

No. 67579-6- I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JENNIFER MINATO,

Appellant,

v.

KING COUNTY,

Respondent.

APPEAL FROM THE
SUPERIOR COURT FOR KING COUNTY WASHINGTON
HONORABLE DEBORAH FLECK

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 14 AM 9:48

APPELLANT'S OPENING BRIEF

HAGENS BERMAN SOBOL SHAPIRO LLP
Anthony D. Shapiro, WSBA #12824
Marty D. McLean, WSBA #33269
1918 Eighth Avenue, Suite 3300
Seattle, Washington 98101

AOKI LAW PLLC
Russell M. Aoki, WSBA No. 15717
720 Olive Way, Ste. 1525
Seattle, WA 98101

Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page(s)</u>
A. INTRODUCTION AND IDENTITY OF PARTIES.....	1
B. ASSIGNMENTS OF ERROR	2
1. Assignments of Error	2
2. Issues Pertaining to Assignments of Error	2
I. Appellant offered evidence and expert testimony that the failure to post warning signs limiting the speed of bicyclists, combined with the excessive design speed and inadequate sight-stopping distances, resulted in a latent danger that was not readily apparent to the general class of users of the trail. Whether a condition is latent for purposes of RCW 4.24.210, is a question of fact. Did the trial court err in concluding, as a matter of law, that the above-described characteristics are not a latent condition? (Assignment of Error I).....	2
C. STATEMENT OF THE CASE.....	3
1. The Cedar River Trial	3
D. WARNINGS PROVIDED TO KING COUNTY PRIOR TO OCTOBER 5, 2007.....	8
E. OCTOBER 5, 2007, COLLISION.....	12
F. PROCEDURAL HISTORY.....	17
G. LEGAL ARGUMENT.....	18
1. The trial court erred by concluding, as a matter of law, that the excessive design speed, inadequate sight-stopping distance and lack of signage at the location of the trail where Appellant was injured, was not a latent condition.....	18

2.	Injury-Causing Condition	20
3.	King County had actual knowledge of the injury-causing condition	23
4.	The “S” curve where Jennifer was injured is Dangerous	26
5.	The “S” curve in the trail is an artificial, man-made condition.....	28
6.	The danger posed by the “S” curves was latent to the general class of users.....	30
H.	CONCLUSION.....	33

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Berger v. Sonneland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001).....	19
<i>Castro v. Stanwood Sch. Dist.. No. 401</i> , 151 Wn.2d 221 (2004).....	18
<i>Cultee v. City of Tacoma</i> , 95 Wn. App. 505, 977 P.2d 15 (1999).....	passim
<i>Davis v. State</i> , 102 Wn. App. 177, 6 P.3d 1191 (2000).....	passim
<i>Gaeta v. Seattle City Light</i> , 54 Wn. App. 603, 774 P.2d 1255 (1989).....	24, 26
<i>Ravenscroft v. Washington Water Power Co.</i> , 136 Wn.2d 911, 969 P.2d 75 (1998).....	passim
<i>Tabak v. State</i> , 73 Wn. App. 691, 870 P.2d 1014 (1994).....	19, 23, 24
<i>Tennyson v. Plum Creek Timber Co.</i> , 73 Wn. App. 550, 872 P.2d 524 (1994).....	30
<i>Van Dinter v. Kennewick</i> , 121 Wn.2d 38, 846 P.2d 522 (1993).....	21, 22, 23, 30

STATUTES

RCW 4.24.200	19
RCW 4.24.210	2, 17, 19
RCW 4.24.210(1), (3).....	19
RCW 4.24.210(3).....	30

OTHER AUTHORITIES

Torts §31 (4th ed. 1971).....26

Webster’s Third New International Dictionary (1986).....28

A. INTRODUCTION AND IDENTITY OF PARTIES

On October 5, 2007, Jennifer Minato (“Jennifer” or “Appellant”) was catastrophically injured when she collided with another bicycle on a sharp curve on the Cedar River trail (“CRT” or “trail”).¹ The section of trail where Jennifer was injured is characterized by a sloping, -4% grade and a series of ninety-degree “S” turns that significantly compromise the trail-users’ sight distances.

King County (“King County” or “Respondent”) is responsible for the design, construction, and maintenance of the portion of the CRT where Appellant was injured. In the months leading up to Jennifer’s injuries, King County received numerous warnings about dangers posed by blind curves on its bicycle trail system in general, and specific warnings that this particular section of the CRT posed a serious risk to users.

Appellant sued King County for failing to post signs alerting cyclists of the need to reduce speed due to limited sight distances along this section of the CRT.

¹ On October 5, 2007, Jennifer was preparing to start a career as a teacher. As a result of the collision, Jennifer was rushed to Harborview Medical Center for trauma care. She remained in the hospital for several weeks. Following discharge, Jennifer was placed in rehabilitative care facility where she remains to this day. Jennifer’s ability to communicate is limited to providing one to two word answers to rudimentary questions. Her vocabulary is estimated to be less than twenty five total words.

Respondent King County moved for summary judgment claiming immunity under RCW 4.24.210, the Recreational Land Use statute. On December 11, 2009, King County Superior Court, Honorable Deborah Fleck, granted Respondent King County's motion and dismissed Appellant's claims against Respondent. Judge Fleck ruled that the condition causing Jennifer's injury was not latent and granted King County immunity under the Recreational Land Use statute.

B. ASSIGNMENTS OF ERROR

1. Assignments of Error

- I. The trial court erred in granting King County immunity under the Recreational Land Use statute, RCW 4.24.210. Specifically, the trial court erred by concluding that the diminished sightlines, inadequate sight-stopping distances, excessive design speed and lack of signage at the location of the trail where Appellant was injured could not be considered a latent, dangerous condition by a reasonable juror.

