SC#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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, the City of Port Orchard (hereinafter "the City"), the Plaintiff below, seeks review of the Court of Appeals' decision to reverse and remand the Superior Court's summary judgement order.

II. COURT OF APPEALS' DECISION

The Court of Appeals' decision was filed on June 28, 2016, reversing the Trial Court's dismissal of the Plaintiff's case. The Court of Appeals' decision is attached here to as Appendix 1.

III. ISSUES PRESENTED FOR REVIEW

The Court of Appeals' reversal of the Superior Court's summary judgement order was in error, which involved a significant question of law under Washington Law and the Court of Appeals' decision conflicts with Washington case authority:

1) The Court of Appeals erred by considering the testimony of Mr. Couch's speculative and inadmissible testimony;
2) The Court of Appeals expanded the duty to maintain streets which is applicable to all cities, counties and the state, contrary to legislative intent; and
3) The Court of Appeals erred by failing to require the Plaintiff to identify a factual basis of her claim by identifying the specific defect which caused her fall or that a defect in the road caused her fall at all, as required by CR 56.

IV. STATEMENT OF THE CASE

A. Statement of Facts

The factual background of this matter is generally well stated within the Court of Appeals' opinion. Appendix 1. On July 18, 2009, the Plaintiff 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). In her deposition, Respondent was not clearly able to articulate what exact defect caused her fall:

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 Respondent's Deposition, Respondent 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.)

Respondent appears unable to clearly identify a defect in the roadway and where such defect was located. Respondent 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, Respondent changed her opinion and could identify a particular location. Nonetheless, Respondent 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 Respondent'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, Respondent 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.)

B. 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.

The Plaintiff filed a Motion for Reconsideration, which was denied on December 18, 2014. See (CP 148, 161). The Plaintiff then filed a Notice of Appeal to the Court of Appeals on January 20, 2015. (CP 162). 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."**
> Appendix 1.

The Court then reversed and remanded the case to the superior court. The City then filed a Motion for Reconsideration, which was denied on August 10, 2016. Appendix 2. The City/Petitioner now submits this Petition for Review to the Supreme Court.

V. ARGUMENT AS TO WHY REVIEW SHOULD BE ACCEPTED

This Court should review the Court of Appeals' decision because: (1) it erroneously permitted inadmissible expert testimony; (2) it included bicycles as a mode of "ordinary travel," which usurps legislative duty and contradicts legislative intent; and (3) the Respondent, Pamela O'Neil, could not establish causation.

A. **The Appellate Court erred in declaring Couch's visual observations of the road and his opinions regarding a cyclist's ability to see a defect and the effect of road conditions as admissible testimony.**

The trial court properly excluded the purported 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). Contrary to the Appellate Court's decision, the trial court did not err in excluding Mr. Couch's testimony contained in his declaration in opposition to Defendant's summary judgment motion.

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

The Plaintiff submitted the "Declaration of James Couch" as expert witness testimony. Washington Rules of Evidence define an expert witness as "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. Washington courts ask 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 (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 (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 (2012).

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 made the factual conclusion that Plaintiff's bicycle engaged the defect between two concrete slabs that ran parallel to Plaintiff's direction of travel. (CP 124D). Upon this happening, the Declaration continues that O'Neill's bike was turned to the side and she fell. Id. This opinion is in conflict with testimony provided by O'Neill in her deposition. (CP 94). Respondent 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, Respondent cannot provide a clear identification of what defect actually caused her to fall. Mr. Couch's inferences in his report on what caused O'Neill to fall are not supported by any factual statement she made. Also, similar to Miller, Mr. Couch performed no quantitative analysis as to what may have caused O'Neill's fall nor does Mr. Couch have the training or expertise to perform such quantitative analyses.

Additionally, Mr. Couch made 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 O'Neill'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). Ultimately, the distance between the concrete slabs appears to be overstated and not quantitatively determined with an accurate measuring tool.

Mr. Couch's factual statements and his conclusion gleamed from them are purely speculative in nature and should be stricken by this Court. The Court of Appeals' erred and this Court should reinstate the Trial Court's decision excluding this speculative testimony.

ii. *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, Respondent's expert Mr. Couch offered conclusory statements that are outside the purview of a bicycle expert witness. The first is Mr. Couch's statements regarding road design. Mr. Couch stated that "there is no signage warning cyclists that there are significant risks along this route." (CP 125D). Mr. Couch also stated 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. Further, the Plaintiff's purported expert has no experience or training in utilizing road sign manuals such as MUTCD. 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 have been stricken by the Court of Appeals and was properly stricken by the Trial Court.

Secondly, Mr. Couch made 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. He has no training or experience as a human factors expert. Again, he is also speculating on what O'Neill may or may not have seen as she rode her bicycle.

Finally, Mr. Couch provided no quantitative analysis to show what O'Neill 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, his statements are clearly outside his area of expertise and the trial court did not err in striking his entire declaration from the record.

iii. *Respondent Failed to Show that James Couch is Qualified as an Expert*

Respondent went 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. The City 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, Mr. Couch does not provide the nature of his testimony in his given list of previous retainage as an expert. 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.

