

APPELLANT BRIEF

SYMON COWHER V. ESSEX COUNTY

JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain this appeal and to review the questions of law raised in the Order of the Appellate Division, Third Department, dated August 19, 2009, and the Order of the Honorable Clayton Aikmin, Supreme Court, Essex County, dated July 20, 2009, that finally determined the liability issues in the action below as required by New York C.P.L.R. § 5701(a)(1) and by the Appellate Division, Third Department's Order granting leave to hear the appeal by Order dated August, 19, 2009.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

- I. UNDER NEW YORK COMMON LAW, IS A MUNICIPALITY LIABLE FOR INJURIES SUSTAINED BY A BICYCLIST RIDING ON ITS TRAILS WHEN THE TRAILS WERE DESIGNED TO OFFER RUGGED TERRAINS INTRINSIC TO THE SPORT OF MOUNTAIN BIKING AND WHEN THE CONDITION OF THE TERRAIN WHERE THE RIDER FELL WAS OPEN AND OBVIOUS?

STATEMENT OF THE CASE

Defendants Essex County and the Essex County Parks and Recreation Department (“the County”) were sued by Symon Cowher, the Plaintiff, who alleges that the County was negligent in maintaining the mountain biking trails at Essex County Park. (R at 1-4.) The Complaint, filed on May 4, 2009, arose from events that took place on Sunday, April 19, 2009, when Cowher was injured after

falling from his bike when he rode over a washed-out portion of the most difficult trail. (R at 2.) The Supreme Court of Essex County, New York, entered an Order Granting Plaintiff's Motion for Summary Judgment, on July 20, 2009, based on the absence of a genuine issue of material fact. The court held that the County was negligent in maintaining the Essex County Park trails. (R at 64.) The Defendant filed Notice of Appeal on July 24, 2009, and the New York Court of Appeals entered an order granting appeal on August, 19, 2009. (R at 66.)

STATEMENT OF THE FACTS

Essex County Park ("the Park") has three mountain biking trails designed and advertised to be easy, moderate, and difficult. (R at 52.) The Essex County Parks and Recreation Department is responsible for maintaining the trails owned by Essex County, although maintenance on the biking trails is rarely required because mountain biking is intended to take place on natural, rugged terrain. (R at 38.) The Park and its maintenance team have received several awards for design and quality. (R at 49.)

A sign at the trailhead informed riders that maintenance workers are present at the Park on Mondays and Fridays. (R. at 58.) They work at the Park for about six hours each of those days. As part of overall park maintenance, the workers ride all-terrain vehicles around the biking trails to check for problems. (R at 38.) Maintenance work usually consists of removing fallen trees from the trails,

repairing the trails after inclement weather, and removing dangerous wildlife. (R at 38.) Workers may make unscheduled inspections after especially bad weather to insure the trail is in good condition and to make necessary repairs. (R at 38.) Based on their many years of combined experience, the maintenance supervisor and workers decided there had not been enough rain on April 17 and 18 to warrant checking the trail on April 19, one day before scheduled maintenance on a Monday. (R at 42.) Unscheduled inspections are warranted, in their experience, only after two to three days of constant rain. (R. at 48.)

Rainstorms passed over the Park beginning on April 17, 2009, and ending on the night of April 18. (R at 62.) The storms lasted from six to nine hours and dropped about three inches of rain. (R. at 62.) On the morning of April 19, 2009, several bicyclists arrived at the Park to ride on its mountain bike trails. (R at 2.) Kellie Corkson was an inexperienced but competent rider who decided to ride the difficult trail that day. (R. at 26-27.). She was particularly careful because she knew the trail was rugged and that she was still learning the intricacies of the sport of mountain biking. (R at 28.) Corkson already had her brakes engaged and was riding very slowly when she approached a section of the trail that had been washed out during the storm. (R at 28.) Because of her cautious approach, she was able to proceed around the hazard. (R at 28.)

Rupert Studman was a more experienced mountain biker, and also encountered the washed-out trail on April 19. (R at 31-32.) Studman, being more confident in his biking ability, was slightly more aggressive than Corkson but less aggressive than Cowher when he encountered the washed-out trail. (R at 33.) When Studman saw the obstacle, he applied his brakes but could not stop in time to go around the hazard. (R at 34.) Instead, he purposely slid onto the ground, came to a stop, and avoided injury. (R at 34.)

The same morning, April 19, the Plaintiff, Symon Cowher, arrived at the Park and began to ride his mountain bike on the trails. (R at 2.) Before riding, Cowher observed the informational signs at the trailhead, which included prominent warnings about proper use of safety equipment and not riding after inclement weather. (R at 13.) Cowher did not pay attention to the warning signs, instead focusing on a map of the trails (R at 13.) Cowher also noticed a sign that gave the hours that the county workers maintained the trails, but Cowher discounted any maintenance issues on the belief that mountain biking trails are supposed to be natural and rugged. (R at 13.) Beside the warnings about safe use of the trails and the Park's maintenance schedule, another sign prominently and in large red letters declared "Ride at your own risk!!!" (R at 56.) Cowher allegedly does not remember reading this sign but acknowledges that it was likely there. (R at 17.)

Cowher only started mountain biking a few months before the accident on April 19, 2009. (R. at 10.) After consulting the trail map, he began his ride on the easiest of Essex Park's bike trails, which was paved. (R. at 12.) He wore proper safety equipment. (R at 2.) Cowher completed the easy trail without incident, although he noticed debris on the trail, which he believed to be a result of the previous night's storm. (R at 12.) Cowher then encountered a friend, Clive Davidson, who is an experienced mountain biker and very well-acquainted with the Essex Park trails. (R at 2.) Davidson encouraged Cowher to join him on the difficult trail. (R at 12-13.)