2. Issues Pertaining to Assignments of Error

- I. Appellant offered evidence and expert testimony that the failure to post warning signs limiting the speed of bicyclists, combined with the excessive design speed and inadequate sight-stopping distances, resulted in a latent danger that was not readily apparent to the general class of users of the trail. Whether a condition is latent for purposes of RCW 4.24.210, is a question of fact. Did the trial court err in concluding, as a matter of law, that the above-described characteristics are not a latent condition? (**Assignment of Error I**)

C. STATEMENT OF THE CASE

1. The Cedar River Trail

According to the King County Parks Department website, “The Cedar River Trail follows the Cedar River from where it enters Lake Washington in the City of Renton upriver to the community of Landsburg at the boundary of the City of Seattle’s Cedar River Watershed.” CP 273.² Between the City of Renton and the City of Maple Valley, the CRT is popular with bicyclists and skaters and provides both recreational and non-motorized commuting opportunities. CP 3, 80.

As the trail approaches the intersection of SR 169 and 154th Place S.E. from the west, it curves sharply to the left, away from SR 169, at a nearly perpendicular angle. CP 23, 275. The trail continues down a gradual slope for a short distance before making a second ninety-degree turn back to the right. CP 23, 275. The trail then passes through a bicycle underpass constructed beneath 154th Place S.E. After exiting the underpass, the trail makes another ninety-degree turn to the right, back towards SR 169. CP 23, 275. After ascending gradually back to grade, the trail makes a fourth ninety-degree turn to the left, bringing in once again parallel to SR 169. CP 23, 275.

² “CP” refers to the Clerk’s Papers

King County is responsible for design, construction, and maintenance of the portion of the CRT between the City of Renton and the City of Maple Valley. CP 2, 80. In fulfilling its responsibilities, King County created Draft Development Guidelines governing the design, construction and maintenance of its regional trail system. CP 138, 256-262, 265-266.

According to the Draft Development Guidelines, King County adopted the American Association of State Highway and Transportation Officials (AASHTO) Guide for the Development of Bicycle Facilities. CP 138, 259-262. In particular, King County has adopted AASHTO guidelines to determine appropriate design speed and minimum sight distances to be utilized on bicycle trails throughout the county, including the CRT. CP 138, 259-262.

AASHTO guidelines provide specific formulae for calculating appropriate design speeds to be implemented on all portions of bicycle trails, including curves. CP 138, 271, 276-283. One method to determine appropriate design speed for curves on a bicycle trail is to calculate the “lean angle” of the rider taking the turn in comparison to the radius of the curve. CP 138, 271, 276-283.

William E. Haro, a professional engineer with extensive expertise in the design of bicycle trails, applied AASHTO guidelines to this section

of the trail. CP 136-137. The radius on the inside of the curve at that location was 59 feet at the edge of the pavement and 65 feet along the yellow centerline. CP 138. According to AASHTO guidelines, a reasonable “lean angle” for casual bicyclists under ideal conditions is considered to be 10 degrees. CP 138. Based upon the formulas in the AASHTO guidelines adopted by King County, the *maximum* design speed for the section of the trail where the collision occurred is between 12.5 and 13.1 MPH. CP 139.

According to AASHTO guidelines, this speed range is considered the maximum safe speed for a bicyclist to safely negotiate this curve (assuming he or she had unlimited sight distances around the entire curve). CP 139. However, the sight distance available to riders is an additional design element that must be factored when calculating an appropriate design speed. CP 139. Again, AASHTO guidelines *require* that a shared use trail such as the CRT have adequate stopping sight distance (“SSD”) to provide bicyclists an opportunity to see and react to the unexpected. CP 139.

The SSD for a particular section of a bicycle trail is dependent upon several factors: (1) design speed; (2) brake reaction time of the cyclist; and (3) friction factor of the pavement. CP 139. AASHTO

guidelines assume a pavement friction factor of 0.25 and a brake reaction time of 2.5 seconds. CP 139.

At the time of the collision, the sight distance at this location was limited by a dense growth of trees on the inside portion of the curve, and by an informational kiosk located along the inside portion of the curve. CP 139. The kiosk is located only 10 feet from the yellow centerline. CP 139. As a result of these obstructions, the sight distance where the collision took place is no more than 75 feet. CP 139.

King County states that the speed limit for the entire CRT is 15 MPH. CP 61, 139. Assuming a downgrade of - 4%, which was measured at the point of the trail just before where the collision occurred, the minimum SSD needed to safely avoid a *fixed* object on this curve is 90.8 feet - 15 feet greater than currently exists. CP 140.

The SSD of 90.8 feet applies to the minimum stopping distance necessary to avoid *fixed* objects on the trail. CP 140. However, because the CRT is utilized by bicyclists traveling in *both* directions, the minimum SSD required by AASHTO to avoid fixed objects must be doubled. Therefore, the SSD for the section of the trail where Jennifer was injured is more than 180 feet for a cyclist traveling at 15 MPH. CP 140.

Since there is only 75 feet of sight distance on the curve where Jennifer was injured, King County was required by its own AASHTO

standards to reduce the speed limit to allow riders to react and avoid the unexpected. CP 140. Applying the AASHTO guidelines, the *maximum* design speed for the curve where Jennifer was injured was no greater than 10 MPH. CP 140.

According to both the AASHTO and the universally-relied upon Manual on Uniform Traffic Control Devices (“MUTCD”) guidelines, King County should have posted prominent speed limit signs warning riders to reduce their speed to 10 MPH while negotiating this curve. CP 140. However, according to Washington State Patrol Trooper Scott Eng, “At the area of the collision, there are no posted speed limit signs for bicyclists.” CP 28.

