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The Supreme Court of the State of Washington - No. 93580-7

Court of Appeals, Division II, of the State of Washington - No 47149-3-II

Kitsap County Superior Court, Cause 12-2-01544-1

THE CITY OF PORT ORCHARD,

Petitioner/ Defendant,

v.

PAMELA O'NEILL,

Respondent/Plaintiff.

RESPONDENT'S ANSWER TO CITY'S
PETITION FOR DISCRETIONARY FOR REVIEW

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 ORIGINAL

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I. IDENTITY OF RESPONDENT

COMES NOW Respondent/Plaintiff Pamela O’Neill, appellant below, responding to the Motion for Discretionary Review by the City of Port Orchard.

II. DECISION BELOW

The Superior Court granted defendant’s motion for summary judgment on December 1, 2014 and denied reconsideration December 19, 2014. An appeal followed. An appellate decision was entered in this matter on June 28, 2016, reversing the trial court, and reconsideration was denied on August 10, 2016.

III. ISSUES PRESENTED ON REVIEW

- 1) Does the City allege error of significance under RAP 13.4(b) by Division II of the Court of Appeals, in recognizing an obligation of municipalities to maintain safe roads for bicycle travel by its decision that bicycles are “ordinary travel” under *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), sufficient to trigger discretionary review by the Washington State Supreme Court?
- 2) Does the City allege error of significance under RAP 13.4(b) by Division II of the Court of Appeals in its decision to allow opinion testimony by plaintiff’s expert James Couch, sufficient to trigger discretionary review by the Washington State Supreme Court?
- 3) Does the City allege error of significance under RAP 13.4(b) by Division II of the Court of Appeals ruling on summary judgment in

finding proximate cause and accepting the factual basis for plaintiff's claims as to why she fell, sufficient to trigger discretionary review by the Washington State Supreme Court?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

Plaintiff fell from her bicycle when encountering a section of a poorly maintained road in the City of Port Orchard, when her bicycle front tire unexpectedly changed directions, throwing her over the handlebars onto the concrete, fracturing her clavicle and puncturing her lung. She sues for compensation for her losses.

The street in question is Sidney Avenue, a major road into the City of Port Orchard. Deposition of City Engineer Mark Dorsey, p. 68, lines 12-17, CP 111. As it approaches downtown, it has a significant downhill grade. Where Sidney has cross streets, such as the one at Kitsap Street, the grade levels out, then the descent starts again on the far side of the cross street. Otto declaration, Exhibit 4, CP 122, 123, 124. The City of Port Orchard has the responsibility to maintain the roadway at Sidney Avenue and Kitsap Street. Dorsey deposition, p. 35, line 24, CP 106. Sidney Avenue was apparently paved in 1946 or before. Dorsey deposition, p. 56, line 20 to p. 57, line 21, CP 109. There have been no major repairs since that time. Sidney is constructed of concrete slabs. The slabs have moved and heaved over time, with one panel rising while the other one does not. Dorsey deposition, p. 58, line 20 to p. 59, line 7. CP 110. This leaves gaps and ledges in the roadway.

The gaps and ledges are significant. Some of the shifting has raised the concrete slabs from neighboring slabs in excess of an inch, with the ledge running parallel to vehicular traffic. Otto declaration, Exhibit 4, CP 121-124. Defects that run parallel to the direction of bicycle travel are particularly hazardous, are difficult to see, and need not be very large to cause a bicycle accident. Declaration of James Couch, CP 124A-E. Even City Engineer Dorsey acknowledged that diagonal hazards can catch a bicycle tire and kick it to the side. Dorsey deposition, p. 49, line 20 to p. 50, line 2, CP 108.

Plaintiff's expert, James Couch, has examined the site and states: "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." Declaration of James Couch, ¶ 30, CP 124D .

There are no records that maintenance has ever been done at the intersection of Sidney Avenue and Kitsap Street. Dorsey deposition, p. 54, line 17, CP 109. Even without records, there is evidence of prior attempts at repair by City road crews, as shown by asphalt patches on the road. Dorsey deposition, p. 55, line 6-21, CP 109. No one currently working in the City road department can remember when those patches were made. Dorsey deposition, p. 65, line 1-11, CP 111. Dorsey estimated that the patches could have been ten to thirty years old, and were placed to reduce the differential so that the edges would not be so abrupt. Dorsey deposition, p. 67 line 20 to p. 68 line 2. CP 111. He agreed that the patches were very worn, and that

“Yes, I would say that the City does need to address this section of road...”

