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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

2012 FEB -6 AM 11:27

No. 67579-6-1

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

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JENNIFER MINATO,

Appellant,

v.

KING COUNTY,

Respondent.

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

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APPELLANT'S REPLY BRIEF

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**A. INTRODUCTION**

Respondent King County makes four arguments in response to Appellant Jennifer Minato's Opening Brief: (1) it is entitled to immunity because it posted a sign indicating an upcoming turn in the trail; (2) it lacked actual knowledge of the dangers of the "blind curves" where Jennifer was injured; (3) the danger posed by limited sight lines, inadequate sight-stopping distances and excessive design speed were not latent; ; and (4) Jennifer cannot establish that King County was the proximate cause of her injuries.

All of these arguments raise questions of fact that must be decided by a jury. King County's arguments reinforce Appellant's own argument: that the trial court wrongly decided these factual questions by granting summary judgment. In addition, King County attempts to raise on appeal an issue that it failed to raise at the trial court level. State law forbids an appellate court from considering issues not decided at the lower court level. Appellant respectfully requests that this court reverse the trial court's summary judgment and remand the case for trial before a jury.

## B. LEGAL ARGUMENT

### 1. **King County failed to post signs warning of the need to reduce speed to safely navigate the curves on the Cedar River Trail where Jennifer was injured.**

King County argues that it is entitled to immunity because:

Even if plaintiff could prove there was [sic] 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.<sup>1</sup>

For King County to prevail on this argument, this Court must accept that the “injury causing condition” was merely a curve in the Cedar River Trail and not also the additional danger posed by the faulty design that allowed excessive speeds in a limited sight distance area. King County argues that the injury-causing condition was simply a “turn” in the bike trail. CP 200. When the “injury-causing condition” is disputed, however, the identification of the condition is left to the trier of fact. *See, e.g., Tabak v. State*, 73 Wn. App. 691, 698, (1994); *see also Van Dinter v Kennewick*, 121 Wn.2d 38, 44, 846 P.2d 522 (1993); *Cultee v. City of Tacoma*, 95 Wn. App. 505, 516, 977 P.2d 15 (1999).

In addition, the “instrumentality causing the injury” must not be viewed in isolation and must take into account **all** external factors

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<sup>1</sup> Brief of Respondent, p. 18.

contributing to the injury. See *Van Dinter v Kennewick*, 121 Wn2d at 38, 846 P.2d 522 (1993). Washington law is clear that 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 v. Washington Water Power Co.*, 136 Wn.2d 911, 921 (1998). Under *Ravenscroft* and *Van Dinter*, this Court must consider all external factors, including the curve’s limited sight lines, excessive design speed, sight obstructions.

For a landowner to be immune from liability it must provide adequate conspicuous signage warning of the specific injury-causing condition. Appellant has offered ample evidence that the dangerous condition was a set of “blind curves” characterized by inadequate sight-stopping distances and an excessive design speed. CP 136-141. Appellant also offered expert testimony that the signage at the location where Jennifer was injured was *inadequate* because it did not caution riders to slow their speed before taking the curve. CP 141. In addition, only **one** sign was posted by King County on only *one* of the approaches to the curve where Jennifer was injured. This single sign simply informed the reader of a 90-degree curve ahead. Consequently, whether the signage at the location where the collision occurred was sufficient to warn of the additional latent dangers that followed remains a question for the jury.

Viewing the evidence in the light most favorable to the Appellant, the injury-causing condition was more than just a curve in the Cedar River trail. The curve was made more dangerous by inadequate sight lines, inadequate sight stopping distances and excessive design speeds – all factors that made the section of the trail where Jennifer was injured a latent danger for all trail users. CP 141. Despite this, the sign posted by King County alerts westbound trail users only that they are approaching an upcoming curve in the trail, CP 93, and fails to warn trail users about:

- Limited sight distances along the trail curve;
- Inadequate sight stopping distance; or
- The needs to reduce speed to safely recognize and avoid obstructions that might be found along the trail’s curve.