The only mention of speed limits is found on the “Trails Rules” signage posted sporadically along the trail. CP 141. The 15 MPH speed limit is listed on this signage, along with all other trail rules, in ½ inch letters. CP 141. This type of sign does not satisfy the MUTCD requirements for conspicuously posting appropriate speed limit signage. CP 141. There are no signs warning riders to slow down before entering the curves. Similarly, there are no signs warning riders that the curve has a limited sight distance. CP 141.

D. WARNINGS PROVIDED TO KING COUNTY PRIOR TO OCTOBER 5, 2007

Prior to the October 5, 2007, collision, King County received multiple warnings about dangerous conditions existing throughout its regional trail system and at this specific location of the CRT. Specifically, King County was warned that bicyclists were traveling at unsafe speeds and that due to the limited sight lines on various “S” curves on its trails, serious bicycle accidents had either occurred, or were imminent.

In a June 16, 2005 e-mail to Kathy Nygard, a supervisor with King County Parks and Recreation Division, bicyclist Jed Aldridge wrote about a collision he suffered in a blind “S” curve on a bicycle trail:

Kathy, you are probably not the person who should get this e-mail, but I trust that you will forward it to someone responsible for “risk management” in king county parks and someone who is responsible for maintenance on the soos creek trail.³ On Thursday, July 14, my wife and I were riding our bicycles north on the soos creek trail between 148th Ave. SE and SE 228 st. ***We were riding on a part of the trail [sic] that has several “s” turns in it. Well, as we approach one curve, a young man on a bicycle can [sic] out of the curve at a very very high rate of speed on our half of the trail and he hit me head-on (he was riding way too fast). It was a violent accident.***

³ The Soos Creek trail is located near the Cedar River trail. In fact, the two trails intersect less than half a mile from the area where Jennifer was injured.

Here is my concern, there are too many blind curves on the trail, if adequate sight distances are not established and maintained someone is going to get seriously hurt. I also separated my shoulder last year on the same trail as I had to swerve to avoid someone on the other side of a blind curve and I crashed my bike. If the young man who hit me, would have hit a young child or an older person it could have been a disaster. I'm hopeful that not only a field supervisor but a manager in the maintenance division will make a site visit and will immediately start improving site distances on all blind and all down hill curves....***If it is ignored, it is only a matter of time until someone is hurt real bad and they end up suing. This is a great trail and it is getting very popular, everyone can co-exist on the trail if there is adequate site distances.***⁴

After Mr. Aldridge warned King County about the dangers associated with blind curves on King County trails, additional concerns poured in from concerned citizens:

01/09/2006 e-mail to Ms. Nygard from concerned citizen⁵

“[T]he trail used to have signs periodically which told all traffic to stay to the right, said that the speed limit was 15 mph, said bikes should yield to pedestrians....”

“All of those signs came down during repaving or park renovation and never put back up. Now, every day I see a confrontation between bikers and pedestrians and near accidents constantly because new users aren't aware of these items. Could a future

⁴ CP 285-286.

⁵ CP 288.

project please be to restore these types of signs periodically along the trail to explain trail use and thereby prevent inevitable catastrophe?”

02/18/2006 e-mail to King County Parks Administration⁶

“The bikers are FLYING on this trail -- especially in the warmer months. Many are in training for bike events. I’ve seen many near-misses with pedestrians (some were young toddlers!) – and some horrible actual crashes.”

02/21/2006 e-mail from Ms. Nygard to Cascade Bicycle Club⁷

“King County Parks and Recreation Division has been receiving a number of complaints about speeding bicyclists on many of the regional trails (Burke Gilman, Sammamish, Cedar River, Soos Creek and Interurban/Green River trails).”

04/03/2006 e-mail to King County Parks Administration⁸

“I am amazed how dangerous it is to walk with children!...so many [bikers] do not use voice or bells to go around. They fly by. This is a huge concern for both the safety of my children and the biker. If they hit someone, they are both messed up pretty bad...I have had other moms sit and tell me the same problems. To [sic] bad the signage is not good enough. I think it should be on the news honestly.”

06/11/2007 e-mail to King County Parks Administration⁹

“It’s very dangerous to be passed by a silent biker who is going 25 mph faster than us. Sure, there are some signs (signal with bell or voice) but they are WAY too few.”

⁶ CP 291.

⁷ CP 293.

⁸ CP 299.

⁹ CP 301.

07/02/2007 e-mail to King County Parks Administration¹⁰

“Over the expanse of ‘trail’ we visited we saw literally hundreds of bikers, mostly speeding, thee [sic] joggers and one walker. You have driven walkers, skaters, joggers and others right out of the trail (let alone horses, which used to have unfettered access).”

In the months leading up to Jennifer’s collision, King County received specific warnings about the dangerous “blind corners” on the exact segment of the CRT where Jennifer was injured. Presciently, one concerned citizen warned King County about the hazard caused from the interaction of pedestrians and bicyclists on these blind “S” curves:

02/21/2007 e-mail to King County Parks Administration¹¹

Problem: When foot traffic uses the underpass, bicyclists and skaters are detoured into the other lane of the extremely blind corners and if there is any oncoming traffic on wheels then the potential of a serious collision will occur. ***It is only a matter of time before a serious accident happens***, as I frequent the Cedar River Trail on a regular basis and have witnessed many close calls. There are mothers with babies in carriages who use this part of the trail and I fear for their safety.