Dorsey deposition, p. 68, lines 3-5, CP 111.

As to the question of whether there are regular inspections of roadways for safety issues, Mr. Dorsey stated the City of Port Orchard operates solely on a “complaint-based system.” (Dorsey deposition, page 78, lines 11-17), implying it does no regular inspections of its streets. Apparently it takes an injury or accident before a defect will be examined. Whether there are actual repairs is based on financial constraints. (Dorsey deposition, page 79, lines 1-24). Mr. Dorsey never saw the police report from this incident until after the tort claim was filed. Dorsey deposition, page 81, lines 23-25.

The City has no training for road staff as to the needs of bicycles. Dorsey deposition, p. 52, line 11 -25, CP 108. The roads are maintained for vehicles. As to the specific intersection in question, Dorsey stated in his deposition at page 59, starting at line 19, CP 110:

A: ... I think that even though that roadway, from what I've been told, lifts and falls seasonally, we've not done anything to that since I've been here. Again, it's primarily maintained for vehicles.

Q: Vehicles other than bicycles?

A: Yes.

The grade from South to North on Sidney is a significant descent, in the neighborhood of 25 percent both above and below the landing at Kitsap Street. Dorsey deposition, p. 69, line 16 to p. 70, line 4, CP 112. This exceeds current standards, but which the City Engineer contends is permitted because it was constructed before the standards. The road was sloped, “[I]n

the order of 25 percent, definitely in excess of 12 percent,” the maximum grade currently allowed by law. Dorsey deposition, p. 70, lines 5-18, CP 112.

Plaintiff/Appellant Pamela O’Neill regularly rode her bicycle to and from work. O’Neill deposition, p. 13, lines 3-11, CP 92. O’Neill had no driver’s license, and so used her bicycle to get to work, and to go to the store, and to visit friends. O’Neill deposition, p. 13, lines 6-18, CP 92. On the day of the incident, she was bicycle commuting on her way home from work. O’Neill deposition, p. 16, lines 22-25, CP 92. Ms. O’Neill worked at that time as a patient personal care provider at Sidney House. Plaintiff’s deposition at p. 41, lines 22 - 25, CP 98. Her bicycle was a Cannondale, which she obtained the year before. O’Neill deposition, pp. 11-12. CP 91. She first learned to ride a bicycle at age six. O’Neill deposition p. 12, line 16, CP 91. She was born in 1960. CP 29. At the time this incident arose, she was 48 years of age. CP 29.

In the year preceding the bike accident, Plaintiff rode her bike daily. O’Neill deposition, p. 13, line 5, CP 92. She never had a bicycle accident, and rode her bike frequently without incident. Moreover, Plaintiff never had any near misses with cars or other bicyclists prior to the bike accident underlying this litigation. O’Neill deposition, p. 15, lines 12-20, CP 92. Ms. O’Neill is a skilled bike rider, but does not ride trails and stays on the concrete. O’Neill deposition, p. 14, line 22 to p. 15, line 8, CP 92. While she frequently rode elsewhere in the City of Port Orchard, Ms. O’Neill never rode her bicycle anywhere other than the City of Port Orchard itself. O’Neill

deposition, p. 14, line 25 to p. 15, line 2, CP 92. Although she had been bicycle commuting for a year, this was the first time she used this particular roadway with her bicycle. O'Neill deposition, p. 29, lines 10-25, CP 37.

As to traffic control devices pertinent to travel on Sidney Avenue, there was no stop sign for a vehicle or bicycle traveling northbound on Sydney as she was. There were stop signs for cross traffic, eastbound and westbound on Kitsap Street. O'Neill deposition, p. 60, lines 9-13, CP 100, Otto declaration, Exhibit 4, CP 124. There was a yellow incline sign warning travelers of a hill that Plaintiff saw further up the hill as she approached the descent. O'Neill deposition, p. 60, line 24, CP 100, which O'Neill understood to mean the incline would be steeper, and to use caution. O'Neill deposition, p. 61, lines 1-3, CP . At the time Plaintiff saw the incline sign, her speed was already slow, but she brought her bicycle to an even slower speed by evenly applying the brakes in the handlebars and pedals of her bicycle. O'Neill deposition, p. 62, lines 2-11, CP 101. There was no signage prohibiting the use of bicycles on Sidney. Deposition of Dorsey, p. 52, line 6, CP 108. The City Engineer never recommended a sign prohibiting bicycle travel on this road, but would consider one if they lost this case. Dorsey deposition p. 70, line 19 to p. 71, line 12. CP 112.