It is undisputed that the speed limit along the entire Cedar River trail was 15 MPH. CP 140. In addition, Appellant has offered evidence that a cyclist traveling at the posted speed limit would not have had an opportunity to recognize and avoid a hazard occurring on the trail’s curve where Jennifer was injured. CP 140. At a minimum, there is a question of fact regarding whether the signage posted at the curve where this collision occurred “conspicuously” warned of these types dangers.

The signage King County relies upon was posted only for riders traveling in one direction – westbound. CP 93. On the date of the

collision, Jennifer was traveling eastbound on the trail and could not have known of the danger ahead. Mr. Warsech was travelling westbound immediately before he collided with Jennifer. CP 58. Thus, only Mr. Warsech would have seen the signage offered by King County.

This is significant because King County has argued that:

(1) Mr. Warsech was an avid and experienced cyclist; (2) frequently rode on the Cedar River trail; and (3) knew that the Cedar River trail curved in the location where he collided with Jennifer. CP 57-58.

Mr. Warsech testified that he understood that the speed limit on the trail was 15 MPH. CP 58. Before the collision, Mr. Warsech estimates that he was riding at between 12 and 15 MPH – within the posted speed limit. CP 58.

Yet, notwithstanding his expertise as a cyclist and his knowledge of this curve in the Cedar River trail, and even with the benefit of the “arrow” signage, Mr. Warsech was unable to safely navigate the curve. On the contrary, immediately after the accident, Mr. Warsech admitted, “I was going too fast and couldn’t hold the corner.” CP 149.<sup>2</sup>

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<sup>2</sup> King County argues that Mr. Warsech’s statement to bystander Michael Brundage is inadmissible hearsay. King County ignores that Mr. Warsech was a party when Mr. Brundage’s declaration was offered and when the trial court dismissed Appellant’s claims. Moreover, Mr. Warsech’s statement qualifies as an exception to the hearsay rule including as an excited utterance and/or as a statement of present sense impression. ER 803(a) (1)&(2).

Because the signage relied upon by King County does nothing to warn trail users about the latent dangers ahead, King County is not entitled to immunity.

**2. King County had actual knowledge of the latent danger facing users of the Cedar River trail.**

King County's argument that it lacked actual knowledge of the dangers of the blind curves is simply not true. Eight months before Jennifer's collision, a concerned citizen warned of the dangers of the blind curves *at the precise* location where Jennifer was injured.<sup>3</sup> This evidence shows that King County had actual knowledge about the "blind curves" at the precise location where Jennifer was injured – on the Cedar River Trail directly across from the New Horizon's Church – eight months earlier.

King County's newly contrived argument that this e-mail refers to a different location is not true and ignores the trial court finding that the County had actual knowledge of the dangerous nature of the curve in question:

The late supplementation of discovery responses shows that the County in fact had actual knowledge from a concerned citizen of this particular dangerous area of the trail some months before Ms. Minato was injured.<sup>4</sup>

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<sup>3</sup> CP 179.

<sup>4</sup> CP 199.

In its briefing on appeal, King County seems to have forgotten that it had both general warnings regarding blind curves along its trail system and at least one specific warning describing the hazard at the precise location where Jennifer collided with Mr. Worsech. Indeed, it is hard to believe it has slipped counsel's mind a second time. Counsel for King County did not produce this critical e-mail until *after* it had filed its summary judgment motion and *after* Jennifer filed her summary judgment response. One warning came from a concerned citizen and warned King County in an e-mail that:

When foot traffic use [sic] 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.<sup>5</sup>

The section of the Cedar River trail referenced by this citizen was located at the overpass "of the new bridge located by Ron Regis Park across from the New Life Church."<sup>6</sup>

*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.<sup>7</sup>

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<sup>5</sup> CP 179. The Court will note that this warning describes the precise circumstances that would later occur in the moments prior to Mr. Worsech's collision with Jennifer. CP 143-146.

<sup>6</sup> CP 179.

<sup>7</sup> CP 179.

It is beyond dispute that the Ron Regis Park and New Life Church are located across from the intersection of State Route 169 and 154<sup>th</sup> Place S.E. – the location where Jennifer’s collision occurred. CP 23.<sup>8</sup> While King County may argue that it had not received a warning regarding the particular stretch of the trail where Jennifer was injured, the documents in their possession show otherwise.