After receiving this e-mail, Robert Foxworthy, the Regional Trails Coordinator for the King County Parks and Recreation Division, wrote to Ms. Nygard that “We might think about a “Slow” sign on each tunnel approach? What do you think?”¹²

¹⁰ CP 306.

¹¹ CP 179.

¹² CP 181.

E. OCTOBER 5, 2007, COLLISION

In the late afternoon on October 5, 2007, Jennifer was riding her bicycle on the Cedar River trail with her friend, Jesse Yourkowski (“Jesse”). CP 28. Jennifer and Jesse were traveling east on the Cedar River trail away from the City of Renton and toward the City of Maple Valley on the portion of the CRT that runs parallel to both State Route 169 and the Cedar River. CP 28. At approximately 5:45 p.m., Jennifer and Jesse were approaching the “S” curves near the intersection of State Route 169 and 154th Place SE. CP 28.

As Jennifer and Jesse approached the bicycle underpass beneath 154th Place SE, Christie Shimizu was walking along the trail. CP 144. Ms. Shimizu was pushing a wide stroller carrying her 8-month-old triplets. Ms. Shimizu was walking in the same direction Jennifer and Jesse were traveling. CP 144.

As Ms. Shimizu approached the bicycle tunnel, she heard two bicyclists approaching from behind her. CP 144. Ms. Shimizu quickly pushed her stroller through the tunnel to ensure that she was out of the cyclists’ path. Ms. Shimizu later learned that the two bicyclists approaching from the rear were Jennifer and Jesse. CP 144.

Jennifer and Jesse rode through the tunnel at a casual pace and overtook Ms. Shimizu approximately 30 feet past the east exit of the

underpass. CP 144-145. While passing Ms. Shimizu, Jennifer and Jesse briefly crossed the yellow centerline to go around the wide stroller containing the three toddlers. CP 145. However, Ms. Shimizu observed that both Jennifer and Jesse returned to the appropriate, right-hand side of the trail immediately after passing her wide stroller. CP 145.

The point in the trail where Jennifer and Jesse passed Ms. Shimizu curves sharply to the right towards State Route 169 and ascends slightly uphill taking the trail back to grade. CP 145. After Jennifer and Jesse passed her, Ms. Shimizu had an uninterrupted and unobstructed view of both bicyclists as they were riding toward the intersection of State Route 169 and 154th Place SE. CP 145. Jesse was riding ahead of Jennifer and closer to the outer edge of the trail. CP 145. Jennifer was riding just inside the centerline on the right side of the yellow centerline. CP 145. Both Jennifer and Jesse remained on the right-hand side of the yellow centerline at all times after passing Ms. Shimizu. CP 145.

As Jennifer and Jesse approached the last of the sharp “S” turns in this section of the Cedar River trail, Ms. Shimizu noticed an oncoming cyclist attempting to negotiate the curve at a high rate of speed. CP 145. Ms. Shimizu later learned that this cyclist was Randall Worsech. CP 145.

Mr. Worsech's bicycle collided head-on with Jennifer. Jennifer was thrown backwards off her bicycle and onto the ground. CP 145. Mr. Worsech was also thrown from his bicycle onto the ground. CP 145.

After witnessing the collision, Ms. Shimizu rushed forward to see if she could help. CP 146. Jesse phoned 911. CP 146. Jennifer was bleeding profusely and choking on her own blood. CP 146.

Several cars passing along State Route 169 stopped and drivers rushed to offer assistance. CP 146. Michael Brundage was one of the drivers who stopped. CP 148. As Mr. Brundage pulled up to the traffic light controlling the intersection of State Route 169 and 154th Place SE, he saw Ms. Shimizu stopped on the trail with her baby carriage. CP 148. He was acquainted with Ms. Shimizu, and got out of his car to see if there was a problem. CP 148.

As Mr. Brundage got closer, he noticed that Ms. Shimizu and her babies were fine, but saw a woman lying on the ground suffering from massive head injuries. CP 148. Mr. Brundage later discovered that the injured woman was Jennifer Minato. CP 148. Mr. Brundage gathered blankets and diapers from Ms. Shimizu's car and pressed them to Jennifer's face and head to try to stop the bleeding. CP 149.

After getting the bleeding under control, Mr. Brundage noticed a man sitting on the ground wearing Spandex-type bicycle shorts, a bicycle

helmet and a bicycle shirt. CP 149. The man was Mr. Worsech. CP 149. Mr. Brundage noticed that the forks of Mr. Worsech's bicycle had been snapped off from the force of the collision. CP 149.

Mr. Brundage asked Mr. Worsech if he was okay. CP 149. Defendant Worsech replied that Mr. Brundage should attend to Jennifer. CP 149. Mr. Brundage then asked Mr. Worsech what happened. CP 149. Mr. Worsech replied, "***I was going too fast and couldn't hold the corner.***" CP 149.

The Washington State Patrol investigated the October 5, 2007 collision. CP 27-35. Trooper Scott Eng made several findings. For riders traveling westbound on the trail, like Defendant Worsech, the "path curves fairly sharply to the right and a rider is unable to see all the way around the curve." CP 25. In addition, Trooper Eng determined that, "At the area of the collision, there are no posted speed limit signs for bicyclists ... As you travel northbound on the bike path approaching 154th Place SE, the path curves to the right sharply with limited sight distance around the curve." CP 28. Trooper Eng concluded his report by noting that, "***A limited sight distance around the curve did not allow for either party to make maneuvers to avoid the collision when the hazard was perceived.***" CP 31.

Trooper Eng did not speak with Ms. Shimizu or Mr. Brundage as part of his investigation into the October 5, 2007 collision.

