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NO. 67579-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

JENNIFER MINATO,

Appellant,

v.

KING COUNTY

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE CASE

A. Introduction

Jennifer Minato ("plaintiff") sued King County and Randall Worsech for injuries she sustained in an October 5, 2007 bicycle accident on the Cedar River Trail. CP 1-7. Plaintiff and Mr. Worsech were both riding their bikes that day, travelling in opposite directions, and they collided on a curve in the bike path. CP 58.

Plaintiff's theory against Mr. Worsech was that he was liable to her because he crossed the centerline and hit her. CP 4. That claim has been settled and Mr. Worsech is no longer a defendant. In a search for a deeper pocket, plaintiff also sued King County. The theory against the County is that it caused Mr. Worsech to cross the centerline in the curve because there was no 10 mph speed limit sign and that there needed to be such a sign because there was "only" 75 feet of sight distance for him as he entered the curve. *See e.g.*, CP 5, 140. Plaintiff has no evidence that this accident would not have occurred if there had been such a sign. *See e.g.* CP 136-42.

As they did in the trial court, plaintiff and her expert ignore the prominent, conspicuously posted 90 degree turn warning sign placed where plaintiff's expert claims the speed limit sign should have been. *See* CP 91, 93, 94; Plaintiff's Brief throughout; CP 136-42. Despite this 90

degree warning, plaintiff asserts that "[t]here are no signs warning riders to slow down before entering the curves." Plaintiff's Brief at p. 7.

In the trial court, King County sought summary judgment under Washington's Recreational Use Act, RCW 4.24.210. CP 8-18. The Honorable Deborah Fleck granted King County's motion, correctly concluding that the curve in the bike path was not a latent condition. CP 196-200. Judge Fleck also correctly found that the 90 degree right hand turn sign was there to be observed. *Id.* CP 200. This appeal followed.

B. The accident

As set forth above, plaintiff's case against the County is premised on the theory that she rode properly and in her lane but that the lack of a speed limit sign caused Mr. Worsech to cross into her lane and hit her. CP 3, 4. Ironically, her theory is that nothing about the supposed dangerous and latent condition of this curve caused her to ride poorly. CP 1-7. Instead, she claims that Mr. Worsech was tricked by the dangerous and latent conditions on this curve causing him to come into her lane. CP 5. In making this unique argument -- that another person, not herself, was tricked by a dangerous and latent condition -- plaintiff ignores the undisputed declaration by Mr. Worsech, who had ridden safely around this curve approximately 100 times before the accident. CP 58. That declaration makes clear that there was nothing latent about this curve. CP

59 ("There were no hidden conditions on the trail and there was nothing about the condition of the trail that caused this collision.").

On the day of the accident, Mr. Worsech was 48 years old and employed as an engineer at Boeing. CP 57. He is an avid and very experienced bicyclist who had ridden his bike about 53,000 miles in the last 12 years (as of 2009). *Id.* He frequently rode on the Cedar River Trail. *Id.* He was very familiar with the trail and knew that a couple of years before 2007 the section of the trail where this accident occurred was completely redesigned and repaved. *Id.* Mr. Worsech knew that instead of going straight through the intersection at State Route 169 and 154th Place S.E., the trail now curves to the north, goes under an overpass, goes back to the south and then curves back to the west. CP 57, 58. Mr. Worsech had ridden this new layout approximately 100 times before the accident. CP 58.

On the day of the accident, Mr. Worsech was riding westbound on the trail to the point where the trail now curves to the right. *Id.*¹ That portion of the trail has a yellow centerline to designate which lane riders should be in as they go around the corner. *Id.* Mr. Worsech knew that he was supposed to stay on the right side of the yellow line. *Id.* There was also a large sign at the trail head saying that riders were to stay on the right

¹ For the court's reference, Mr. Worsech was riding towards 154th Place S.E., which is towards the two aid units that are shown parked in the picture at CP 48.

side of the yellow line. *Id.* He was therefore riding in his lane on the right side of the trail. *Id.* He also knew that the speed limit on the trail is 15 mph and he estimates he was going between 12 to 15 mph. *Id.*