In addition to the specific warning regarding the segment of the trail where Jennifer was injured, King County received numerous generalized warning regarding the danger posed by excessive speed and blind curves along other, similar curves in its trail system. CP 285-306.

After reviewing this evidence, the trial court concluded that Appellant had offered sufficient evidence of “actual knowledge” on the part of King County and that “[T]he question on summary judgment in this case turns on the issue of latency.” CP 200. Accordingly, the issue of whether King County had actual knowledge of the conditions of the trail is not before this court.

When a defendant-landowner denies knowledge of a dangerous, latent condition, a claimant may present evidence, including circumstantial

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<sup>8</sup> Attached as Appendix 1 is a map showing the location of the New Life Church adjacent to the section of the Cedar River trail. Pursuant to Evidence Rule 201, this Court is asked to take judicial notice of the location of the New Life Church adjacent to the intersection of State Route 169 and 154<sup>th</sup> Place S.E. in King County, Washington. Attached as Appendix 2 is the diagram offered by King County depicting where the collision occurred. CP 23. The two locations are the same. King County did not dispute this fact below.

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 claimant presents any evidence from which a jury could infer actual knowledge that a condition is dangerous. *Id.*

Moreover, the standard for establishing actual knowledge is met when a defendant-landowner had actual knowledge of the injury-causing condition even if plaintiff could not establish that defendant had knowledge of the *specific* instrumentality causing his or her injuries. In *Ravenscroft*, discussed above, the Supreme 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).

Here, Appellant has provided far more evidence of King County’s actual knowledge than was offered in *Cultee* or *Ravenscroft*. King County had notice that the specific blind curve on the Cedar River trail where Jennifer was injured posed a serious risk to trail users, that citizens had observed many “close calls” on this precise section of the trail, and that it was only a matter of time before a serious collision occurred. CP 179.

King County’s response to these warnings is enlightening. At the time the warnings were sent to King County, Robert Foxworthy was the Regional Trails Coordinator for King County Parks and Recreation Division. CP 60. When these concerns were brought to Mr. Foxworthy’s attention, he stated “We might think about a “Slow” sign on each tunnel

approach? What do you think?” CP 181.<sup>9</sup> There is no evidence that King County followed through with Mr. Foxworthy’s recommendation.

In addition to these direct warnings about the curve where Jennifer was injured, 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.

The circumstantial evidence supporting actual knowledge is likewise overwhelming. 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. Because the trail was unsafe according to King County’s own design specifications, a jury could infer actual knowledge of the danger at this location of the trail.

As in *Tabak*, *Ravenscroft* and *Cultee*, Appellant presented sufficient evidence, both direct and circumstantial, from which a jury

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<sup>9</sup> The e-mails warning of the danger of the “extremely blind” curves where Jennifer was injured, as well as King County’s discussion of placing a “Slow” sign, were not produced before Appellant’s summary judgment response was filed. In addition, King County has still not provided any of the e-mails demonstrating the County’s response to Mr. Foxworthy’s query.

could infer that King County had actual knowledge of the dangerous conditions that caused Jennifer's injuries.

**3. The issue of latency is a question of fact for the jury to determine**

King County argues on appeal that the dangers present at the curve were not latent. Whether an injury causing condition is latent is a question of fact to be determined by a jury. *See, e.g., Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 920, 969 P.2d 75 (1998). At the summary judgment hearing, Appellant offered uncontested expert testimony that there were inadequate sight lines and sight-stopping distances on the portion of the Cedar River Trail where Jennifer was injured and that these dangers were not be readily apparent to the general class of trail user. Consequently, the trial court erred by taking this issue from the jury.

King County argues that curve where Jennifer was injured was "benign," rather than dangerous.<sup>10</sup> Specifically, King County argues, "a condition that can be seen for 75 feet cannot be deemed latent."<sup>11</sup>

The logic underlying King County's argument is faulty. Common sense indicates that the general class of users would have no way of observing that the trail had an excessive design speed or inadequate sight

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<sup>10</sup> Brief of Respondent, p. 19.