Jennifer was rushed to Harborview Medical Center. CP 308-314. Upon admission she was diagnosed with several facial lacerations, orbital fractures, subdural hematoma and respiratory failure. CP 308. Jennifer's injuries will require life-long care in a skilled nursing or supported living facility. CP 316, 318.

Four days later, a citizen wrote to King County with her concerns about inadequate speed limit signs and the need for bicyclists to reduce speed in blind curves along the CRT:

Could you tell me if the city will be putting into place speeds zones along the Cedar River trail? I am asking in light of the bike to bike accident that happened on the Cedar River trail this past Friday, Oct. 5 at about 5:00 pm. A young lady was struck by a racer riding fast.

I am concerned because I both walk and ride on this trail and have felt that bikers need to reduce their speed in blind areas and while riding a shared trail such as the Cedar River trail.

I would appreciate hearing from you as to whether this issue of speed on trails is being or will be addressed. I am hopeful that the city will respond quickly to this problem and help to avoid another family facing such a

tragic situation because a collision between a bike or pedestrian.¹³

F. PROCEDURAL HISTORY

On October 9, 2009, King County moved for summary judgment claiming immunity pursuant to the Recreational Land Use Statute, RCW 4.24.210. CP 8-18.

Appellant responded arguing that immunity was inappropriate because her injuries were caused by an artificial, dangerous condition that was known to King County, but non-obvious or “latent” to the general class of trail users. CP 111-132.

In support of her arguments, Appellant offered evidence that: (1) King County was responsible for the design, construction and maintenance of the CRT; (2) King County knew that inadequate sight distances and excessive speeds on blind curves on its trail system had resulted in serious collisions, including near where Jennifer was injured; (3) King County was specifically warned that the sight limitations and excessive speed at the precise location of the CRT where Jennifer’s collision occurred had resulted in several “near misses” and that it was “only a matter of time” before a serious injury occurred; (4) that industry guidelines adopted by King County for construction of the CRT called for a reduction in speed

¹³ CP 320-321.

and conspicuous signage due to the limited sight distances on the trail; and (5) that the limited Sight Stopping Distance and need to reduce speed were not readily apparent to the general class of trail users primarily due to King County's failure to conspicuously post appropriate warning signs. CP 107-132.

On December 7, 2009, King County Superior Court, the Honorable Deborah Fleck presiding, granted King County's Motion for Summary Judgment. CP 196-198. Judge Fleck's letter opinion states "The question on summary judgment in this case turns on the issue of latency." CP 200. Judge Fleck ruled that the dangerous condition was not latent because "The 90 degree right hand turn was there to be observed." CP 200. Judge Fleck justified her ruling by stating that "The only reported cases that have survived summary judgment have been cases in which the injury causing condition was truly not able to be perceived because it was hidden under murky water." CP 200.

G. LEGAL ARGUMENT

- 1. The trial court erred by concluding, as a matter of law, that the excessive design speed, inadequate sight-stopping distance and lack of signage at the location of the trail where Appellant was injured, was not a latent condition**

The standard for appellate review of a trial court's decision on summary judgment is *de novo*. See *Castro v. Stanwood Sch. Dist., No.*

401, 151 Wn.2d 221, 224 (2004). As with the trial court, this Court must consider all facts and reasonable inferences in a light most favorable to the Appellant. *See Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001). Summary judgment is inappropriate when there remain disputed issues of material fact and reasonable minds could differ. *See* CR 56(c).

Washington's Recreational Land Use Statute was intended to modify the common law duty owed to public invitees to encourage landowners to open their land to the public for recreational users. *See* RCW 4.24.200. Under RCW 4.24.210, landowners are generally not liable for injuries occurring on their land. However, landowners face liability when: (1) a fee is charged to use the land; (2) the injuries were intentionally inflicted; or (3) the injuries were caused by reason of a known, dangerous, artificial and latent condition for which no warning signs were conspicuously posted. *See* RCW 4.24.210(1), (3).¹⁴

In order to trigger the last exception to immunity, each of the four elements – known, dangerous, artificial, and latent – must be present in the injury-causing condition. *See e.g., Tabak v. State*, 73 Wn. App. 691, 695, 870 P.2d 1014 (1994). However, each of the four elements modifies the

¹⁴ The first two situations where liability may be imposed, i.e., when the landowner charges a fee for use of the land or when the landowner intentionally causes injury, do not apply to the facts of this case.

term “condition” rather than one another. *See e.g., Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 920, 969 P.2d 75 (1998).

In her letter ruling, the lower court indicated that the sole basis for her granting summary judgment was her finding that the injury causing condition was not latent: “the question on summary judgment in this case turns on the issue of latency.” CP 200. The trial court took no issue regarding the adequacy of Appellant’s evidence regarding: (1) the nature of the injury causing condition; (2) the artificial nature of the curve; (3) the dangerous qualities of the curve; and (4) King County knowledge of the curve’s danger. However, to provide this Court with proper context, these four elements, along with the issue of whether the curve’s dangerous nature was latent, are addressed below.

2. Injury-Causing Condition

To determine whether the injury-causing condition was known, artificial, dangerous and latent, the “condition” at issue must first be identified. *Davis v. State*, 102 Wn. App. 177, 185, 6 P.3d 1191 (2000). The injury-causing condition is the “specific object or instrumentality that caused the injury, viewed in relation to other external circumstances in which the instrumentality is situated or operates.” *Ravenscroft*, 136 Wn.2d at 921.