In sum, Respondent expert, James Couch, is not qualified to provide the testimony in his declaration because he has no expertise in the areas of his opinions. O'Neill 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 Appellate Court erred when it included bicycles as a mode of "ordinary travel," thus expanding the City's duty to maintain its roadways.**

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 (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 (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, a municipality "'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 (2014) (quoting Laguna v. Wash. State Dep't of Transp., 146 Wn. App. 260, 263 (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.

By including bicycles as an ordinary mode of travel, the Appellate Court erroneously usurped the function of the Legislature, which regulates transportation in the State of Washington. By announcing, in one sentence, the following: ...*We hold that cycling is a mode of "ordinary travel", and therefore the City has a duty to maintain its roads for bicycle travel* ..., the Court of Appeals has dictated that all roads in Washington must comply with the new bicycle standards (Appendix 1, Pg. 11).

However, RCW 47.01.011 is the legislative declaration regarding regulation of transportation in the State of Washington. Appendix 3. Further evidence, that it is the Legislature, not the Courts, which determines transportation safety issues for bicyclists, is found in RCW 43.59.010. Appendix 4.

In construing a statute, the fundamental objective of the Court is to ascertain and carry out the intent of the legislature. State v. Morales, 173 Wn. 2d 560, 567 (2012). The Court determines the intent of the legislature primarily from statutory language. Id. *citing* Lacey Nursing Ctr., Inc., v. Dept. of Revenue, 128 Wn. 2d 40, 53 (1995). Further, the Court must interpret the terms of the statute in harmony with its purpose. N. Coast Air Servs., Ltd. v. Grumann Corp., 111 Wn. 2d 315, 321 (1988).

The Court of Appeals referenced only RCW 47.06.100, and limited the scope and analysis of this statute, standing only for the proposition that bicycles are an integral part of Washington's statewide intermodal transportation plan. However, a more thorough analysis of the statute states that *an analysis and assessment of statewide bicycle and pedestrian transportation needs should be undertaken by the legislature to coordinate bicycle traffic with other transportation needs.* This would necessarily include, as has been seen in many municipalities throughout the State, specific bicycle lanes designated for purposes of bicycle traffic coordinating with vehicular traffic. In such a situation, once bicycle lanes are specifically constructed and designed for bicycle traffic, it is at that point that a municipality would have a duty to maintain those lanes specifically for the safety of bicycle traffic, according to specific standards and regulations. It would also, at a minimum, set necessary standards for the maintenance and repair of roadways to coincide with bicycle traffic.

The Court in Pudmaroff v. Allen, 138 Wn. 2d 55 n.3 (1999), recognized that the legislature is the appropriate entity to deal with rights and duties regarding bicyclists traveling on state roadways. The Court noted:

> **Bicyclists enjoy an anomalous place in the traffic safety laws of Washington. Bicyclists are generally not pedestrians. RCW 46.04.400,**

> **47.04.010(22). Nor are bicyclists always considered vehicles; See, RCW 46.04.670, 47.04.010(40). For example, bicycles may be operated on both sidewalks and roadways. WAC 308-330-555(2). Unfortunately, the Legislature has not clarified the status of bicycles under Washington traffic safety laws.**

The Court went on further to state in FN3

> **These statutes indicate the Legislature has reviewed bicycles and paths on a case by case basis, and without any continuity. Plainly, the Legislature could usefully consider and clarify the State's traffic safety policy for bicycles and bicycle paths. Id. at FN3.**

Currently, bicyclists are no more than permissive users of streets and roadways in Washington. WAC 308-330-555(2) provides: ... *A person may ride a bicycle on any other sidewalk or roadway unless restricted or prohibited by traffic control devices* ... There was no authority relied upon by the Court of Appeals, or presented by the Respondent, that existing streets and roadways were constructed, designed and maintained for permissive users such as bicyclists. In fact, bicyclists pay no taxes that fund roadway maintenance. They are not licensed or regulated in any manner. They are not required to take tests for obtaining a license to ride or register their bicycles, and pay fees for the same, which if assessed, would necessarily be utilized by the municipalities in the State to maintain roadways for bicyclists who would be paying for their use, such as licensed drivers of motorized vehicles. Essentially, the Court's ruling allows a permissive user of the State's streets and roadways, to be given a specialized benefit to have those streets and roadways which were not originally constructed, designed and maintained for bicyclists to use them while placing the onerous burden on municipalities to pay for maintaining those streets, absent any corresponding contribution from a cyclist.

Clearly, it is the Legislature which must establish standards for road and street design and maintenance involving existing streets, incorporating standards for bicycle types and riders. Neither O'Neill nor the Court can pointed out any statute or authority setting forth the standards for roadways to accommodate bicycle riders. For example, such standards would include the surface requirements, grade requirements, types of repairs required for reasonable safety for bicycles utilizing thin tires, mountain bike tires, racing bike tires, and/or recumbent bike tires. It is not the function of the Court to announce a duty to maintain streets that have been designed and constructed for trucks and cars without any guidance whatsoever as to what standards the Legislature might establish in dealing with this mode of transportation in order to keep these roadway surfaces safe for bicycle travelers.