<sup>11</sup> *Id.*

stopping distances. In fact, Mr. Worsech, an experienced rider who frequently travelled this portion of the Cedar River trail, could not perceive these characteristics of the curve where he collided with Jennifer. The Washington State Patrol agreed, “*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.

The line of cases cited in King County’s brief are not on point because here there was nothing for the general class of trail user to “see” that could have alerted them to the danger present. The danger facing cyclists on the Cedar River trail was latent: King County posted a safe speed of 15 MPH for the entire trail. It posted a sign indicating a curve in the trail, but only for riders going in one direction. The presence of these signs may have made even added to the danger because they did not warn cyclists to also slow down in the curve or to beware of shorter sight distances ahead. Cyclists would have had no way to know that travelling the trail at the posted speed limit was exposing them to a serious risk of injury.

King County counters that “the condition must be hidden from view and essentially trick the recreational user by virtue of its dangerousness and latency.”<sup>12</sup> At the same time, King County

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<sup>12</sup> Brief of Respondent, p. 23.

acknowledges that the posted speed limit at the location where this collision occurred was 15 MPH.<sup>13</sup> King County does not contest that a cyclist traveling at the posted speed limit would be unable to detect an avoid collision if an unexpected obstruction was encountered. King County has not disputed that 75 feet is an inadequate sight stopping distance for cyclists traveling in opposite directions at the posted speed limit.

Rather, King County claims that since the curve itself can be photographed its dangerous nature cannot be considered latent.<sup>14</sup> A still photograph cannot replicate what a cyclist entering this section of trail at 15 MPH might encounter, nor potential conditions that might be present on the trail on any given day depending on weather conditions or trail usage. The general class of trail user would not be able to discern, by looking at a photograph of the curve where Jennifer was injured, that he or she would be unable to detect and avoid an obstruction in the trail path when traveling at the posted speed limit.

Finally, similar to disputes regarding the nature of the injury-causing condition, Washington law holds that “*Latency is a factual question which must usually be decided by a jury.*” See *Cultee*, 95 Wn.

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<sup>13</sup> Brief of Respondent, p. 4.

<sup>14</sup> Brief of Respondent, pp. 24-25.

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 has offered ample evidence that the latent danger facing cyclists included: (1) the failure to post adequate speed limit signage at the location of the collision; (2) excessive design speeds 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. CP 136-142. Appellant has offered sufficient evidence to establish a question of fact on the issue of latency and one a jury following trial must determine.

**4. King County did not contest causation below.**

Finally, King County claims that Appellant's claims were properly dismissed for lack of proximate cause. King County did not *argue* lack of causation below, however, and the trial court did not rule on causation in

its Order dismissing Jennifer's claims. Consequently, King County cannot raise this claim for the first time on appeal.<sup>15</sup>

Washington law is clear that a reviewing court may sustain an order granting summary judgment only on a basis raised in the pleadings below. *See Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348 (2000). King County did not raise the issue of causation below, in any manner. In addition, the issue of causation is a question of fact to be decided by the jury at the close of trial. *See, e.g., Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005).

King County states in its brief that Appellant cannot demonstrate that King County's negligence was the cause of her injuries.<sup>16</sup> However, nowhere in King County's summary judgment briefing, or in any of its supporting materials, did it argue that it was not a proximate cause of Jennifer's injuries. The trial court did not decide the issue. Consequently, causation cannot form the basis for affirming the trial court's order granting summary judgment here. *Id.; see also Mt. Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994) (a reviewing

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<sup>15</sup> Because the trial court did not rule on the issue of causation and King County cannot raise it for the first time on appeal, Appellant did not brief the issue in its opening brief.

<sup>16</sup> Brief of Respondent, p. 29.

court may sustain a trial court's summary judgment ruling only upon grounds *established by the pleadings*).

