

V. ARGUMENT

In accordance with RAP 13.4(b), only certain issues may be appealed further under discretionary review:

- 1) If the decision of the Court of Appeals is in conflict with a Supreme Court decision;
- 2) If the decision of the Court of Appeals is in conflict with a Court of Appeals decision;
- 3) If a significant question of law under either the Washington State Constitution or the United States Constitution is involved; or
- 4) If the petition involves a unique issue of substantial public interest that should be determined by the Supreme Court.

In our case, drastically expanding the duty of care owed in the construction, repair, and maintenance of public roads across Washington State certainly qualifies as a unique issue of substantial public interest, especially considering the grave financial repercussions that would inevitably result. Because there is no clear indication that bicycles are considered “ordinary travel,” and because the inclusion of bicycles within this term is law-creating function reserved for the legislature, this issue is also a “significant issue of law,” further qualifying it for discretionary review.

- a. By holding that bicycles are a mode of “ordinary travel,” the Appellate Court usurped the role of the legislature by drastically expanding the statewide duty to maintain public roads.

The Plaintiff claims that “the legislature has already made a determination that bicycles are part of ordinary travel...” (Respondent’s Answer, pg 13). RCW 46.61.755 states that “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...” Despite what the Plaintiff contends, this statute does not identify bicycles as a mode of “ordinary travel” and it certainly does not create a duty for municipalities to build, repair, and maintain their public roadways to be safe for bicycles use specifically.

To the contrary, the statute seemingly implies that bicyclists are merely permissive users of the roadway, entitled to the same rights and subject to the same laws that drivers of motor vehicles (“ordinary travel”) are held to. In addition, the statute is found within a chapter entitled “RULES OF THE ROAD,” which provisions “refer exclusively to the operation of vehicles upon highways.” RCW 46.61.005. Considering that the entire chapter is devoted to regulating *vehicles* upon roadways, this only further differentiates bicycles from what has long been viewed as “ordinary travel”—motor vehicles—and reaffirms that bicycles are merely permissive users of the roadway.

The Plaintiff claims that including bicycles within “ordinary travel,” will not create an enormous financial impact because all that is needed to meet the safety needs of bicycles are mere “routine inspection of roads...modification of the rare traps and ledges which will re-direct bicycle tires...or warning signs.” (Respondent’s Answer, pg. 15). Plaintiff further posits that only “rare hazards” cause bicycle accidents and that “simple asphalt patches” could be applied to eliminate any bicycle hazards, which are not “a budget buster.” *Id.* However, these assertions were not corroborated. Not only do Plaintiff’s statements seem to propose a plan for increasing the safety standards of roads to better accommodate bicycles, they also predict that such plan would result in a small financial impact. As the Defense has previously stated, the road safety standards required by bicycle travel and the costs associated with meeting such standards are considerations and plans to be made by the legislature, not the judiciary.

The Plaintiff’s reliance on Camicia v. Howard S. Wright Const. Co., 179 Wn. 2d 684 (2014), is misplaced and actually supports Defendant’s argument that bicycle traffic laws should be determined through the legislative process. The Court in Camicia held

that WSDOT determined that a major purpose of the path was for bicycle transportation and authorized funding for that purpose. Camicia, 179 Wn.2d at 700. The evidence in Camicia went further to establish that WSDOT expended transportation funds and not recreational funds. Id. As in our case, there is no evidence that transportation funds have been spent to improve the city streets for the purpose of allowing bicycle transportation. As such, this case establishes that the legislative process should determine whether the city streets of Port Orchard should be used for bicycle transportation services. This court should find that “ordinary travel” as defined by Keller, does not include bicycles without the involvement of the legislature. In addition, there is a factual distinction between our case and Camicia. In Camicia, the city and WSDOT used transportation funds to create a bike specific lane of travel and in that situation bicycle traffic became “ordinary travel” as defined by Keller. See Keller v. City of Spokane, 146 Wn.2d 237, 249 (2002). However, in our case, no such bike-specific lane existed so the Keller standard cannot be implied.

Expanding the duty to maintain roads safe for “ordinary travel” to include bicycle travel creates a much more severe impact than the Plaintiff seems to comprehend. Heightening road safety standards would apply not only to “rare traps and ledges” that will re-direct bicycles tires, but to all potential hazards relevant to bicycles travel, which are much more numerous than those relating to motor vehicles. Despite what the Plaintiff suggests, a few asphalt patches would not be sufficient in bringing all of Washington’s roads up to a standard safe for bicycle travel. In addition, these standards would span across the entire state of Washington, not just the small city of Port Orchard, and would inevitably require substantial government funding. Again, RCW 46.61.755 does not

indicate that bicycles are a mode of “ordinary travel,” requiring heightened safety standards to be implemented across Washington State. It is clear that such determination would necessitate the implementation of safety standards for bicycle travel and also consideration of funding such standards—tasks which, again, are meant for the legislature.

b. The Plaintiff failed to establish that her injury was proximately caused by an act or omission of the Defendant.