This Appellate Court's reliance on Keller v. City of Spokane is misplaced. The Panel's Decision creates a specialized duty for bicyclists based on the complete reliance of the common law principle set forth in Keller v. City of Spokane, 146 Wn. 2d 237 (2002). The Court of Appeals erroneously adopted the roadway safety duty for streets and roadways by including permissive users (bicyclists) to fit within the definition of "ordinary travel." In essence, this decision will require that all roads and streets be constructed, to a higher degree, for bicycle safety as opposed to automobile safety. The term "ordinary travel" should more accurately be interpreted to include only motorized vehicles, such as trucks, cars, motorcycles, for which the streets, roads and highways were constructed and designed to accommodate. No other Washington Court has interpreted "ordinary travel" to include bicycles.

The Appellate Court's sweeping interpretation also places a tremendous financial burden on municipalities across the State. It is axiomatic that there are millions of miles of streets and roadways within the State of Washington upon which bicyclists have, essentially, free reign to travel. The Court's Decision will require every City, County and the State of Washington to redesign, reconstruct and maintain all of the roads to this exceedingly high standard for bicycle traffic. This unprecedented requirement for the expenditure of funds should be discussed and approved by the legislative branch as the appropriate forum for this determination, and not by judicial decree. As a result of the limited financial resources of many municipal entities, it is likely they will choose to prohibit bicycle traffic on their roadways and streets rather than expend the significant amount of money to comply with this Court's judicially imposed safety standards. Presumably, the legislative process will attempt to assist the funding issues created as they progress in incorporating standards for the compatibility of safe streets for both vehicular and bicycle traffic.

C. **The Plaintiff did not establish, beyond mere speculation, that her injury was proximately caused by any act or omission of the defendant.**

In addition to producing evidence that a duty of care was breached, it must be shown that the breach was "the proximate cause of the injury." Crowe v. Gaston, 134 Wn.2d 509, 514 (1998). Proximate cause has two elements: "[c]ause in fact and legal causation." Hartley v. State, 103 Wn.2d 768, 777 (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 (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 (2001) (*citing* Jankelson v. Sisters of Charity, 17 Wn.2d 631, 643 (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 (2005).

In this case, O'Neill merely provided speculation of what may have caused her to fall, which is not sufficient to establish proximate cause. Her testimony stated that she suspected it was the uneven surface of the roadway or spaces between the concrete that caused her fall. However, she also testified 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 O'Neill was traveling too fast on her bicycle, was startled by the pickup truck overtaking her bicycle, or was distracted by the parked cars. Her mere speculation as to what caused her fall is too attenuated for The City to be held liable for her injuries.

If evidence of cause in fact is produced, legal causation must also be established. Simply offering evidence of the accident itself is insufficient. See Claar ex rel. Claar, 126 Wn. App. at 902-903. Assuming a breach of duty can be identified, legal cause must also be

demonstrated. Holding the City responsible for an injury that it could neither have foreseen nor prevented defies logic, common sense, and justice. O'Neill failed to demonstrate that any act or omission of the City was the cause in fact and legal cause of her injuries.

VI. CONCLUSION

The Appellate Court erred in permitting the testimony of Mr. Couch as his statements went beyond his alleged expertise and included speculation. The Appellate Court's inclusion of bicycles in "ordinary travel" drastically expands Washington State municipality's duties in constructing and maintaining roads, which goes beyond legislative intent. The decision is also one reserved for the legislature, not for the courts. Lastly, the Plaintiff failed to establish that an act or omission by the Defendant was the proximate cause of her injuries, as exemplified in the Plaintiff's own testimony, which shows her inability to identify what defect caused her fall or if a defect caused her fall at all. Because of the foregoing reasons, we respectfully request the Supreme Court to review the recent decision submitted by the Court of Appeals.

Dated this 8th day of September, 2016.

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AWC05-02256A/PLE/Petition for Review.090816

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 8th day of September, 2016, I caused to be served and delivered to the attorney for the Respondent, a copy of this PETITION FOR REVIEW, and caused this same document to be filed with the Clerk of the above-captioned Court.

I filed and mailed (enclosing the filing fee) with the Supreme Court of the State of Washington, the aforementioned document via Federal Express to:

David Ponzoha
Clerk/Administrator
State of Washington
Division II Court of Appeals
950 Broadway, Suite 300
Tacoma WA 98402

This document was provided to Respondent's attorneys, via Federal Express to:

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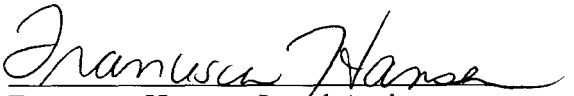
DATED this 8th day of September, 2016, at Wenatchee, Chelan County, Washington.



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June 28, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAMELA O'NEILL, Appellant, v. CITY OF PORT ORCHARD, Respondent.	No. 47149-3-II PUBLISHED OPINION

SUTTON, J. — This appeal arises from Pamela O'Neill's bicycle accident in the City of Port Orchard (City). O'Neill filed suit against the City, claiming that a defect in the street pavement caused her accident. The superior court granted summary judgment in favor of the City.