As usual, there were very few cyclists on the trail that day. *Id.* The weather was clear and sunny. *Id.* As Mr. Warsech approached the curve, he made sure to look ahead to see if anyone was coming. *Id.* He saw two people coming towards him riding their bikes side-by-side on the trail. *Id.* Mr. Warsech made eye contact with each of them. *Id.* The man, Mr. Yourkowski, was in the proper lane. *Id.* However, plaintiff was fully in Mr. Warsech's lane, about 12 inches from the edge of the path. *Id.* Mr. Yourkowski and plaintiff were not wearing helmets. *Id.* There was no indication, verbally or physically, that plaintiff was going to move from her position in Mr. Warsech's lane. *Id.* Mr. Warsech decided that his only option to try and avoid a collision was to go between the oncoming cyclists. *Id.* As he tried to do so, plaintiff suddenly moved to her right, directly into Mr. Warsech's path, just as he was moving between her and Mr. Yourkowski. *Id.* Mr. Warsech was therefore unable to avoid a collision with plaintiff. *Id.*

After the accident, Mr. Warsech spoke briefly with Mr. Yourkowski. *Id.* Mr. Yourkowski was very upset about what had just happened to his friend. *Id.* He apologized, saying that just prior to the

collision he and Ms. Minato spoke about riding in the oncoming lane and that she should not ride there or she might get hit. *Id.*

Mr. Worsech confirms that there were no hidden (i.e., latent) conditions on the trail and confirms that he knew the exact configuration of the curve as he entered it:

There were no hidden conditions on the trail and there was nothing about the condition of the trail that caused this collision. It was a nice, sunny fall day. It was light out. The trail was dry with no debris or defects in the pavement. I knew exactly where I was going. I knew the speed limit. I knew the trail curved to the right. And I knew there was a lane designated for each direction. I therefore rode my bike within the speed limit. I was fully in my designated lane. And I was in complete control of my bike as I entered the curve.

CP 59.

After the accident, 911 was called and Trooper Scott Eng investigated. CP 58, CP 24-53. The trooper's investigation revealed that the portion of the trail where this accident occurred is paved and flat. CP 25. There is one lane of travel for each direction on the bike path which is divided by a solid yellow centerline. *Id.* Traveling westbound on the trail approaching 154th Place S.E., the path curves fairly sharply to the right and a rider is unable to see all the way around the curve. *Id.* The fact that there is a curve in the trail is obvious to users in each direction. *Id.* The pavement was in good condition, and Trooper Eng saw no holes, bumps or other defects in the trail. *Id.*

Trooper Eng concluded that the collision resulted from plaintiff riding her bicycle on the wrong side of the bike path. *Id.* He also concluded that her failure to wear a helmet may have played a role in the severity of her injuries. CP 25, 26. The trooper discovered no evidence that Mr. Worsech rode his bike in a negligent manner. CP 26.

Nearly six weeks after the accident, Trooper Eng was contacted by a private investigator that had apparently been hired by Ms. Minato's attorney. *Id.* The investigator sent the trooper a declaration that was signed by an eyewitness, Christie Shimizu. *Id.* The trooper reviewed the declaration and added it to his report. *Id.* It did not change his opinions about how the accident occurred. *Id.*

In her brief, plaintiff relies heavily on a declaration she obtained from Michael Brundage in which Mr. Brundage asserts that Mr. Worsech told him that "I was going too fast and couldn't hold the corner." CP 149. That claimed statement of Mr. Worsech is inadmissible hearsay from a non-party. ER 801(c); ER 802.

Regardless of the exact details of how this accident occurred, it is clear that it occurred because of the activities of the three bike riders, not because of some hidden condition of the curve. There is nothing latent about the condition of this curve, which plaintiff's own expert states has 75 feet of sight distance. CP 140.

C. History of the Cedar River Trail where the accident occurred.

There are approximately 300 miles of regional trails throughout King County, of which the County has various levels of responsibility for about 175 miles. CP 162. This extensive network of trails provides recreational and commuting opportunities for millions of user trips each year. CP 163. The King County trails include some or all of 16 different trails, including the Burke-Gilman Trail, Sammamish River Trail, Marymoor Connector Trail, East Lake Sammamish Trail, Preston-Snoqualmie Trail, Snoqualmie Valley Trail, Green River Trail, Interurban Trail, Cedar River Trail, Redmond Ridge Trails, East Plateau Trails, Green-to-Cedar Rivers Trail, Soos Creek Trail, Lake Youngs Trail, Tolt Pipeline Trail, and Issaquah-Preston Trail. CP 162, 163.

