

No. 67713-6-I

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

ESTATE OF MAIA HAYKIN
and RICHARD HAYKIN,
individually and as personal representative of the
ESTATE of MAIA HAYKIN,

Appellant,

vs.

CITY OF BELLINGHAM,
a municipal corporation,

Respondent.

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STATE OF WASHINGTON
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Reply Brief of Appellant

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REPLY ARGUMENT

As in their summary judgment briefing before the trial court, Bellingham refuses to address the unequivocal testimony of their Interim Parks Director, Leslie Bryson and Park Planner, Tim Wahl, that the City of Bellingham has never possessed any ownership or control over the North Boulevard Park railroad crossing. Instead, Bellingham makes a conclusory argument without any factual support that they possessed “a property right, and possession, and control of the north crossing” sufficient to support recreational immunity. (Respondent’s brief pg 3). On review, the Court of Appeals must treat the evidence and the inferences from the evidence in a light most favorable to the nonmoving party.

Bellingham argues for the first time on appeal that the 2001 permit agreement they signed with BNSF vested them with ownership or possession and control. The agreement does no such thing. Bellingham merely has non-exclusive permission to use the BNSF crossing. CP 108. Permissive use fails to meet the strict criteria of ownership or possession and control as mandated by the recreational immunity statute. Bellingham argues that the agreement represents an “intent to grant the City a permanent railroad crossing.” (Respondent’s Brief, pg 8). However, the permanency of the grant was conditioned on formalizing a permanent safety design for the crossing,

which never happened. CP 108. To this day, the crossing remains the “interim design” described in the 2001 agreement. CP 107, CP 110. Even if Bellingham had installed the dismount barriers and flashing lights and the parties had taken action to formalize the permanent grant of use, such grant would still remain non-exclusive to Bellingham and fails to establish either ownership or control. In short, a grant of non-exclusive permissive use fails to meet the criteria of ownership or control.

Bellingham contends the agreement is akin to the contract in the case of Power v. Union Pacific Railroad Co., 655 F.2d 1380 (1981). The clear distinctions of the Power contract and the BNSF permit agreement with Bellingham was discussed in Appellant’s opening brief and will not be repeated here. Suffice to say, Bellingham can take no actions whatsoever in connection with BNSF’s crossing without first obtaining BNSF’s express written approval.

Bellingham misstates the facts when it argues that had they not obtained permission to cross the tracks, the South Bay Trail would not exist. (Respondent’s Brief, pg. 10). This section of the South Bay Trail was constructed in the mid-1990s. The trail has always terminated prior to the tracks and picked up again approximately 30 feet later. Until the 2001 agreement, anyone entering the 30 ft railroad right of way was treated by

BNSF as a trespasser. CP 61, CP 136. The 2001 agreement did not incorporate the 30 ft right of way into the South Bay Trail. The term, “South Bay Trail”, is contained nowhere in the agreement. All the agreement did was grant Bellingham non-exclusive permission to cross the railroad’s property. As Interim Parks Director, Leslie Bryson, stated in her declaration supporting summary judgment, the original access to the north side of Boulevard Park was the pedestrian footbridge located 140 ft south of the current crossing, and allows the public to enter the park without crossing the railroad tracks. CP 221. The pedestrian footbridge continues to provide park access to this day. CP 305, 306.

Bellingham ignores and fails to respond to appellants citation to Steinbach v. CSX Transp., Inc., 913 N.E. 2d 554, 393 Ill. App. 3d 490 (Ill. App. 2009), where it was held that a non-exclusive right to use railroad property did not create a sufficient possessory interest to extend recreational immunity. All Bellingham has is a non-exclusive right to use the BNSF’s property and is insufficient to extend recreational immunity.

Bellingham incorrectly states that issues of negligence have been abandoned on appeal (Respondent’s Brief, pg. 7, footnote 2). Issues of negligence were not briefed on appeal because the trial court made no ruling on negligence. The summary judgment order on appeal relates exclusively

to recreational immunity.

Bellingham argues that in the event this Court finds lack of ownership, possession and control, summary judgment should still be confirmed on the grounds that without possession and control, no premises liability attaches. First, issues of negligence are not on appeal. Any determination of premises liability must be remanded to the trial court. Secondly, the record establishes that after reaching the agreement with BNSF, in 2001, Bellingham assumed the legal obligation to improve pedestrian safety at the crossing. CP 222. The agreement itself vested Bellingham with an obligation to work cooperatively with BNSF to come up with a permanent safety design for the crossing. CR 107-108. BNSF played no role in the design of the crossing. CP 86. Thus, despite the fact that Bellingham only possessed a limited property right to use the crossing, they assumed responsibility to make the railroad crossing safe by installing bicycle dismount barriers and train-activated flashing lights, an obligation they failed to uphold. Bellingham neglected to install measures with full knowledge of the dangers posed by directing the public across active railroad tracks. CP 67-68. Bellingham also acknowledged the desirability of these safety measures. CP 64. Following the 2001 agreement, BNSF expected Bellingham to install flashing lights as a permanent design, but it never

happened. CP 086.

Bellingham took the lead in the design of the crossing. CP 086; CP 222. BNSF constructed and owns the 30 ft at-grade crossing. Bellingham had the responsibility for designing and installing additional safety features at the crossing but neglected to do so. CP 086-87; CP 222. See also, Respondent's Brief pg. 17.

BNSF considered dismount barriers and flashing lights to be the standard for pedestrian crossings. CP 83. As early as 1995, BNSF informed the City of Bellingham that,

“As a condition of constructing the pedestrian grade crossing we expect the city to install active warning devices in the form of shoulder mounted signals, and dismount railings, or other improved devices, that would make bicyclists walk their bikes across the tracks.”

CP 71.

BNSF expected Bellingham to install the dismount barriers and flashing lights, but they never did. CP 87-88.

Bellingham has acknowledged responsibility for the safety of the crossing distinguishes this case from Coulson v. Huntsman Packaging Products, Inc., 121 Wa. App. 941, 92 P.2d 278 (2004), cited by respondent. Coulson held that “neighborly maintenance” of a strip land the defendant did not own was insufficient to create a legal duty to maintain the property. In

the present case, Bellingham signed an agreement with the railroad whereby they assumed legal responsibility to install necessary safety features, which it neglected to do, and the railroad made accepting that responsibility as a condition of allowing use of the crossing. At a minimum, questions of fact exist as to Bellingham's duty and breach.

Regardless, issues of negligence are not before this Court and must be left for the trial court. The only issue on appeal is whether the record supports a finding that the City of Bellingham owns or controls and possesses BNSF's railroad crossing. Appellants respectfully submit that no such evidence exists and that the trial court erred in extending recreational immunity to Bellingham. Summary judgment should be reversed, the affirmative defense of recreational immunity be dismissed, and the case remanded for trial court on issues of Bellingham's negligence.

DATED this 12 day of January, 2012.

Respectfully submitted,



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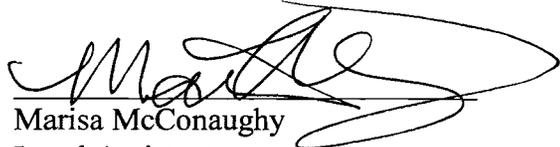
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date an original and/or copy of the **Reply Brief of Appellant** was sent via first class mail, postage prepaid for filing with the courts identified below and delivered to the following attorneys:

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DATED at Bellingham, Washington this 12th day of January, 2012.


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