In *Ravenscroft*, the plaintiff was injured when the boat in which he was riding struck one of several submerged tree stumps near the middle of a water channel in a man-made reservoir. The defendant in *Ravenscroft* was responsible for artificially raising and lowering the water levels of the reservoir and knew that the tree stumps would sometimes become submerged. *Ravenscroft*, 136 Wn.2d at 915-16. Taking a broad view of the “injury-causing condition,” the Supreme Court held that the defendant was not entitled to statutory immunity:

The specific object causing the injury in this case was a tree stump. Under *Van Dinter*, the stump must be viewed in relation to other external circumstances, such as the location of the stump in the water channel and the water level, when considering whether the "condition" is known dangerous artificial and latent.

The injury-causing condition was created by [defendants] cutting down trees, leaving stumps near the middle of a water channel, then raising the river to a level which covered the stumps. This condition was contrived through human effort, not by natural causes detached from human effort. The condition was therefore artificial.

In *Van Dinter v. Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993), the Supreme Court confirmed that the “instrumentality causing the injury” must not be viewed in isolation and must take into account all external

factors contributing to the injury. The plaintiff in *Van Dinter* was injured when his eye struck an antennae protruding from a caterpillar-shaped piece of playground equipment. *Van Dinter*, 121 Wn.2d at 40. Plaintiff claimed that the injury-causing condition was the proximity of the caterpillar to a grassy play area. *Van Dinter*, 121 Wn.2d at 43. Defendants claimed that the injury-causing condition was the caterpillar in isolation from its surroundings. *Van Dinter*, 121 Wn.2d at 43. Agreeing with plaintiff, the Supreme Court held:

To view the caterpillar or some part of it, such as the antennae, as having been the injury-causing condition would be to artificially isolate some particular aspect of the total condition that caused [plaintiff's] injury. We also must give [plaintiff] the benefit of every reasonable inference that can be drawn from the facts. Consequently, we hold that the condition that caused [plaintiff's] injury was the caterpillar's placement, rather than the caterpillar viewed in isolation.

Van Dinter, 121 Wn.2d at 44.

Here, the trial court defined the injury-causing condition quite narrowly and in isolation from its surroundings. Specifically, the trial court held that that the injury-causing condition was simply a “turn” in the bike trail. CP 200. Under *Davis*, *Ravenscroft* and *Van Dinter*, this was error because the trial court considered the “turn” in isolation and did not

account for all external factors including limited sight lines, excessive design speed, sight obstructions and lack of conspicuous warnings.

Jennifer's injuries were caused by a combination of several factors: (1) the failure to post adequate speed limit signage at the location of the collision despite prior warnings of the danger of collision on the CRT; (2) excessive design speeds at in violation of the AASHTO guidelines; (3) inadequate sight lines caused by the location of dense trees and the placement of a man-made informational kiosk on the inside portion of the curve; and (4) inadequate Sight Stopping Distance according to the guidelines relied upon by King County for trail design.

Washington law recognizes that when there is a dispute regarding the nature of the "injury-causing condition," the identification of the condition is left to the trier of fact. *See Tabak*, 73 Wn. App. at 698; *See also, Van Dinter*, 121 Wn.2d at 44; *Cultee v. City of Tacoma*, 95 Wn. App. 505, 516, 977 P.2d 15 (1999). At a minimum, Appellant has raised a genuine issue of material fact regarding the identity of the injury-causing condition.

3. King County had actual knowledge of the injury-causing condition

For a condition to be "known" under the Recreational Land Use Act, the land owner must have actual knowledge of the condition. *See*

Gaeta v. Seattle City Light, 54 Wn. App. 603, 609, 774 P.2d 1255 (1989).

If knowledge is denied, plaintiff may present evidence, including circumstantial evidence, from which the trier of fact could reasonably infer actual knowledge by a preponderance of the evidence. *See Tabak*, 73 Wn. App. at 696; *Cultee*, 95 Wn. App. 517-18. Summary judgment is inappropriate where the plaintiff presents evidence that the landowner had actual knowledge that a condition is dangerous. *Id.*

In *Ravenscroft*, discussed above, the Supreme Court found that a defendant-landowner had actual knowledge of the injury-causing condition even though plaintiff could not establish that defendant had knowledge of the *specific* tree stump causing his injuries. *Ravenscroft*, 136 Wn.2d at 923. The Court held:

We note that [defendant] does not contest that the accident was caused by *one of several* submerged tree stumps in the middle of the water channel. It was not the stump, alone, but the stump, as part of the man-made condition of the water channel, that caused the injury.

Ravenscroft, 136 Wn.2d at 923 (emphasis added).

Similarly, the Court of Appeals in *Cultee* confirmed that actual knowledge is established if the landowner-defendant is shown to have actual knowledge of the injury-causing condition *in general, rather than specific, terms*. In *Cultee*, a young girl drowned when the bicycle she was riding slipped off the edge of an eroded roadway into tidal waters. *Cultee*

at 510. The roadway had eroded because a man-made levy holding back the waters of Hood Canal had failed. *Id.*

In *Cultee*, there was no evidence that the defendant-landowner had actual knowledge of the erosion at the *precise section of the roadway* where the young girl drowned. However, the court still found actual knowledge because, “[Plaintiff] presented evidence that the [defendant] had actual knowledge of the injury-causing condition ...: The [defendant] admits it knew that tidal waters sometimes covered *roads* at the Nalley Ranch.” *Cultee* at 517 (emphasis added).

Eight months before Jennifer was injured, King County was warned regarding the dangers posed by the “blind curves” on the CRT at the precise location her collision occurred. King County was also warned that:

It is only a matter of time before a serious accident happens, as I frequent the Cedar River Trail on a regular basis and have witnessed many close calls.¹⁵

In addition, King County Parks and Recreation Division received multiple warnings that: (1) traffic control signage on its bicycle trails was inadequate to ensure the safety of bicyclists and pedestrians; and (2) actual collisions and “near misses” were occurring on King County trails due to the inadequate sight lines along blind curves. CP 288-306.