Even if this Court were to consider King County's untimely arguments regarding causation, the Washington State Supreme Court has consistently held that, "[c]ause in fact is usually a question for the jury; it may be determined as a matter of law only when reasonable minds cannot differ." *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005); *see also Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 610, 257 P.3d 532 (2011) (establishing cause in fact involves a determination of what actually occurred and is generally left to the jury); *Unger v. Cauchon* 118 Wn. App. 165, 73 P.3d 1005 (2003) (trial court erroneously granted summary judgment to county on issue of whether county's failure to make public roadway safe proximately caused plaintiff's injuries); *Doherty v. Municipality of Metro. Seattle*, 83 Wn. App. 464, 921 P.2d 1098 (1989) (question of whether driver's negligence caused collision was properly reserved for jury at trial).

### **C. 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 known to King County, but not to the general class of trail users.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of February, 2012.

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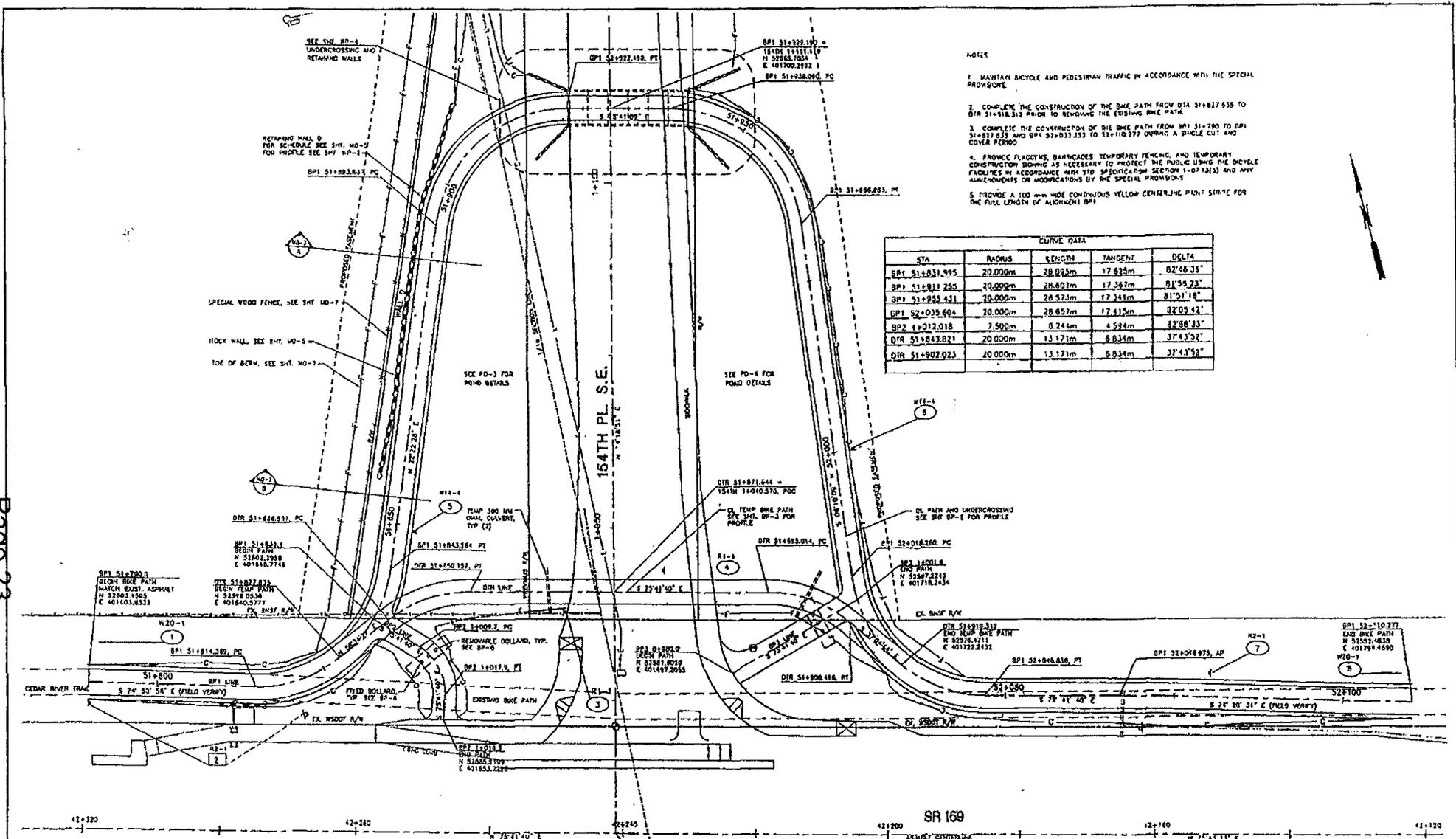
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- NOTES
1. MAINTAIN BICYCLE AND PEDESTRIAN TRAFFIC IN ACCORDANCE WITH THE SPECIAL PROVISIONS.
  2. COMPLETE THE CONSTRUCTION OF THE BKE PATH FROM STA 31+827.935 TO STA 31+818.312 PRIOR TO RESUMING THE EXISTING BKE PATH.
  3. COMPLETE THE CONSTRUCTION OF THE BKE PATH FROM BPI 31+790 TO BPI 31+827.935 AND BPI 31+833.353 TO 31+103.377 DURING A SHELVE CUT AND COVER PERIOD.
  4. PROVIDE FLAGGERS, BARRICADES, TEMPORARY FENCING, AND TEMPORARY CONSTRUCTION SIGNAGE AS NECESSARY TO PROTECT THE PUBLIC USING THE BICYCLE FACILITIES IN ACCORDANCE WITH STD SPECIFICATION SECTION 1-07.13(3) AND ANY AMENDMENTS OR MODIFICATIONS BY THE SPECIAL PROVISIONS.
  5. PROVIDE A 100 mm WIDE CONTINUOUS YELLOW CENTERLINE PAINT STRIPE FOR THE FULL LENGTH OF ALIGNMENT BPI.