Specific to the Cedar River trail, starting in 1988 King County's Department of Transportation (DOT) embarked on a substantial capital improvement project to replace a structurally deficient bridge and install a new roadway going north just to the east of State Route 169 in Maple Valley. CP 19, 20. The project was known as the Elliott Bridge Replacement Project because the most substantial part of the project was constructing a new bridge over the Cedar River. CP 20. From

approximately May 2000 to April 2004, Larry Jaramillo was the project manager for King County DOT on the project. *Id.*

Beginning in 1996, and continuing until the construction was completed in 2005, King County contracted with an engineering design firm, ABKJ, to provide the engineering and design of the plans, specifications, and estimates and consultant construction phase services for this project. *Id.* The County generally does not use in-house staff to design large scale projects but instead contracts with design firms with the appropriate expertise. *Id.*

A relatively small piece of ABKJ's work was to design a re-routing of the Cedar River Trail under 154th Place S.E. so that the bike trail would no longer cross at grade level with the intersection of SR 169 and 154th Place S.E. *Id.* ABKJ's solution for a safer route was to have the trail curve to the north, go through a bike path undercrossing tunnel structure below 154th Place S.E. and then turn back to the south and then west again. *Id.* Final design plans for the trail were sealed and signed by ABKJ as the Engineer of Record. *Id.*

Sheet 53 of the final design plan made by ABKJ show the new configuration for the bike path. CP 20, 23. This new route was installed by Pacific Road & Bridge, the general contractor for the Elliot Bridge Replacement Project. CP 20. The Declaration of Substantial Construction

Completion for the project was issued in September 2005. *Id.* Once construction was complete, Roads' involvement with the trail in this area was finished and King County Department of Natural Resources and Parks again took over management of this section of the trail. *Id.*

Mr. Jaramillo confirms that there is nothing hidden or dangerous about the condition of the bike path. CP 21. It is simply a paved path with a center line stripe with standard straight and curved sections along its route. *Id.* It is not possible that a sighted person about to ride around this curve would not know he or she was about to do so. *Id.*

Robert Foxworthy is the Regional Trails Coordinator for the King County Parks and Recreation Division. CP 60. Mr. Foxworthy confirms that the Cedar River Trail is for recreational use and that no fee is charged. CP 60, 61. He confirms that to the best of his knowledge the trail was designed and constructed according to professional engineering guidelines. CP 61. He confirms that the curve where the accident occurred is open and obvious. *Id.* Finally, Mr. Foxworthy confirms that he knows of no other accidents at the location. *Id.* In fact, he knows of only one other significant accident on any King County trail, ever. CP 163. That accident was on the Interurban Trail in 2004. *Id.*

Further, as the person in charge of managing the trail system, Mr. Foxworthy confirms that he has no knowledge of a dangerous or hidden

condition at the location where the accident occurred. *Id.* He does not believe there is anything dangerous about the curve. *Id.* And he believes that the curve where this accident occurred is obvious to users of the trail. *Id.*

Despite these undisputed facts, plaintiff claims that King County had actual knowledge of a dangerous and latent condition at this curve. Such actual knowledge is required to overcome immunity under RCW 4.24.210. Plaintiff relies on eight e-mails, seven of which are from citizens and one from Parks to the Cascade Bicycle Club, to try and show actual knowledge. These e-mails prove no such thing. Each e-mail is addressed below in the order raised in plaintiff's brief.

1. E-mail No. 1

E-mail No. 1 was from Jed Aldrige about the Soos Creek Trail. CP 285-86. Mr. Aldridge complained that another rider on that trail had been going "very very very" fast and had hit Mr. Aldridge. *Id.* Mr. Aldridge also complained that there were too many blind curves on the Soos Creek Trail. *Id.* Mr. Aldridge made no complaints about the Cedar River Trail or the curve at issue. *Id.*

2. E-mail No. 2

E-mail No. 2 was from an unidentified person. CP 288. The person complained that the rules signs for the Sammish River Trail were

not posted anymore. *Id.* The writer asked that the signs be put back and stated that he had seen a number of near accidents between trail users. *Id.* The writer made no mention of the Cedar River Trail or the curve at issue in this case. *Id.*

3. E-mail No. 3

E-mail No. 3 was from Nancy Herring. CP 290-91. Ms. Herring was responding to an online survey regarding the Burke Gilman/Sammamish River Trail. *Id.* She stated that she walks that trail regularly. CP 291. She noted that there was lots of litter and dog poop on the sides of the trail and asked that more trash cans be put out. *Id.* She also complained that bikers are "flying" on that trail and that she had seen some accidents and near misses. *Id.* She asked that the speed limit and no littering laws be enforced. *Id.* She made no complaints about the Cedar River Trail or about the curve at issue. *Id.*