We hold 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 the risk barred O'Neill from any recovery. Thus, we reverse and remand to the superior court for further proceedings consistent with this opinion.

FACTS

I. BACKGROUND

On July 18, 2009, O'Neill was commuting home from work when she was thrown from her bicycle at the intersection of Sidney Avenue and Kitsap Street in Port Orchard. O'Neill, an

experienced and skilled cyclist, rode a new route every day to challenge her "skilled abilities," and regularly commuted by bike to and from work. Clerk's Papers (CP) at 37. Before July 18, O'Neill had never ridden down Sidney Avenue.

As she rode down Sidney Avenue, O'Neill noticed a sign indicating a steep incline and she noticed a change in conditions from smooth to "uneven" with "lots of variations in the condition of the road." CP at 94. O'Neill understood the sign to mean that she should use caution traveling down the steep incline.

O'Neill continued down the hill. As she crossed the intersection, her bike changed direction, jerking the handlebars to the right and throwing her onto the ground, where she landed on her head and right shoulder. O'Neill suffered serious injuries.

II. PROCEDURE

A. LAWSUIT

O'Neill sued the City, alleging that it was negligent in failing to maintain Sidney Avenue in a manner that provided safe travel for bicycles. In her complaint alleging negligence against the City, she alleged that the road was "damaged" and that the surface variations and uneven road conditions caused her accident. CP at 94.

The City asserted several affirmative defenses, including assumption of risk. The City then moved for summary judgment and dismissal, arguing that the City did not owe O'Neill a special duty as a bicyclist above its "general duty to keep roadways reasonably safe for ordinary travel," that O'Neill failed to present evidence of any breach of a duty, and that O'Neill failed to show that the City had actual or constructive notice of any alleged defect in the roadway. CP at 20.

B. SUMMARY JUDGMENT HEARING

At the hearing on the summary judgment motion, O'Neill submitted a deposition in which she stated that she was thrown from her bicycle because her front tire suddenly changed directions due to the uneven surface of the roadway. She submitted photographs of the roadway around the accident site showing gaps between concrete slabs of up to four inches and height differentials of more than one inch. One photograph depicts grass or weeds growing in the gaps. In her deposition, O'Neill stated that she believed that it was the "uneven, loose gravel, [and] wider space" that caused her to fall, but she later admitted that she did not know exactly where the alleged defect was in the roadway that caused her to fall. CP at 94.

Mark Dorsey, P.E., is the City's public works director and City engineer. In his deposition, Dorsey stated that the City maintains the municipal roadways, including the intersection of Sidney Avenue and Kitsap Street where O'Neill fell.[1] Dorsey stated that the City performs roadway maintenance on a complaint-based system initiated either by a complaint from the public or from a City employee. Before 2008, the City had an informal complaint system. After 2008, when Dorsey became public works director, the City has not received any complaints about the road surface conditions at the intersection of Sidney Avenue and Kitsap Road, and there are no maintenance records of any repairs at the intersection. Before her accident, O'Neill never filed a complaint about the road conditions at the intersection and was unaware if any other cyclist had complained to the City.

[1] The record alternately refers to "Kitsap Street" and "Kitsap Boulevard." For consistency, we use Kitsap Street, the name used by City entities.

Despite the absence of maintenance records, Dorsey admitted that there were older asphalt patches installed at different points in the intersection. The patches were installed before 2008, when public works employees would sometimes go out and perform minor maintenance on the roadways without keeping a record of their repairs. Because the concrete panels on Sidney Avenue rise and fall seasonally, the patches helped to alleviate some of the height differentials between the panels. Dorsey testified that the public works superintendent had no specific recollection of the patches being installed. While Dorsey acknowledged that the asphalt patches were worn and needed replacing, he was unaware of any specific issues related to the intersection of Sidney Avenue and Kitsap Street where O'Neill fell.

To rebut the Dorsey's testimony and the City's assertions, O'Neill offered the declaration of an expert, James Couch. Couch is a trained and certified bicycle technician and is a certified United States Cycling Federation cycling coach. He owned a bicycle store in Tacoma for 17 years, he provided coaching, training, and skills development services to cyclists throughout western Washington, and event and mechanical support to several organized cycling events. Couch served as a member of the University Place Economic Development Committee and Multnomah County Bicycle and Pedestrian Citizen Advisory Committee, advising both organizations regarding cycling facilities. Couch had testified or consulted in eight Washington cases as a bicycle expert, and other unidentified cases, but he provided no explanation or description regarding the nature and scope of his testimony or consultation.

Couch opined, in part, as follows:

> 13. The height difference between the slabs [of concrete] exceed 1 inch. This alone is enough to cause even the most skilled cyclist to lose control of their bike.
>
> . . . .

> 17. 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.
>
> 18. Defects that run to the direction of bicycle travel are particularly hazardous, and need not be very large to cause a bicycle accident.
>
> 19. In this case, one of this size creates a significant hazard to cyclists given its size and length.
>
> 20. Once the cyclist's wheel engaged the defect, it would be extremely difficult for even the most experienced of cyclists to [maintain] control [of] their bicycle.
>
> 21. The location of the defect in the roadway is in a place that an experienced and skilled rider would most likely ride.
>
> . . . .
>
> 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.
>
> 26. There is also physical evidence of repairs on the southbound (uphill) lane of traffic.
>
> 27. There is no evidence at the site or in City maintenance records that any type of comprehensive repair has been performed.