On July 17, 2009, Plaintiff Pamela O'Neill was riding home after work by bicycle. O'Neill deposition, p.16, line 25, CP 92. She was proceeding Northbound on Sidney Avenue in Port Orchard, downhill. As she approached the intersection with Kitsap Street, described above, a truck

was traveling her same direction, requiring her to pull to the right to allow the truck to pass on the left, though there were cars parked on the right side of the road. O'Neill deposition, p. 20, lines 8-19, CP 93 . This is the area where bicycles in the flow of traffic are expected to travel, and where experienced and skilled bicyclists are most likely to ride. Declaration of James Couch, ¶ 21, CP 124D. When there is other traffic on the roadway, bicycles are to move to the right, so that traffic can pass, but they cannot go so far right as to be endangered by the parked cars.

Suddenly, her front tire changed directions, and she was thrown over the handlebars. O'Neill deposition, p. 20, line 3, CP 93, p 21, line 24, CP 94. She testified that the condition of the road caused her to fall, Plaintiff declaration, p. 23, line 24. In particular the uneven, rough road surface of the road which had been repaired caused the fall. It turned her handlebars. Plaintiff declaration, p. 24, lines 9-16, CP 94.

In further describing why she fell, Plaintiff O'Neill stated, "All of a sudden the bike changed directions with the front tire. That's all I know." O'Neill deposition, p. 21, lines 24-25 CP 94. Plaintiff explained that she felt a vibration and a quick jerk when her tire changed direction, and her handlebars moved to her right. O'Neill deposition, p. 22, lines 1-7, CP 94.

Plaintiff landed on her head and right shoulder, and injuring her elbow, back, hands and knees. O'Neill deposition, p. 33, lines 10-24, CP 96. Fortunately she was wearing a bicycle helmet, and suffered no head injury or loss of consciousness. Plaintiff declaration, p. 33, lines 13-20, CP 96. She

knew right away that her bones broke, as she could hear them cracking and had immediate pain. Plaintiff declaration, p. 34, lines 3-9, CP 96, CP 30. The assessment of paramedics was possible right shoulder dislocation, elbow, rib and clavicle fracture. CP 30. She was in the hospital for seven days with a fractured clavicle and punctured lung. O'Neill deposition, p. 39 | lines 17-24, CP 97, p. 40, line 1, CP 97.

James Couch was retained to look at the circumstances and supply an expert opinion as to the cause of this crash. But for a short hiatus in 1979, Couch has spent his career the bicycle industry since 1975. He was trained in manufacturing and fitting bicycles by the top companies, and is employed by REI as a Technical Specialist II, the highest level cycle and ski shop technician certification. He has been trained and certified as a United States Cycling Federation Category 3 cycling coach. He has owned his own bicycle shop, Spoke & Sprocket, for 17 years in Tacoma, Washington. His shop provided mechanical support to the areas top organized rides, including the Seattle to Portland Classic (STP), Peninsula Metric, Daffodil Metric, and Rhapsody events. His shop sponsored recreational and racing bicycle clubs. He has organized and run bicycle races, and has provided assistance in both racing and recreational route and course development. Declaration of James Couch, CP 124A-C.

While a member of the University Place Economic Development Committee, he was often asked to give advice about cycling facilities. He is currently on the Multnomah County Bicycle and Pedestrian Citizen Advisory

Committee which advises Multnomah County regarding bicycle and pedestrian facilities. CP 124B.