4. E-mail No. 4

E-mail No. 4 was from Parks to the Cascade Bicycle Club. CP 293. The Parks representative asked the club to remind its members not to speed on the trails. *Id.* There was no reference to curves or to the curve at issue. *Id.*

5. E-mail No. 5

E-mail No. 5 was from an unidentified person. CP 299. The person wrote about the Burke-Gilman Trail, responding to an on-line survey. *Id.* The person complained that bike riders were being rude, that many did not use their voice or a bell when they passed and that they "fly by." *Id.* The person indicated that the behavior of these bike riders made him or her concerned for their safety. *Id.* The person made no complaint about curves, the Cedar River Trail or the curve at issue here. *Id.*

6. E-mail No. 6

E-mail No. 6 was from Jim and Carolyn Hitter. CP 301. The Hitters wrote in about the "Sammamish Valley Trail and other trails in the King County system." *Id.* The point of the email was to ask that there be a greater emphasis on instilling a culture of biking courtesy, complaining that too few bike riders signal they are passing and some are going too fast. *Id.* They also asked for trail name signs when the trails join. *Id.* The Hitters made no complaint specific to the Cedar River Trail. *Id.* And they did not complain about any curve or the curve at issue here. *Id.*

7. E-mail No. 7

E-mail No. 6 was from an unidentified person complaining about the "River Trail," which appears to be the Sammamish River Trail. CP 306. The person complained that the County had driven walkers, skaters and joggers "right out of the trail" and that this is "a perfect example of

lousy planning, unless of course you planned it that way." *Id.* The person made no mention of the Cedar River Trail or any curve, much less the curve at issue. *Id.*

8. E-mail No. 8

E-mail No. 8 was from "Gail." CP 179. Gail complained about "the potential danger concerning pedestrians who insist on walking under the overpass of the new bridge" *Id.* This is the underpass under to the northwest of where plaintiff was injured. CP 98. She complained about the curves at both ends of the tunnel. *Id.* She suggested that slow moving traffic should not use the underpass because of the blind corners and that warning signs should be placed telling people to use the crosswalk, rather than the underpass. *Id.* She made no complaint about the curve at issue. *Id.*

Plaintiff claims that these eight e-mails, seven of which are from trail users -- out of the millions of user trips each year on the 175 miles of King County's trail system -- show that "a jury could infer King County had actual knowledge of the dangerous conditions that caused Jennifer's injuries." Plaintiff's Brief at p. 26. Yet only two of the e-mails complain about curves: e-mail No. 1 complains about curves on the Sammish River Trail and e-mail No. 8 complains about the curves on each side of the underpass on the Cedar River Trail. CP 285-86, CP 179. There is not a

single complaint about the curve where plaintiff was injured. Instead, most of the complaints are about discourteous bike riders and a variety of other complaints and suggestions. These e-mails therefore prove nothing that is relevant to this case.

The reality is that there is only one known previous significant reported accident *on the entire King County trail system*. CP 163. That occurred on the Interurban Trail in 2004. *Id.* As for the curve at issue, there is nothing dangerous or latent about the curve -- it is simply a well-marked and well-paved curve of a bike path with a prominent warning sign just before the curve begins.

II. ISSUES PRESENTED

- A. **A recreational land owner is immune if it places a conspicuous sign warning of a condition ahead. There is a prominent 90 degree turn warning sign conspicuously placed just prior to the curve complained of by plaintiff. Is King County immune?**
- B. **A recreational land owner is immune from liability if the injury causing condition was not latent, regardless of whether the plaintiff actually discovered the condition. The curve where plaintiff was injured in broad daylight was not latent. Is King County immune?**
- C. **A recreational land owner is immune unless it has actual knowledge of a dangerous and a latent condition. King County had no actual knowledge of either condition. Is King County immune?**

- D. In order to show proximate cause, a plaintiff must show cause-in-fact without resorting to speculation. Plaintiff cannot show a 10 mph speed limit sign would have prevented this accident. Has plaintiff failed to meet her burden of producing evidence of proximate cause?**

III. ARGUMENT

Plaintiff's claim against King County was properly dismissed by The Honorable Deborah Fleck under the Recreational Use Act, RCW 4.24.210. CP 196-200. Citing to the controlling cases of *Van Dinter v. City of Kennewick* and *Tennyson v. Plum Creek*, Judge Fleck correctly concluded that the condition at issue -- the bike curve where plaintiff was injured -- was not a latent condition because it was "there to be observed," as was the 90 degree turn sign that is prominently placed just before the curve. CP 200. She therefore properly rejected plaintiff's arguments that the curve is somehow a latent condition because it has 75 feet of sight distance and the speed limit should have been 10 mph. CP 200.