CP 124C-D.

The City argued in its reply that Couch's factual statements and opinions were "speculative" and that he was unqualified to offer an expert opinion regarding road design and human perception. CP at 128. The City asked the superior court to strike the parts of his declaration offering opinions on subject matter where he was not qualified to offer an opinion on the ultimate issue.

The superior court found that Couch was qualified under ER 702 "to testify as an expert as to owning and operating a bicycle store, how to fix a bicycle, how to fit a bicycle to the human body, how to train someone in cycling, and specifics on bicycle races." CP at 143 (FF 4). But the

superior court also found that Couch was not qualified as an expert under ER 702 in the fields of "(a) road design or defects, (b) bicycle accident reconstruction, and (c) road signage requirements and how humans visually perceive obvious versus vague signage." CP at 143 (FF 4). Thus, the superior court excluded Couch as an expert witness because his proffered testimony "'stray[ed] beyond' his 'area of expertise.'" CP at 144 (CL 8) (quoting *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 735, 959 P.2d 1158 (1998), *rev'd*, 138 Wn.2d 248, 978 P.2d 505 (1999)).

Because it excluded Couch's opinions, the superior court found that O'Neill failed to rebut the City's initial showing that there were no genuine issues of material fact. The superior court then granted summary judgment for the City and dismissed O'Neill's claims with prejudice.

O'Neill moved for reconsideration. She argued that the photographs of the asphalt patches and defects around the intersection created a genuine issue of material fact as to the City's notice of the roadway defect, and that the superior court should reconsider its ruling that Couch was not qualified to testify and that O'Neill had assumed the risk of her injuries. The superior court denied O'Neill's motion for reconsideration.

O'Neill appeals the superior court's exclusion of her expert witness and its order of summary judgment in the City's favor.

ANALYSIS

I. EXCLUSION OF EXPERT WITNESS

O'Neill first argues that the superior court erred when it excluded all of Couch's declaration regarding the road and the accident. We hold that, although the superior court properly excluded limited portions of Couch's declaration, the superior court erred in excluding Couch's visual

observations of the road and his opinions regarding a cyclist's ability to see a defect and the effect of road conditions on the performance of a bicycle.

We review a superior court's ruling excluding an expert in a summary judgment proceeding de novo. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 494, 183 P.3d 283 (2008) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

ER 702 governs the admissibility of expert testimony at trial, and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Experience alone may qualify a person as an expert. *Katare v. Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012). "Once the basic requisite qualifications are established, any deficiencies in an expert's qualifications go to the weight," not the admissibility, of an expert's testimony. *Keegan v. Grant County Public Util. Dist. No. 2*, 34 Wn. App. 274, 283, 661 P.2d 146 (1983). Expert testimony must be "'sufficiently trustworthy and reliable to remove the danger of speculation and conjecture'" from the jury. *Larson v. City of Bellevue*, 188 Wn. App. 857, 880, 355 P.3rd 331 (2015) (quoting *State v. Maule*, 35 Wn. App. 287, 294, 667 P.2d 96 (1983)). An expert may not testify about information outside of his area of expertise. *Katare*, 175 Wn.2d at 38.

In *Katare*, the proffered expert's formal education did not include the field of child abduction. *Katare*, 175 Wn.2d at 38. However, he had 17 years of experience and knowledge, participating in organizations related to the field of child abduction attending numerous conferences, consulting with governmental entities, and testifying as an expert in abduction cases. *Katare*, 175 Wn.2d at 38-39. The superior court allowed the expert's testimony because it would

"assist [the court] in understanding the status of the literature on these topics." *Katare*, 175 Wn.2d at 33 (alteration in original, internal quotation marks omitted). Our Supreme Court held that the superior court did not abuse its discretion in admitting the expert's testimony. *Katare*, 175 Wn.2d at 39.

Couch's declaration testimony can be divided into three categories. First, paragraphs 8 and 12-16 of Couch's declaration involved his physical observations of the roadway, and were not expert opinions. Instead, Couch provided eyewitness testimony regarding the observed road conditions. We hold that the superior court erred in excluding this testimony.

Second, paragraphs 17-21, 23 and 30 of Couch's declaration involved expert opinions regarding a cyclist's ability to see a roadway defect and the effect of road conditions on the performance of a bicycle. Couch had 17 years of experience as a bicycle expert, extensive training regarding the performance and maintenance of bicycles, provided training and coaching to cyclists, consulted and testified in eight Washington cases as a bicycle expert, and advised University Place and Multnomah County regarding bicycle facilities. This knowledge, skill, experience and training qualified Couch as an expert on bicycle riding and the effect of road conditions on cyclists. We hold that the superior court erred in excluding this testimony.