As outlined in our Petition for Review, Plaintiff merely provided speculation of what caused her fall, which is not sufficient to establish proximate cause. See (Petition for Review, pgs. 16-18); Rasmussen v. Bendotti, 107 Wn. App. 947, 959 (2001) (“[S]peculation is not sufficient to establish proximate cause.”). Contrary to Plaintiff’s allegation, the issue of proximate cause was raised at the trial court level. See (CP 22-25) In our Motion for Summary Judgment, submitted to the Kitsap County Superior Court, we argued that although the Plaintiff suspected that the uneven surface on the roadway caused her fall, several other causes could equally be hypothesized. (CP 24).

c. The Appellate Court erred in declaring certain portions of James Couch’s testimony admissible.

As outlined in our Petition for Review, the testimony of Plaintiff’s expert, James Couch, included speculation, statements that lacked foundation, and statements outside of his realm of expertise. See generally (Petition for Review). Mr. Couch made the factual conclusion that Plaintiff’s bicycle engaged the defect between two concrete slabs, causing her to fall. (CP 124D). However, this statement is in conflict with testimony provided by Plaintiff, who stated that changes in road conditions caused her fall. (CP 94). Additionally, Mr. Couch performed no quantitative analysis as to what may have caused

the Plaintiff to fall, nor does Mr. Couch have the training or expertise to perform such analysis. Mr. Couch also made factual statements about distances between the slabs, which was not supported by any evidence in the record. See (CP 124C). Lastly, Mr. Couch also offered conclusory statements about road design and human factors, both of which are outside the purview of a bicycle expert witness.

The Plaintiff references Jewels v. City of Bellingham, where Mr. Couch was cited as an expert, in an attempt to prove his qualifications. 183 Wn.2d 388, 353 (2015); See (Respondent's Answer, pg. 17). First, the "full discussion" on Mr. Couch's qualifications was submitted by the dissent and was not affirmed or even commented on by the majority. Secondly, our case offers a separate set of circumstances and statements than Jewels, so the admissibility of Mr. Couch's statements and his general qualifications differ. The admissibility of an expert's opinion is based upon their knowledge and the facts of the case, not on prior judicial opinion.

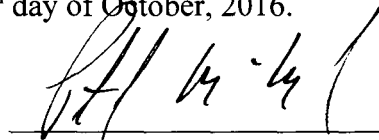
VI. CONCLUSION

The Court of Appeals decision, declaring bicycles a mode of "ordinary travel," is not a "natural expression of established law" as the Plaintiff alleges. See (Respondent's Answer, pg. 19). The legislature has granted bicyclists the same rights and duties of automobile drivers when riding on public roads; but bicyclists, as permissive users of the roadway, clearly do not share the same "ordinary travel" status as motor vehicles. In addition, such declaration carries a much larger impact than the Plaintiff implies—not only would the necessary maintenance and repairs be extensive, they would be incredibly costly to municipalities across Washington State. Including bicycles into "ordinary travel," and expanding the road safety standards across Washington State is a task meant

for the legislature. As previously mentioned, Plaintiff's expert is not qualified to offer the statements and opinions stated his declaration and his involvement as an expert in other matters bears no weight on this. Lastly, the Plaintiff has failed to establish the her injury was proximately caused by an act or omission by the Defendant, an issue that was argued at the trial court level.

For the reasons set forth above, we respectfully request that Petitioner's Petition for Discretionary Review be granted.

Dated this 12th day of October, 2016.



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DECLARATION OF SERVICE

I, Francesca Hansen, hereby declare under penalty of perjury that the following statements are true and correct: I am over 18 years and am not a party to this case.

On this 12th day of October, 2016, I caused to be served and delivered to be filed, the **original** of this REPLY TO RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW, with the Clerk of the above-captioned Court.

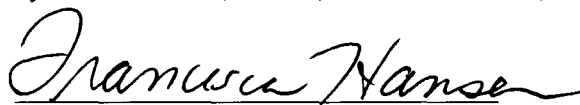
The aforementioned document was sent via Federal Express to:

Susan L. Carlson, Clerk
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A copy of this document was served and delivered to Respondent's attorneys, via Federal Express to:

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DATED this 12th day of October, 2016, at Wenatchee, Chelan County, Washington.



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