Mr. Couch has served as a bicycle accident expert for 17 years, identifying eight specific court cases in which he was retained, and referencing being a consultant in a number of other cases which did not make it to formal litigation. He has never been found unqualified to serve as an expert witness. CP 124B-C

Mr. Couch met with Pamela O'Neill at the scene of the crash, discussed the accident with her, read her deposition, and personally inspected the site. Couch declaration, ¶¶ 6-8, CP 124C. He has reviewed all of the photographs, the deposition of the City Engineer, Mr. Dorsey, and the accident report. Couch declaration, ¶¶ 9-11, CP 124C. He saw that there are pavement defects of concrete slabs that have separated in the area that her front tire of her bicycle hit. Couch declaration, ¶ 12, CP 124C. He saw that the height difference between the slabs exceed one inch, which alone is enough to cause the most experienced bike rider to lose control of their bicycle. Couch declaration, ¶ 13, CP 124C. Otto declaration, Exhibit 4, CP 124. He saw that the slabs in question are separated from each other by a distance that varies, from two to six inches, with one as wide as eleven inches. Couch declaration, ¶ 14, CP 124C. Otto declaration, Exhibit 4, CP 122-124. He saw that the surface area within (between) the slabs is very rough and formed by a variety of substances, including dirt, gravel, and road patch material. Couch declaration, ¶ 15, CP 124C. He saw that the primary

defect runs nearly parallel to the direction of travel, and is long, running the length of the slab. Couch declaration, ¶ 16, CP 124C. He saw that the roadway defects at Sidney Avenue and Kitsap Street are in the area where skilled and experienced bicyclists are most likely to ride, far enough from parked cars to be safe for travel. Couch declaration, ¶¶ 21, 22, CP 124D. He knows that the defects which run parallel to the direction of travel are difficult for a cyclist to see while cycling. Couch declaration, ¶ 17, CP 124C-D. He knows that roadway defects which run the direction of bicycle travel need not be very large to cause a bicycle accident. Couch declaration, ¶ 18, CP 124D.

Mr. Couch expressed an opinion that, this particular defect creates a significant hazard to cyclists, given its size and length. Couch declaration, ¶ 19, CP 124D, as, once a bicyclist's wheel engaged the defect, even the most experienced cyclist would have trouble maintaining control of the bicycle. Couch declaration, ¶ 20, CP 124D. Mr. Couch found O'Neill to be a cautious, skilled, safe cyclist. Couch declaration, ¶ 29, CP 124D. He expressed the opinion that O'Neill's tire engaged the road defect, which steered her bike, caused a loss of control, turned her bike, and caused her body to fly over the handlebars. Couch declaration, ¶ 19, CP 124D. Mr. Couch expressed the opinion that, in his entire career, he has seen only a few hazards as pernicious as the pavement defect here at issue. Couch declaration, ¶ 30, CP 124D.

B. Statement of Procedure

A Summons and Complaint for damages was filed on July 16, 2012. CP 1-7.

An Answer was filed July 27, 2012. CP 8-12.

The trial court entered Findings of Fact, Conclusions of Law and an Order Granting Summary Judgment, dismissing the action on December 1, 2014. CP 141-147.

A Notice of Appeal was timely filed. CP 162.

Division II of the Court of Appeals heard the matter and issued its published opinion on June 28, 2016, establishing that bicycles are “ordinary travel” for negligence purposes to require safe roadways under *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), and reversing the trial court’s dismissal.

The City sought reconsideration, which was denied on August 10, 2016.

The City timely filed a Petition for Discretionary Review on September 9, 2019.

V. ARGUMENT & AUTHORITIES

A. Considerations Governing Acceptance of Review

In Washington’s two tiered appellate system, not every case is appropriate for review by the Washington State Supreme Court. As the parties have already had benefit of a complete appellate review, only certain issues may be appealed further, under discretionary review. RAP 13.4(b), as

amended effective September 1, 2016, enumerates principles which govern acceptance of review by the Supreme Court, none of which were addressed by the Petition for Review:

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

B. Application of the Governing Considerations

1. Whether the decision below usurped the legislative authority.

Only one of the issues raised by the City here arguably meets these governing principles: whether the Court of Appeals has imposed a fiscal responsibility on the City, exceeding its authority, usurping the legislature's fiscal role by determining the duty owed under negligence standards to bicyclists. This argument might arguably trigger consideration under RAP 13.4(b)(3&4).