- A. Washington has a strong public policy of encouraging the public's use of recreational land by substantially limiting the liability of recreational land owners who offer use of their land for free.**

The Recreational Use Act provides that public or private landowners who allow members of the public to use their land for free for purposes of outdoor recreation "shall not be liable for unintentional injuries to such users." RCW 4.24.210. The purpose of the statute is to encourage landowners to make their land available for public recreational

purposes by substantially limiting their liability toward persons using their land for free. RCW 4.24.200. To accomplish this strong public policy objective, the Legislature provided immunity to landowners unless: (1) they charge a fee; (2) they intentionally injure someone; or (3) the injuries are caused by a known dangerous artificial latent condition for which warning signs have not been conspicuously posted. RCW 4.24.210; *see also Riksem v. City of Seattle*, 47 Wn. App. 506, 510, 736 P.2d 275 (1987); *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 42-43, 846 P.2d 522 (1993).

The four terms of the statute -- (1) known; (2) dangerous; (3) artificial; and (4) and latent -- "modify the term 'condition', not one another." *Swinehart v. City of Spokane*, 145 Wn. App. 836, 844, 187 P.3d 345 (2008). Plaintiff must therefore show the existence of each of these four conditions.

A latent condition is one that is not readily apparent to the recreational user. *Tabak v. State*, 73 Wn. App. 691, 698, 870 P.2d 1014 (1994). Whether a condition is latent is determined without regard to whether the property user actually discovered it. *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 555, 872 P.2d 524 (1994). Courts instead look to whether the condition is generally evident. *Tennyson*, 73 Wn. App. at 555.

It is insufficient for plaintiff to show that this curve was somehow latently dangerous (which is, in reality, what she is arguing). See *Swinehart*, 145 Wn. App. at 848. ("the condition itself, not the danger it poses, must be latent.") (quoting *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 924, 969 P.2d 75 (1998)).

In addition, to overcome immunity, plaintiff must prove that the County had actual knowledge that a dangerous latent condition exists. *Davis v. State*, 102 Wn. App. 177, 189, 6 P.3d 1191 (2000) (citation omitted). Summary judgment should be affirmed where a plaintiff fails to meet her burden of producing evidence of this actual knowledge. *Davis*, 102 Wn. App. at 190.

Judge Fleck correctly found that the bike curve where this accident occurred was not a latent condition. CP 200. Her ruling on summary judgment should be affirmed for four reasons, each of which is sufficient to affirm. First, a prominent 90 degree turn warning sign was conspicuously placed just before the curve that Mr. Worsech rounded. This dispositive fact is simply ignored by plaintiff and her expert. Second, the curve of the bike path was not latent. Third, King County had no actual knowledge of a dangerous or latent condition on this curve. Fourth, it is speculation to guess that a 10 mph speed limit sign for Mr. Worsech

would have prevented this accident. Each of these arguments will be addressed in order.

- i. A recreational land owner is immune if it places a conspicuous sign warning of a condition ahead. There is a prominent 90 degree turn warning sign conspicuously placed just prior to the curve complained of by plaintiff. King County is therefore immune.**

Even if plaintiff could prove that there was a dangerous condition, a latent condition and actual knowledge of both by the County, her claim is still barred because a prominent 90 degree turn warning sign was conspicuously posted at the curve. *See* RCW 4.24.210; CP 91, 93, 94. While plaintiff's expert, Mr. Haro, chastises the County for not having a 10 mph sign at the curve because he claims there is "only" 75 feet of sight distance, he fails to even acknowledge this warning sign. CP 136-42. Plaintiff similarly ignores the sign in her brief.

The prominent and conspicuously posted 90 degree turn warning sign results in immunity for the County. *See* RCW 4.24.210.

- ii. A recreational land owner is immune from liability if the injury causing condition was not latent, regardless of whether the plaintiff actually discovered the condition. The curve where plaintiff was injured in broad daylight was not latent. King County is therefore immune.**

Plaintiff cannot show any latent (i.e., hidden) condition on this benign curve of the bike path. The extent of plaintiff's evidence of latency is the claim that Mr. Worsech "only" had 75 feet of sight distance as he rounded the curve and that this somehow makes the corner dangerous at over 10 mph. CP 140. While plaintiff argues over and over that 75 feet of sight distance makes this curve unduly dangerous, the fact remains that a condition that can be seen for 75 feet cannot be deemed latent. *See e.g. Swinehart*, 145 Wn. App. at 849, 852 (photographs of the complained of condition proved that the condition was "visible and obvious", otherwise it "could not have been captured by a photograph.").