Third, Couch provided expert testimony—in paragraphs 25-27 of his declaration—regarding evidence of repairs on the roadway and the City's notice of defective conditions on the roadway. There is no indication in the record that Couch is qualified to provide expert opinions on these issues, and we hold that the superior court did not err in excluding that testimony. We also hold that Couch's opinion in paragraph 29 of his declaration regarding O'Neill's character traits as a cyclist constituted a legal conclusion, and was improper. Thus, the superior court

properly struck his opinions offered on road maintenance, defects, and design, and on O'Neill's character traits.

II. SUMMARY JUDGMENT

O'Neill further argues that (1) the City has a general duty to provide safe roadways for all expected traffic, including bicycles, (2) the City had constructive and actual notice of the roadway's defect, and (3) the City failed to maintain the road to ensure safe conditions for ordinary travel. She also argues that the superior court erred by ruling that the implied primary assumption of the risk doctrine barred any recovery because by engaging in bicycling as a sport, she assumed the risks inherent in biking on the roadway. We hold that (1) the City owes a duty to maintain its roadways in a condition that is reasonably safe for ordinary travel, which includes bicycle travel, (2) that there are genuine issues of material fact as to whether the City had constructive notice of the defects, and (3) that implied primary assumption of the risk does not bar any recovery.[2]

A. LEGAL PRINCIPLES

Under CR 56, a party is entitled to summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). "To avoid summary judgment in a negligence case, the plaintiff must show a genuine issue of material fact on each element of negligence—duty, breach, causation and damage." *Clark County Fire Dist. No. 5 v. Bullivant House Bailey, PC*, 180 Wn. App. 689, 699, 324 P.3d 743, *review denied*, 181 Wn.2d 1008 (2014). We review a summary judgment order de novo, construing all

[2] The City argues that the superior court did not err in granting summary judgment because O'Neill failed to prove that the City was the proximate cause of her injuries. Because the superior court did not address the issue of causation, we address only the issues of duty and breach.

facts and reasonable inferences in the light most favorable to the nonmoving party. *Clark County*, 180 Wn. App. at 698.

B. DUTY AND BREACH

1. Legal Principles

Our courts generally hold municipalities to the same negligence standard as private individuals. *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002). Whether a municipality owes a duty in a particular situation is a question of law, and, as an individual, a municipality owes a general duty of care of a "reasonable person under the circumstances.'" *Keller*, 146 Wn.2d 243 (quoting DAN B. DOBBS, THE LAW OF TORTS § 228, at 580 (2000). A municipality owes a duty to build and maintain roadways in a condition that is "reasonably safe for ordinary travel." *Keller*, 146 Wn.2d at 249. But a municipality does not, however, insure against an accident or guarantee the safety of travelers on its roads, nor is it required to "maintain streets 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 (1956). A city is not required to maintain its roadways in a 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 (1989).

A municipality "'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.'" *Leroy*, 124 Wn. App. 65, 69, 98 P.3d 819 (2004) (quoting *Niebarger v.*

City of Seattle, 53 Wn.2d 228, 229, 332 P.2d 463 (1958)). Notice may be actual or constructive. *Nguyen v. City of Seattle*, 179 Wn. App. 155, 165, 317 P.3d 518 (2014).

2. Bicycles as "Ordinary" Travel

The City argues that although a municipality has a duty to maintain its road for ordinary vehicle travel, it does not owe a duty to keep roads safe for bicyclists. We hold that cycling is a mode of "ordinary travel," and therefore, the City has a duty to maintain its roads for bicycle travel.

Bicycles are an integral part of Washington's "statewide multimodal transportation plan," RCW 47.06.100. Further, bicycles are subject to the same traffic laws as motorists and other vehicles when traveling on public roadways.

> 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, except as to special regulations in RCW 46.61.750 through 46.61.780 and except as to those provisions of this chapter which by their nature can have no application.

RCW 46.61.755(1). RCW 46.61.770 regulates where cyclists may travel in the "normal flow of traffic," which direction they must travel, and how they must ride on roadways "except on paths or parts of roadways set aside for the exclusive use of bicycles." RCW 46.61.770.

Our Supreme Court has also recognized that bicycles are a mode of transportation. *See Camicia v. Howard S. Wright Const. Co*, 179 Wn.2d 684, 317 P.3d 987 (2014); *see also Pudmaroff v. Allen*, 138 Wn.2d 55, 63 n.3, 977 P.2d at 574 (1999). Thus, we hold that bicycles, as a part of our statewide transportation plan, are a mode of "ordinary travel," and the City has a duty to maintain roadways that are safe for bicycle travel.

3. Actual Notice

O'Neill alleges that the City was on actual notice of the gaps in the road and the height differential between concrete slabs because there were "prior, ineffective, attempts to patch and repair" the road. Br. of Appellant at 27. There is, however, no evidence regarding the condition of the road at the time the patching occurred or the reasons for the repairs. The repairs may have fixed any defect existing at that time.

Further, Dorsey stated that the City had never received any complaints, from motorists or cyclists, about any defects at the intersection of Sidney Avenue and Kitsap Street. And Dorsey testified that there had been only one other accident at this intersection. We conclude that there is no evidence that the City had actual notice of the defective roadway condition at the intersection of Sidney Avenue and Kitsap Street where O'Neill fell.