The City's position is that Division II usurped the legislature's role in establishing regulations for bicycling. Petition, page 12. In the City's view, special lanes should be provided to bicyclists under a comprehensive transportation policy, and only then would the city have an obligation to make those lanes, and only those lanes, safe for bicyclists. Petition for Review, page 13. Under this vision for our communities, bicyclists going outside those special lanes would have no protection from dangerous

conditions and hazards known to the City, which is expressly contrary to the statute quoted below.

The City complains that as bicycles use no gasoline, and pay no gas tax, or other financial support from bicyclists, Petition for Review, page 14, they do not financially support construction and maintenance of roads. This argument is of no relevance in a negligence claim, but the City argues this triggers a fiscal note, which is only in the province of the legislature, Petition for Review, page 14. The City claims that the court's ruling will require reconstruction of millions of miles of roadways, which should be a legislative determination, and which the State would have to fund. Petition for Review, page 16.

The City's arguments fail as they ignore the fact that the legislature has already made a determination that bicycles are part of ordinary travel in RCW 46.61.755, which states in pertinent part:

(1) 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....

This statute was passed in its initial form in 1965, and was amended in 2000, clarifying that bicycles on sidewalks have the rights and responsibilities of pedestrians. No changes were made to the rights of bicycles to use roadways at that time.

As bicycles are given rights to use the roadways and duties to follow traffic rules, bicycle traffic is a regular part of ordinary travel for considerations of negligence and municipal liability. Bicycles are a

predictable and routine part of traffic to be expected on the roadways. Bicyclists are expressly given the rights applicable to the driver of a vehicle. A primary right of vehicular traffic is the right to have safe roads. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). Note that the *Keller* case itself involved a crash by a motorcycle, not an automobile.

The legislature chose the language in RCW 46.61.755 purposefully, and is presumed to be aware of its own enactments. *ATU Legislative Council of Washington State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656, 660 (2002). Further, the Legislature is presumed to be familiar with judicial interpretations of statutes, and absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions. *Pudmaroff v. Allen*, 138 Wn.2d 55, 64-65, 977 P.2d 574, 579 (1999). Washington law has long held governmental entities responsible for unsafe roads.

But the duty to keep streets in repair is a municipal or ministerial duty, for a breach of which an action will lie in favor of a party injured thereby. *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705. In the second place, we think that where, as here, a city has exclusive control and management of its streets, with power to raise money for their construction and repair, a duty (when not expressly imposed by charter) arises to the public, from the character of the powers granted, to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and that it is liable to respond in damages to those injured by a neglect to perform such duty. [emphasis added].

Sutton v. City of Snohomish, 11 Wash. 24, 28, 39 P. 273, 275 (1895). Note that *Sutton, supra*, involved injuries to a pedestrian, who also paid no gas taxes.

The City further submits that millions of miles of roadways will need to be reconstructed to meet the needs of bicyclists, at enormous financial impact, which is a legislative, not a judicial decision. Petition for Review, page 16. The City's hyperbole is unfounded. All that is needed is routine inspection of roads and modification of the rare traps and ledges which will re-direct bicycle tires, or warning signs to advise of the hazard. Please recall that there had been earlier repairs at the site of this injury, where simple asphalt patches were applied to eliminate the height differential and fill the gaps between the concrete slabs, but the patches had not been maintained for between ten to thirty years. Dorsey deposition, p. 67 line 20 to p. 68 line 2. CP 111. Presumably, asphalt patches are not a budget buster.

As an example of the rarity of two wheeled vehicle hazards, there are signs routinely placed at re-paving sites stating "motorcycles use extreme caution" to warn of the ledges in pavement, parallel to the direction of travel, when one lane of new pavement has been put down and the other has not, or at railroad crossings. Making safe such rare hazards will not have the same fiscal note as reconstructing millions of miles of highways. Please see *McCluskey v. Handorff-Sherman*, 125 Wash.2d 1, 882 P.2d 157 (1994) for the proposition that it was harmless error to exclude cost of repair information in a road design case where all that was needed was a sign to warn of the hazard.