Judge Fleck therefore correctly concluded that the bike path curve was not latent, ruling that:

As in Tennyson v. Plum Creek, the turn was there to be observed as was the downward slope of the path. The 90 degree turn sign was there to be observed. . . .

CP 200.

The controlling case law shows that Judge Fleck is correct. Out of all of the reported Recreational Use Act cases in Washington, there are ten that made holdings on the issue of latency. The seven cases that affirmed dismissal on the issue of latency establish that plaintiff has made no showing that this bike path curve with 75 feet of sight distance and a warning sign was a latent condition.

First, in *Riksem v. City of Seattle*, 47 Wn. App. at 511, Division One held that an accident between a bicycle and a jogger was not caused by any latent condition on the Burke Gilman bike trail but instead "resulted from an *activity*, not from a condition of the land." As she did in the trial court, plaintiff ignores this controlling authority.

Second, in *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 610, 774 P.2d 1255 (1989), Division One affirmed summary judgment for the defendant on the issue of latency where a motorcyclist was injured on the Diablo dam because his wheel got stuck in tracks, holding that "[t]he condition was not latent because the tracks were obvious"

Third, in *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993), the Supreme Court affirmed summary judgment for the city on latency where a child was injured because his eye struck an antennae of a playground caterpillar. The caterpillar violated rules regarding size and outlying grass. The court held that "[a]t most . . . the present situation is one in which a patent condition posed a latent, or unobvious, danger. . . . The condition itself must be latent."

Fourth, in *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. at 555-56, Division One affirmed summary judgment for a timber company where a motorcyclist was injured when he drove over a large mound but could not see from his perspective that half of the back side of the mound

had been removed. The court held the condition was not latent because "the excavation was in plain view and readily apparent to anyone who examined the gravel mound as a whole."

Fifth, in *Chamberlain v. State*, 79 Wn. App. 212, 219-20, 901 P.2d 344 (1995), Division One affirmed summary judgment for the state on the issue of latency where a child walking on the Deception Pass bridge was hit by a car because the walkway he was on was too close to the road. The court held that "the photographs . . . make clear that the proximity of the walkway to the vehicular traffic . . . cannot be deemed other than open and apparent."

Sixth, in *Swinehart v. City of Spokane*, 145 Wn. App. at 849, 852 Division Three affirmed summary judgment for Spokane on the issue of latency where the plaintiff slid down a "Red Wagon" slide and broke his back on impact at the bottom because there were not the required 12 to 18 inches of wood chips at the landing. The court held that "any insufficient or improperly maintained playground surface at the Red Wagon slide exit was not a latent condition. Instead, the displacement and condition of the wood chips at the playground was patent, or obvious." The court found that the fact the plaintiff took pictures of the condition proved that the condition was "visible and obvious," otherwise it "could not have been captured by a photograph."

Seventh, in *Widman v. Johnson*, 81 Wn. App. 110, 115, 912 P.2d 1095 (1996), Division Two held that the intersection of a logging road with SR 407 was not latent, despite the fact that the stop sign had been removed by vandals.

These seven cases show that the bike curve in this case was not a latent condition. Further, the three reported cases that were remanded for trial, because there were issues of fact on latency, show what must be established to make a case of latency.

First, in *Tabak v. State*, 73 Wn. App. 691, the injury causing condition was a number of narrow fishing docks held to each other by underwater bolts. Because the bolts were underwater they could not be seen. Unfortunately, the bolts were broken. When plaintiff stepped from one dock to the other, one dock rose and the other fell because of the unseeable, broken bolts. Plaintiff was injured by this dangerous and latent condition. Division One found issues of fact on latency because there was nothing about the condition of the dock that would put plaintiff on notice that the underwater bolts were broken and that the dock would suddenly sink beneath his weight. *Id.* at 698.

Second, in *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, a power company cut trees in a lake resulting in stumps being hidden under water near the middle of a boating channel. The stumps

could not be seen. The plaintiff was going across the lake in his power boat and was injured when the boat struck a hidden, submerged stump. The Supreme Court found that there were issues of fact on latency because "[t]he record does not support a conclusion that the submerged stumps near the middle of the channel were obvious or visible" *Id.* at 926.