¹⁵ CR 179.

There is also circumstantial evidence from which a jury could infer that King County had actual knowledge of the above-defined condition. According to King County's own regulations, specifically the AASHTO guidelines, the design speed and Stop Sight Distance of the curve where Jennifer was injured were unsafe in light of the 15 MPH speed limit. CP 138-140, 271, 276-283.

As in *Tabak, Ravenscroft and Cultee*, plaintiffs have presented sufficient evidence, both direct and circumstantial, from which a jury could infer that King County had actual knowledge of the dangerous conditions that caused Jennifer's injuries.

4. The "S" curve where Jennifer was injured is Dangerous

While the term "dangerous" is not defined by the Recreational Land Use Act, case law has construed the term applying common law negligence concepts. *Gaeta*, 54 Wn. App. at 609. Consequently, an injury causing condition is deemed "dangerous" if it poses an unreasonable risk of harm. *See Prosser, Torts* §31 (4th ed. 1971). Typically, the question of whether a condition is dangerous will be left for the jury to decide. *Cultee*, 95 Wn. App. at 519.

Plaintiff has offered sufficient evidence demonstrating that the curve where Jennifer was injured posed an unreasonable risk of harm. The curve had: (1) inadequate Sight Stopping Distances; (2) an

inappropriate design speed; and (3) failed to warn riders to reduce speed when attempting to negotiate the curve. According to William E. Haro, these factors made the curve where Jennifer was injured “a highly unsafe facility.” CP 141.

Even the evidence relied upon by King County raises issues of fact as to whether this curve is dangerous. Mr. Worsech testified that he was traveling between 12 and 15 MPH before the collision and that he was aware that the posted speed limit is 15 MPH. CP 58. However, even while traveling at or below the posted speed limit, he was unable to avoid the collision with Jennifer: “I was going too fast and couldn’t hold the corner.” CP 149.

Finally, Trooper Eng determined that, “At the area of the collision, there are no posted speed limit signs for bicyclists ... As you travel northbound on the bike path approaching 154th Place SE, the path curves to the right sharply with limited sight distance around the curve.” CP 28. Trooper Eng concluded his report by noting that, “*A limited sight distance around the curve did not allow for either party to make maneuvers to avoid the collision when the hazard was perceived.*” CP 31.

There are genuine issues of material fact as to whether this curve was dangerous and presented an unreasonable risk of harm bicyclists. Summary judgment was not appropriate.

5. The “S” curve in the trail is an artificial, man-made condition

For purposes of the Recreational Land Use Statute, the meaning of "artificial" is the same as the dictionary definition of the word.

Ravenscroft, 136 Wn.2d at 922. “Artificial” is defined as “Contrived through human art or effort and not by natural causes detached from human agency: relating to human direction or effect in contrast to nature: (a): formed or established by man's efforts, not by nature.” Webster’s Third New International Dictionary, 124 (1986).

Courts have broadly construed whether a condition is deemed “artificial” for purposes of the statute. For example, in *Ravenscroft*, our Supreme Court held that defendants raising of the water level at a reservoir, thereby concealing tree stumps, constituted an artificial condition under the statute.

Likewise, the Court of Appeals has suggested that an established trail, such as the CRT, is considered “artificial” for purposes of the act. In *Davis v. State*, 102 Wn. App. 177, 188 (2000), the Court indicated that the purposeful creation of an established trail of particular, length, width and/or time of existence is considered artificial:

The evidence here indicates a transient print in the shifting sand left by a recreational user. The record does not show an established “trail” of any particular width,

length, or time in existence; it merely indicates numerous vehicle tracks the day of the accident. Nor is there evidence suggesting that the tracks were a purposeful creation.

Davis, 102 Wn. App. at 188.

King County's admits that the trail was constructed in phases over the course of the past 25 years. CP 20, 60-61. The portion of the trail where Jennifer was injured was constructed at the direction of King County within the last five years. CP 60-61. King County re-routed the paved bicycle path beneath 154th Place SE through a man-made bicycle underpass. CP 60-61.

Each characteristic of the curve where Jennifer was injured was "contrived through human art or effort and not by natural causes detached from human agency." The CRT is a purposeful creation, an established trail, with a specific length, width and/or time in existence. *Davis*, 102 Wn. App. at 188. In addition, the trail has limited traffic control signage and pavement markings, and a man-made informational kiosk, the placement of which added to the dangerousness of the curve by obstructing the sight lines of riders attempting to negotiate the curve.

The "S" curve on the trail where Jennifer was injured is an artificial condition within the meaning of the Recreational Land Use Act.

6. The danger posed by the “S” curves was latent to the general class of users

“Latent” as used in RCW 4.24.210(3) means “not readily apparent to the general recreational user.” See *Van Dinter v. Kennewick*, 121 Wn.2d 38, 45 (1993). The dispositive question regarding latency is whether the condition is readily apparent to the general class of recreational users, not whether one particular user might fail to discover it. *Ravenscroft*, 136 Wn.2d at 924; *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 555, 872 P.2d 524 (1994).

Washington law is crystal clear that “***Latency is a factual question which must usually be decided by a jury.***” See *Cultee*, 95 Wn. App. at 522; see also *Ravenscroft*, 136 Wn.2d at 926 (question of latency is one of fact making summary judgment on the issue whether a danger condition is latent, inappropriate); *Davis*, 102 Wn. App. at 193 (Whether a drop-off was readily apparent to the general class of recreational user was a question of fact sufficient to pose a jury question.)