The ruling that bicycles are part of ordinary travel for *Keller* purposes, is consistent with prior decisions of this court. In *Camicia v. Howard S.*

Wright Construction Co., 179 Wash.2d 684, 317 P.3d 987 (2014), a bicyclist was using a bicycle trail along the I-90 corridor, owned by the City of Mercer Island, when she crashed into a wooden post, suffering injury. The recreational immunity claim¹ turned on whether there were facts supporting a theory that the trail was used for transportation rather than recreation. As the title history of the land made clear, the trail was a part of a transportation corridor, and the bicycle was therefore being used for transportation, not recreation. The court overturned the summary judgment dismissal which was based on recreational immunity. At page 699, the *Camicia* court affirmed that bicycles are part of “ordinary travel” for *Keller* analysis:

Extending the reach of RCW 4.24.210 to land that is open to the public for purposes other than recreation simply because some recreational use occurs not only undermines the statute's plain language and the legislature's intent but would also unjustly relieve the government of its common-law duty to maintain roadways in a condition reasonably safe for ordinary travel. See *Keller v. City of Spokane*, 146 Wash.2d 237, 249, 44 P.3d 845 (2002). [emphasis added]

The court should therefore decline discretionary review.

2. Whether James Couch is a qualified expert

Petitioner opens its motion with complaints that Plaintiff's expert is not qualified to express opinions under ER 702.

¹The Recreational Immunity Statute does not apply here. Plaintiff/Appellant Pamela O'Neill was using her bicycle to get to and from work at the time of the injury. Recreational immunity under RCW 4.24.210 was not part of the summary judgment motion by the City of Port Orchard. It was neither raised nor briefed below.

Initially, this issue does not fall under one of RAP 13.4(b)'s Considerations Governing Acceptance of Review, and therefore the Petition should be summarily denied.

Further, Mr. James Couch, plaintiff's expert here, was the same person recently cited as an expert in *Jewels v. City of Bellingham*, 183 Wn.2d 388, 353 P.3d 204 (June, 2015). There was full discussion of the qualifications of James Couch in the dissent of Justice Gordon McCloud, joined by Justices Gonzales, Wiggins, and Stephens, at page 406, which was not addressed nor contradicted by the majority.

Couch states that “[s]peed bumps are usually marked by warnings on the roadway such as yellow paint and/or through signage to give people notice.” CP at 108. The basis for that observation is Couch's 30 years “in bicycle riding and coaching,” CP at 107—experience sufficient to qualify him as an expert in the kinds of speed bumps that bicyclists typically encounter. See ER 702 (witness may be “qualified as an expert by ... experience”). Couch also opined that “it was reasonable for Mr. Jewels to believe that [the site of the accident] was a typical speed bump, particularly when the first speed bump he came to in the park fit that common pattern.” CP at 109. This was not, as the City asserts, “speculat[ion]” about Jewels' decision to ride over the water diverter. City of Bellingham's Suppl. Br. at 20. Rather, it was an opinion about what bicyclists generally do and expect. As such, it was admissible under ER 702.

There is no reason to accept review here, as to the qualifications of Mr. Couch.

3. The City's challenge on proximate cause.

The City asks acceptance of review of an issue of proximate cause on summary judgment. Again, this issue does not fall under one of RAP

13.4(b)'s limited Considerations Governing Acceptance of Review, and therefore the Petition should be denied.

Further, proximate cause was not challenged in the City's Summary Judgment Motion at the trial court level. CP 13-14, CP 16. The City presented only two questions in its summary judgment motion: Breach of the City's duty of care, and claims of assumption of risk. CP 16. Proximate cause was not challenged below, not developed in briefing, and should not be considered here.

Further still, particularly in negligence decisions, the supreme court has noted that:

“issues of negligence and proximate cause are generally not susceptible to summary judgment.” *Ruff [v. King County]*, 125 Wash.2d at 703, 887 P.2d 886 (citing *LaPlante v. State*, 85 Wash.2d 154, 159, 531 P.2d 299 (1975)); accord *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wash.2d 745, 759, 912 P.2d 472 (1996) (noting negligence is ordinarily a question of fact).

Similarly, whether a condition is inherently dangerous or misleading is generally a question of fact. See *Leber v. King County*, 69 Wash. 134, 124 P. 397 (1912); *Provins v. Bevis*, 70 Wash.2d 131, 422 P.2d 505 (1967); *Tanguma v. Yakima County*, 18 Wash.App. 555, 563, 569 P.2d 1225 (1977); cf. **1224 *Hewitt v. Spokane, Portland & Seattle Ry. Co.*, 66 Wash.2d 285, 291–92, 402 P.2d 334 (1965) (noting unusual circumstances at railroad crossing may allow trier of fact to find crossing “exceptionally dangerous” and “extrahazardous”). Likewise, the adequacy of the government's attempt to take corrective action is generally a question of fact. E.g., *Livingston v. City of Everett*, 50 Wash.App. 655, 658, 751 P.2d 1199 (1988).