4. Constructive Notice

Because there is no evidence that the City had actual notice of the defect in Sydney road, the question is whether it had constructive notice. Constructive notice arises where the defective condition has existed for such time that a municipality in exercising ordinary care would have discovered the defective roadway condition. *See Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 189, 127 P.3d 5 (2005). What constitutes constructive notice varies "with time, place, and circumstance." *Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn.2d 745, 748, 375 P.2d 487 (1962). Ordinarily, it is a question of fact for the jury to decide whether a defective condition existed long enough to be discovered. *Fredrickson*, 131 Wn. App. at 189.

Here, Dorsey testified that Sidney Avenue is one of the City's "major roads." CP at 111. The photographs and testimony about the condition of the road show that the alleged defects have

existed for a long period of time. For instance, one photograph depicts grass or weeds growing in the gaps. A fact finder could infer that the City had constructive knowledge of defects on one of its major roads that obviously have existed for years or decades. And Dorsey's knowledge of the roadway's construction—concrete panels that have "periodic seasonal lifting and settling" that causes height differentials—could allow an inference of constructive knowledge to the City. CP at 110.

Based on this record, we hold that there are genuine issues of material fact as to whether the City had constructive notice of the defective roadway conditions. Thus, we hold that the superior court erred by granting summary judgment and dismissing with prejudice O'Neill's action against the City.

C. PRIMARY IMPLIED ASSUMPTION OF THE RISK

O'Neill argues that the superior court erred when it ruled that she assumed the risk of poor roadway surface conditions under the doctrine of implied primary assumption of the risk, which relieved the City of its duty to provide safe roadways. We agree.

The doctrine of assumption of risk limits the duty a defendant owes to a plaintiff. *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 454-55, 746 P.2d 285 (1987); *Leyendecker v. Cousins*, 53 Wn. App 769, 773, 770 P.2d 675(1989). "'[A]ssumption of risk is a matter of what the plaintiff knows, understands, and is willing to accept.'" *Reed-Jennings v. Baseball Club of Seattle, LP*, 188 Wn. App. 320, 331, 351 P.3d 887, *review denied*, 184 Wn.2d 1024 (2015) (quoting RESTATEMENT SECOND OF TORTS § 496C cmt. e. (1965)). There are four categories of assumption of risk, express, implied primary, implied reasonable, and implied unreasonable. *Barrett v. Lowe's Home Ctrs., Inc.*, 179 Wn. App. 1, 5, 324 P.3d 688 (2013). Express and implied primary assumption of risk

arise when a plaintiff consents to relieve a defendant of a duty owed to the plaintiff regarding specific known risks, and operate as a complete bar to recovery. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636-37, 244 P.3d 924 (2010).

In contrast, we treat implied unreasonable and implied reasonable assumption of risk as forms of contributory negligence, attributing some fault to the plaintiff and mitigating the amount of damages the plaintiff can recover. *Barrett*, 179 Wn. App. at 6. Implied unreasonable assumption of risks arises when the plaintiff knows about a risk created by the defendant's negligence, but voluntarily chooses to encounter it anyway. *Barrett*, 179 Wn. App. at 6.

Classic examples of implied primary assumption of risk occurs in sport-related cases where the plaintiff, a participant in the sport, "assumes the dangers that are *inherent in* and *necessary to*" the particular sport or activity. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 500-01, 834 P.2d 6 (1992). Cases since *Scott* have affirmed that, in order for implied primary assumption of risk to apply, the plaintiff's injuries must result from inherent and necessary risks associated with the particular sport or activity. *See Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 144, 875 P.2d 621 (1994) (holding that a fall sustained during rock climbing at a zoo was not inherent in the activity of visiting a zoo); *Barrett*, 179 Wn. App. at 7-8 (holding falling freight was not an inherent risk of plaintiff's job duties); *Taylor v. Baseball Club of Seattle, LP*, 132 Wn. App. 32, 38-39, 130 P.3d 835 (2006) (holding that the risk of being struck by a baseball is an inherent risk a spectator assumes when attending a pregame warm-up).

But implied primary assumption of risk does not apply when the defendant creates some additional risk and the plaintiff encounters that risk. *Gleason v. Cohen*, 192 Wn. App. 788, 800, 368 P.3rd 531 (2016).

> "[I]mplied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. In such a case, plaintiff's conduct is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk."

Scott, 119 Wn.2d at 499 (quoting *Leyendecker*, 53 Wn. app. at 773-74).

The issue here is whether O'Neill assumed the risks of a defective roadway surface condition when she assumed the risks inherent in cycling to work. Falling is an inherent and necessary risk of the activity of cycling, and O'Neill assumed the general risk that she would fall off her bicycle and injure herself. She did not, however, assume the enhanced risks associated with the City's failure to repair an alleged defective roadway of which the City allegedly had constructive notice.

Scott is instructive. There, the plaintiff was injured while skiing on a slalom course when he hit a tow-rope shack adjacent to the course. *Scott*, 119 Wn.2d at 488. The Supreme Court held that although implied primary assumption of risk applied to the risks inherent in skiing, it did not apply to the defendant's negligence in placing a race course dangerously close to the shack. *Scott*, 119 Wn.2d at 500-03.