Appellant offered both documentary evidence and expert testimony that the dangerous nature of this curve was not readily apparent to the general class of recreational users. King County failed to provide warning signs indicating that the sight distances were limited and failed to warn bicyclists to reduce speed to safely negotiate these turns.

Further, there is evidence that a recreational cyclist attempting to negotiate the blind “S” curve at the claimed speed limit of 15 MPH would not be aware that his or her speed would prevent recognition and avoidance of an oncoming cyclist. Mr. Warsech, who claims to be very familiar with the trail, and claims he was traveling between 12 to 15 MPH before his collision with Jennifer, stated, “*I was going too fast and couldn’t hold the corner.*” CP 149. Likewise, Trooper Eng’s investigation concluded “*A limited sight distance around the curve did not allow for either party to make maneuvers to avoid the collision when the hazard was perceived.*” CP 31.

William E. Haro, an engineer with extensive expertise and experience in the design of bicycle trails, testified that, “the dangerous condition posed by the inadequate Sight Stopping Distances and excessive design speeds of the portion of the Cedar River trail where Ms. Minato was injured, would not have been readily apparent to the general class of users of the trail.” CP 141.

Despite the evidence regarding the latency of the dangerous curve, and despite the teachings of *Cultee*, *Ravenscroft* and *Davis*, the trial court determined, *as a matter of law*, that the injury causing condition was not latent. The trial court held, “the turn was there to be observed as was the downward slope of the path.” CP 208. Dismissing appellant’s arguments,

the trial then opined “I do not find that the lack of a sign advising or requiring a reduced speed in order to have adequate sight stopping distance for a biker approaching the other direction is necessary, nor do I believe that the related sight-line arguments precludes summary judgment in this case.” CP 208.

The trial court suggested that the only circumstances where immunity under the Recreational Land Use statute should not be granted are when “the injury causing condition was truly not able to be perceived because it was hidden under murky water.” CP 208.

The trial court’s analysis is flawed. To start, the trial court’s belief that latency somehow relates to whether the injury causing condition was submerged under murky water ignores Washington law. Neither the statute, nor any case cited by the trial court or King County imposes such a requirement for establishing latency. In fact, the Court of Appeals in *Davis v. State*, 102 Wn. App. 177, 188 (2000), held that an abrupt drop off on a trail constituted an issue of fact regarding latency despite there being no water concealing the allegedly dangerous condition.

In addition, the trial court’s determination that the “turn was there to be perceived” ignores the numerous external factors which are both not visible and that make the turn a latent danger. There is no evidence in the record that the general class of trail users could perceive inadequate Sight

Stopping Distances and/or the excessive design speeds on this portion of the CRT. In fact, Mr. Haro testified that trail users could *not* perceive these hidden dangers – the very definition of latency. Consequently, the trial court erred in concluding, as a matter of law, that characteristics of the “S” curve where Jennifer was injured could not be found latent by any reasonable juror.

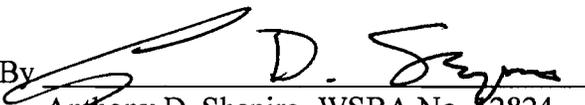
H. CONCLUSION

For the reasons stated herein, this Court should REVERSE the trial Court’s dismissal of Jennifer’s claims and allow a jury to determine whether her injuries were caused by an artificial and dangerous condition that was known to King County, but not to trail’s users.

RESPECTFULLY SUBMITTED this 14th day of December, 2011.

HAGENS BERMAN SOBOL SHAPIRO LLP

By


Anthony D. Shapiro, WSBA No. 12824
Marty D McLean, WSBA No. 33269

AOKI LAW PLLC

Russell M. Aoki, WSBA No. 15717
720 Olive Way, Ste. 1525
Seattle, WA 98101-3933
(206) 624-1900 Tel
(206) 442-4396 Fax

No. 67579-6- I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JENNIFER MINATO,

Appellant,

v.

KING COUNTY,

Respondent.

APPEAL FROM THE
SUPERIOR COURT FOR KING COUNTY WASHINGTON
HONORABLE DEBORAH FLECK

PROOF OF SERVICE

HAGENS BERMAN SOBOL SHAPIRO LLP
Anthony D. Shapiro, WSBA #12824
Marty D. McLean, WSBA #33269
1918 Eighth Avenue, Suite 3300
Seattle, Washington 98101

AOKI LAW PLLC
Russell M. Aoki, WSBA No. 15717
720 Olive Way, Ste. 1525
Seattle, WA 98101

Attorneys for Appellant

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 DEC 14 AM 9:48

I, LAURIE CECIL, hereby declare as follows:

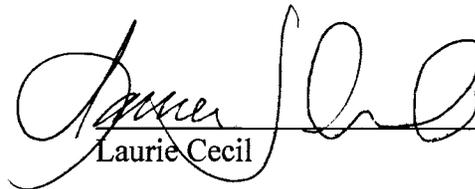
1. I am a citizen of the United States, living and residing in King County, in said State, I am over the age of 18 years, and not a party to or interested in the within-entitled cause. I am an employee of Hagens Berman Sobol Shapiro LLP and my business address is 1918 Eighth Avenue, Suite 3300, Seattle, Washington 98101.

2. On December 14, 2011, I caused APPELLANT'S OPENING BRIEF to be filed with the court and served on the following parties by ABC Legal Messenger:

Mr. Kristofer J. Bundy
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
500 Fourth Avenue
Suite 900
Seattle, WA 98104

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of December, 2011, in Seattle, Washington.


Laurie Cecil