Owen v. Burlington N. and Santa Fe R.R. Co., 153 Wash.2d 780, 788; 108 P.3d 1220, 1223 (2005).

Finally, there was ample evidence that the street defect made her fall. The record contains evidence that the plaintiff encountered the raised and heaved concrete slabs, the ledges, lips and drop off, and the gaps and rough surfaces and the debris between the slabs, and all of a sudden, her bicycle handlebars turned and she was pitched over onto the road surface, O'Neill deposition, p. 20, line 3, CP 93, p 21, line 24, CP 94. When she got to the defect with the rough surface, she felt a vibration and a quick jerk when her tire changed direction, and her handlebars moved to her right. O'Neill deposition, p. 22, lines 1-7, CP 94. Landing on her head and shoulder, she instantaneously suffered a fractured clavicle, a punctured lung, and was required to endure an extended hospital stay. O'Neill deposition, p. 39 lines 17-24, CP 97, p. 40, line 1, CP 97.

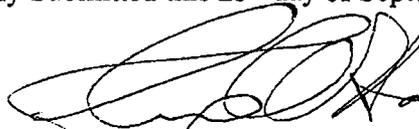
There is no issue here needing Supreme Court resolution.

VI. CONCLUSION

As the decision of the Division II of the Court of Appeals that bicycles are part of ordinary travel for liability purposes is a natural expression of established law; and as the legislature has already statutorily allowed that bicycles have all the rights and duties of automobile drivers, making them predictable and expected users of roadways; and as the appellate court's ruling simply clarified the status of bicycles for analysis under *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), we submit that the decision below was appropriate. The qualifications of Expert Couch are not an issue of significant statewide concern, nor is there a

compelling issue as to summary judgment on the issue of the road defect being a proximate cause of injury, so there is no issue meeting the standards of RAP 13.4(b). Accordingly, we request that the motion for discretionary review by the Petitioner, City of Port Orchard be DENIED.

Respectfully Submitted this 23rd day of September, 2016,

A handwritten signature in black ink, appearing to read 'Anthony C. Otto', is written over the typed name and address below.

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NO. 93580-7

SUPREME COURT
OF THE STATE OF WASHINGTON

PAMELA O'NEILL, a single person,
Appellant,

vs.

THE CITY OF PORT ORCHARD, a
municipal corporation,

Respondent.

CERTIFICATE OF SERVICE

I, Karen Alfano, declare under penalty of perjury under the laws of the State of Washington, that I am an employee at the Law Offices of Anthony C. Otto, over the age of 18 years, and not a party to nor interested in this action. On September 26, 2016, I caused to be delivered a copy of *Respondent's Answer to City's Petition for Discretionary Review and Certificate of Service* on the following parties via **Electronic Mail and United States Mail**:

Patrick McMahon
Carlson, McMahon & Sealby, PLLC
P.O. Box 2965
Wenatchee, WA 98807-2965
Patm@Carlson-McMahon.org

Signed on this 26th day of September, 2016, at Port Orchard, Kitsap County, Washington.


Karen Alfano

CERTIFICATE OF SERVICE

Law Offices of Anthony C. Otto
Post Office Box 1368
Port Orchard, WA 98366
(360) 876-5566 Telephone
(360) 895-8689 Facsimile

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Dear Clerk:

Attached please find:

Respondent's Answer to City's Petition for Discretionary Review & Certificate of Service

Case Name: Pamela O'Neill vs. City of Port Orchard

Cause #: 93580-7

Filing Attorney:

Anthony C. Otto, WSBA #11146
Law Offices of Anthony C. Otto
P.O. Box 1368
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Tel: (360) 876-5566
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tony@anthonyotto.com

Sincerely,

Karen Alfano
Paralegal/Office Manager
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(360) 876-5566 (Office)
(360) 895-8689 (Facsimile)

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