Third, in *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999), a levee had been breached for some time, causing tidal waters to flood the inland area when the tide came in. When flooded, the area had muddy water and hidden, eroded steep road edges underneath the water. The plaintiff was riding her bike in shallow water and fell off of a hidden road edge into water over her head. She drowned as a result. Division Two held that latency was an issue of fact because "the condition was not 'readily apparent'" because it was hidden under the muddy water. *Cultee*, 95 Wn. App. at 522.

These three cases illustrate what a condition must be to be deemed latent under the statute. The condition must be hidden from view and essentially trick the recreational user by virtue of its dangerousness and latency. Judge Fleck analyzed this issue correctly, noting that "[t]he 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. This analysis was correct and should be affirmed.²

Plaintiff claims that Judge Fleck believes that a condition must be under murky water in order to be considered latent. Plaintiff's Brief at p. 32. Certainly there is no such requirement in the statute and of course Judge Fleck does not believe that there is. There are countless conditions that could be found to be latent, such as a hidden trap door, fishing line across a bike trail, or other hidden conditions that cannot be seen. But the reality is that the only three reported cases that have been sent back to trial on the issue of latency involved dangerous conditions that were hidden under murky water. No similar condition exists on this well marked curve on a bike path.

The ten reported Washington cases with holdings on the latency under the Recreational Use Act show that in order to be latent a condition must be hidden. The photographs of the bike curve at issue establish that

² Plaintiff relies on *Davis v. State*, 102 Wn. App. 177, 188 (2000), asserting that the court "held" that there was an issue of fact as to whether an abrupt, hidden drop off on a sand dune was latent. That is not correct. Instead, the court affirmed summary judgment for the state, holding that the condition was not artificial and there was no actual knowledge by the defendant. *Davis*, 102 Wn. App. at 189, 191. The court then goes on in dicta to say that there was an issue of fact on latency because the condition may not have been "readily apparent." *Id.* at 193. The abrupt, hidden drop off in the sand dunes that tricked Davis is not similar to 75 feet of sight distance around a properly laned bike path curve with a warning sign.

there was nothing hidden about the condition of this benign, well marked curve with a warning sign. A condition that can be seen for 75 feet cannot be deemed latent. Nor can a condition that can be readily photographed. *Swinehart*, 145 Wn. App. at 852 ("such a condition could not have been captured by a photograph."). As in *Riksem*, this accident was the unfortunate result of activity on the trail -- two riders going in opposite directions that happened to collide. If one of these riders had not been there, the other would have made it around the corner without incident.

The collision between plaintiff and Mr. Worsech was therefore not the result of any latent condition of the curve and Judge Fleck's order on summary judgment should be affirmed.

iii. A recreational land owner is immune unless it has actual knowledge of a dangerous and a latent condition. King County had no actual knowledge of either condition. King County is therefore immune.

Plaintiff has the burden of showing that King County had actual knowledge that this curve in the bike path is a dangerous condition and a latent condition. *See* RCW 4.24.210. Plaintiff cannot meet her burden for six reasons.

First, there was no latent condition. The County cannot have actual knowledge of something that does not exist. This fact alone is dispositive.

Second, King County did not have actual knowledge that this curve was a dangerous condition. It is plaintiff's contention that the curve was dangerous because there was "only" 75 feet of sight distance and therefore the speed limit should have been posted at 10 mph for the curve. Yet nowhere does plaintiff or her expert explain, or even address, the fact that a prominent 90 degree turn warning sign was placed where they claim the 10 mph speed limit sign should have been. CP 91, 93, 94. Riders were therefore told that they should enter the curve with caution. King County did not have actual knowledge of a dangerous condition that did not exist.

Third, King County's actual knowledge about the design of this bike curve was that it was properly designed and engineered by ABKJ. CP 20. That firm did the entirety of the design for the new layout of the trail that was completed in 2005. *Id.* Therefore, the County's actual knowledge was that they had paid a lot of money to a very good firm to do a good design job. There is no evidence that the County's actual knowledge was anything other than that.

Fourth, there had never been a prior reported accident on this curve. CP 163. In fact, the manager of the trail is aware of only one previous serious accident on *all* of the County's extensive trail system. *Id.*

The County's actual knowledge was therefore that its trails generally, and this curve in particular, were safely designed.

Fifth, plaintiff's claimed evidence of actual knowledge of a dangerous and latent condition is eight e-mails, seven from trail users out of the millions of user trips per year on the trail system. These seven e-mails express a variety of concerns about King County bike trails, mostly about conflicts between bike riders and pedestrians. None of the e-mails complain about the curve at issue. As set forth in the facts section, above, these e-mails do not show actual knowledge of a dangerous condition or latent condition at this curve.