Under *Scott*, O'Neill did not assume the risk of the City's negligence. Thus, the superior court erred in ruling that implied primary assumption of risk barred O'Neill from any recovery against the City.

CONCLUSION

We hold that the superior court erred by excluding portions of O'Neill's expert's proposed testimony under ER 702, granting summary judgment because there are genuine issues of material fact as to whether the City had constructive notice of the roadway defect, and applying the doctrine of implied primary assumption of the risk to O'Neill's accident. Thus, we reverse and remand to the superior court for further proceedings consistent with this opinion.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, C.J.
BJORGEN, C.J.

Maxa, J.
MAXA, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAMELA O'NEILL,

Appellant,

v.

THE CITY OF PORT ORCHARD,

Respondent.

No. 47149-3-II

ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT moves for reconsideration of the court's **June 28, 2016** opinion. After consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Sutton, Maxa, Bjorgen

DATED this 10th day of August, 2016.

FOR THE COURT:

Bjorgen, C.J.
CHIEF JUDGE

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West's Revised Code of Washington Annotated
Title 47. Public Highways and Transportation (Refs & Annos)
Chapter 47.01. Department of Transportation (Refs & Annos)

West's RCWA 47.01.011

47.01.011. Legislative declaration

Effective: July 22, 2007
Currentness

The legislature hereby recognizes the following imperative needs within the state: To create a statewide transportation development plan which identifies present status and sets goals for the future; to coordinate transportation modes; to promote and protect land use programs required in local, state, and federal law; to coordinate transportation with the economic development of the state; to supply a broad framework in which regional, metropolitan, and local transportation needs can be related; to facilitate the supply of federal and state aid to those areas which will most benefit the state as a whole; to provide for public involvement in the transportation planning and development process; to administer programs within the jurisdiction of this title relating to the safety of the state's transportation systems; and to coordinate and implement national transportation policy with the state transportation planning program.

The legislature finds and declares that placing all elements of transportation in a single department is fully consistent with and shall in no way impair the use of moneys in the motor vehicle fund exclusively for highway purposes.

Through this chapter, a unified department of transportation is created. To the jurisdiction of this department will be transferred the present powers, duties, and functions of the department of highways, the highway commission, the toll bridge authority, the aeronautics commission, and the canal commission, and the transportation related powers, duties, and functions of the *planning and community affairs agency. The powers, duties, and functions of the department of transportation must be performed in a manner consistent with the policy goals set forth in RCW 47.04.280.

Credits
[2007 c 516 § 2, eff. July 22, 2007; 1977 ex.s. c 151 § 1.]

West's Revised Code of Washington Annotated
Title 43. State Government--Executive (Refs & Annos)
Chapter 43.59. Traffic Safety Commission (Refs & Annos)

West's RCWA 43.59.010

43.59.010. Purpose--Finding

Effective: July 26, 2009
Currentness

(1) The purpose of this chapter is to establish a new agency of state government to be known as the Washington traffic safety commission. The functions and purpose of this commission shall be to find solutions to the problems that have been created as a result of the tremendous increase of motor vehicles on our highways and the attendant traffic death and accident tolls; to plan and supervise programs for the prevention of accidents on streets and highways including but not limited to educational campaigns designed to reduce traffic accidents in cooperation with all official and unofficial organizations interested in traffic safety; to coordinate the activities at the state and local level in the development of statewide and local traffic safety programs; to promote a uniform enforcement of traffic safety laws and establish standards for investigation and reporting of traffic accidents; to promote and improve driver education; and to authorize the governor to perform all functions required to be performed by him or her under the federal Highway Safety Act of 1966 (Public Law 89-564; 80 Stat. 731).

(2) The legislature finds and declares that bicycling and walking are becoming increasingly popular in Washington as clean and efficient modes of transportation, as recreational activities, and as organized sports. Future plans for the state's transportation system will require increased access and safety for bicycles and pedestrians on our common roadways, and federal transportation legislation and funding programs have created strong incentives to implement these changes quickly. As a result, many more people are likely to take up bicycling in Washington both as a leisure activity and as a convenient, inexpensive form of transportation. Bicyclists are more vulnerable to injury and accident than motorists, and should be as knowledgeable as possible about traffic laws, be highly visible and predictable when riding in traffic, and be encouraged to wear bicycle safety helmets. Hundreds of bicyclists and pedestrians are seriously injured every year in accidents, and millions of dollars are spent on health care costs associated with these accidents. There is clear evidence that organized training in the rules and techniques of safe and effective cycling can significantly reduce the incidence of serious injury and accidents, increase cooperation among road users,

and significantly increase the incidence of bicycle helmet use, particularly among minors. A reduction in accidents benefits the entire community. Therefore it is appropriate for businesses and community organizations to provide donations to bicycle and pedestrian safety training programs.

Credits

[2009 c 549 § 5141, eff. July 26, 2009; 1998 c 165 § 2; 1967 ex.s. c 147 § 1.]

West's RCWA 43.59.010, WA ST 43.59.010
Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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