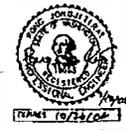
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BPI 31+811.255	20.000m	28.892m	17.362m	81°55'22"
BPI 31+258.431	20.000m	28.573m	17.341m	81°31'18"
BPI 32+035.604	20.000m	28.852m	17.415m	82°05'42"
BPI 31+012.018	7.500m	8.244m	4.584m	82°58'53"
DTR 31+843.821	20.000m	13.171m	6.834m	37°43'32"
DTR 31+902.923	20.000m	13.171m	6.834m	37°43'32"



SR189 42+241.088-  
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CALL 2 WORKING DAYS  
BEFORE YOU DIG  
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(LANDBOROUGH UTILITY LOCATIONS ARE APPROX.)

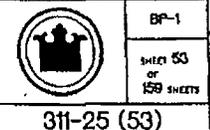
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SURVEYED	MAY SPANGLER 7/1991
SURVEY BASE MAP	DAVIES 8/1945
DESIGN ENTERED	WINKEL 12/2002
DESIGNED	WINKEL 12/2002
CHECKED	SPERRY 12/2002
DATE	
REVISION	
BY	
DATE	



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PROJECT No. 401289  
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KING COUNTY DEPT. OF TRANSPORTATION  
HAROLD TAMGUCH, DIRECTOR  
ELLIOTT BRIDGE # 3166  
BRIDGE REPLACEMENT PROJECT  
BKE PATH DETAILS



311-25 (53)

No. 67579-6- I

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PROOF OF SERVICE

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Attorneys for Appellant

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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I, LAURIE CECIL, hereby declare as follows:

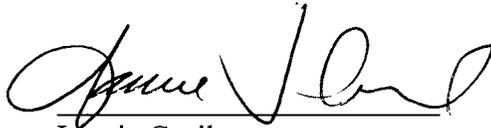
1. I am a citizen of the United States, living and residing in King County, in said State, I am over the age of 18 years, and not a party to or interested in the within-entitled cause. I am an employee of Hagens Berman Sobol Shapiro LLP and my business address is 1918 Eighth Avenue, Suite 3300, Seattle,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

2. On February 6, 2012, I caused APPELLANT'S REPLY 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 6<sup>th</sup> day of February, 2012, in Seattle, Washington.

  
Laurie Cecil