Nevertheless, plaintiff claims these eight irrelevant eight e-mails show that "a jury could infer King County had actual knowledge of the dangerous conditions that caused Jennifer's injuries." Plaintiff's Brief at p. 26. It would take a whole lot of inferring to reach that inference. Only two of the emails complain about curves: e-mail No. 1 complains about curves on the Sammish River trail; e-mail No. 8 complains about the curves on each side of the underpass on the Cedar River Trail. CP 285-86, 179. There are no complaints about the curve where plaintiff was injured. The fact is that there is nothing dangerous or latent about this curve -- it is simply a well-marked and paved curve of a bike path with a prominent

warning 90 degree turn warning sign. This was the extent of King County's actual knowledge about this curve.

Sixth, plaintiff claims that AASHTO requires that the speed limit be less than 15 mph on the curve and that this somehow gave King County actual notice that the curve was "unsafe in light of the 15 MPH speed limit." Plaintiff's Brief at p. 26. This argument also fails. First, plaintiff greatly overstates the purpose of the AASHTO guidelines, claiming without authority that the guidelines are mandatory. *Id.* at p. 5. That is not the case. AASHTO and the MUTCD guidelines are simply that -- guidelines. CP 163. And in any event, plaintiff has no evidence that King County had actual knowledge that the lack of a 10 mph speed limit sign on this curve made the curve a dangerous and a latent condition. Moreover, plaintiff has not and cannot explain why the prominent 90 degree turn warning sign is not as good as, if not substantially better than, the speed limit sign that Mr. Haro claims is mandatory.

Plaintiff cannot show that King County had actual knowledge that the curve at issue was a dangerous and a latent condition. Judge Fleck's order on summary judgment should therefore be affirmed.

- iv. **In order to show proximate cause, a plaintiff must show cause-in-fact without resorting to speculation. Plaintiff cannot show a 10 mph speed limit sign would have prevented this accident. Plaintiff has therefore failed to meet**

her burden of producing evidence of proximate cause.

In order to take the issue of proximate cause to a jury, plaintiff must have sufficient evidence to show cause-in-fact. *Bordon v. State*, 122 Wn. App. 227, 95 P.3d 764, 768 (2004). “Cause-in-fact does not exist if the connection between an act and the later injury is indirect and speculative.” *Bordon*, 122 Wn. App. at 770-71. Here, it is complete speculation to imagine that this accident would not have occurred if there had been a 10 mph speed limit sign instead of the prominent warning sign that was there. Mr. Haro certainly makes no such claim. CP 136-42. More importantly, the person who was supposedly tricked by the curve, Mr. Worsech (the expert bike rider who had safely gone around this curve approximately 100 times prior to the accident, and who was fully aware of the curve's exact contour and nature), certainly makes no such claim. CP 57-59.

The reality is that only wishful speculation by plaintiff supports the notion that a 10 mph speed limit sign for Mr. Worsech would have prevented this accident. Judge Fleck's order on summary judgment should therefore be affirmed because plaintiff cannot show cause-in-fact.

CONCLUSION

The unfortunate accident between plaintiff and Mr. Worsech occurred because plaintiff was riding in the wrong lane, and Mr. Worsech's attempt to avoid a collision was not successful. Yet even if one assumes that Mr. Worsech was in the wrong lane, the accident was clearly the result of activity on the trail -- two riders colliding on a curve -- similar to *Riksem v. City of Seattle*. It was not the result of a latent condition of the curve. The public policy of this state, as set forth in the Recreational Use Act, strongly supports immunity for King County. There was a prominent, conspicuously placed warning sign before the curve. The curve is not a latent condition. King County had no actual knowledge of a dangerous and a latent condition. And plaintiff cannot show that a 10 mph speed limit sign at the curve would have prevented this accident.

In the end, plaintiff's brief is a plea for the court to let sympathy for her trump the strong public policy of this state. Plaintiff's position is, in reality, a request that this court ignore the latent condition and actual knowledge prongs of the statute. The court should decline the invitation to let this sympathetic case ruin the opportunity for the entire public to use the recreational lands of this state.

RESPECTFULLY SUBMITTED this 6th day of January, 2012.

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CERTIFICATE OF SERVICE

On the 6th day of January, 2012, I sent, by ABC Messenger Service, with instructions to be delivered no later than 5:00 p.m. on the afternoon of January 6th, 2012, the original Brief of Respondent to the following:

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