Davidson proceeded to the difficult trail while Cowher rode the moderate unpaved trail to meet him there. (R at 13.) Upon meeting Davidson and entering the difficult trail, Cowher immediately noticed that the trail was more rugged than the other two; it was cut out of dense woods, extremely hilly and curvy, was covered by debris from the storm, and had a large puddle at the bottom of the first hill. (R at 13.) Cowher, however, was not discouraged and continued his ride with Davidson. Davidson testified in his deposition that Cowher rode like a "daredevil," speeding around corners and taking few precautions when encountering obstacles. (R at 22.) Cowher routinely rode ahead of the much more experienced Davidson because Cowher felt that Davidson rode too slowly. (R at 15.)

At one point, Davidson became worried that Cowher was riding too recklessly and yelled a warning at Cowher to slow down. (R at 22.) Cowher did not heed the warning and continued at his own pace. (R at 22.) Cowher then rounded a downhill curve on the trail and crashed when he encountered a portion of the trail that had been washed out during the rainstorm. (R at 2.) According to Cowher, his bike slid out from under him, and his body hit a tree. (R at 16.) When Davidson approached the same curve, he got off of his bike and cautiously rounded the corner (R at 23.) Davidson found the injured Cowher lying on the ground and called an ambulance. (R at 16.) Davidson stated that Cowher probably would have avoided the accident if he had been riding less recklessly. (R at 23.)

STATEMENT OF THE STANDARD OF REVIEW

Review on appeal from a trial court's grant of summary judgment is de novo. Duane Reade, Inc. v. Cardtronics, L.P., 54 A.D.3d 137, 140 (N.Y. App. Div. 2009). Summary judgment is granted when a trial court construes all facts in a light most favorable to the non-moving party and still agrees with the moving party that there are no issues of material fact and judgment is therefore directed as a matter of law. Brill v. City of New York, 814 N.E.2d 431, 433 (N.Y. 2004). Therefore, the appellate court should remand this case for trial by jury if it finds that the facts, construed in the light most favorable to the Defendant, could possibly create issues of fact for the jury to decide.

SUMMARY OF THE ARGUMENT

The County was not negligent in failing to repair the washed-out portion of the difficult mountain bike trail because there was no duty owed to Cowher to repair the trail when the Cowher assumed the risk of injury. First, Cowher assumed the risk of injury because biking over rugged terrain, encountering unexpected obstacles, and falling from one's bicycle are all inherent in the sport of mountain biking. Second, Cowher assumed the risk of injury because the washed out section of the trail was open and obvious to a reasonable mountain biker.

ARGUMENT

I. THE COUNTY WAS NOT NEGLIGENT IN FAILING TO REPAIR A WASHED-OUT PORTION OF THEIR BIKING TRAIL IN THAT THEY DID NOT OWE COWHER A DUTY TO REPAIR THE HAZARD BECAUSE COWELL ASSUMED THE RISK OF INJURY.

Defendant Essex County and the Essex County Department of Recreation did not breach their duty of reasonable care in maintaining a recreation, although they are not generally immune from liability. See Sena v. Town of Greenfield, 696 N.E.2d 996, 998 (N.Y. 1998) (holding that New York General Obligations Law § 9-103 generally immunizes private landowners opening their property for recreational activities but not municipalities). In New York, the elements of a negligence action are: (1) the existence of a duty by a defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff as a result thereof. Akins v.

Glens Falls City School Dist., 424 N.E.2d 531, 535 (N.Y. 1981). Summary

judgment is improper if, after construing all evidence in the light most favorable to the Defendants, there are genuine issues as to any material facts surrounding any one of those elements.

Cowher was injured during his accident on the Essex County Park trail. The evidence construed in the light most favorable to the County, however, shows that a duty to the Cowher never arose because Cowher assumed the risk of injury that is inherent in mountain biking and because the hazard was open and obvious.

- A. The County did not have a duty to repair a washed-out portion of the trail insofar as Cowher assumed the risk of injury because riding over rugged terrain, avoiding dangerous conditions, and falling from the bicycle are inherent dangers of mountain biking

The County did not owe the Cowher a duty to repair a trail designed for the sport of mountain biking because Cowher assumed the risks of the sport.

Generally, a landowner owes a duty to another on his land to keep it in a reasonably safe condition, considering all of the circumstances, including the purpose of the person's presence and the likelihood of injury. Weller v. Colleges of the Senecas, 217 A.D.2d 280, 284 (N.Y. App. Div. 1995). Therefore, the landowner's duty of care is to protect such participants "from injuries arising out of unassumed, concealed or unreasonably increased risks." Benitez v New York City Bd. of Educ., 542 N.E.2d 29, 31 (N.Y. 1989). In other words, the owner only has

“a duty to exercise care to make the conditions as safe as they appear to be.”

Turcotte v. Fell, 502 N.E.2d 964, 968 (N.Y. 1986). A plaintiff may assume the risk of injury either because risk is inherent in the plaintiff’s activity or because a risk is open and obvious.

First, Cowher assumed the risk of injury because the potential for encountering rugged terrain, falling, and being injured is inherent in the sport of mountain biking. As Justice Cardozo summarized in his opinion of a ride that was designed to elicit falls, “the timorous may stay at home.” Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929). Generally, by engaging in a recreational activity, “a participant consents to the commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation.” Morgan v. State of New York, 685 N.E.2d 202, 207 (N.Y. 1997). Although a landowner’s subjective knowledge is a factor, inherency is the *sine qua non* in determining the threshold of a defendant’s duty. Id. Similarly, a defendant only owes a duty to prevent conditions that are unique and over and above the usual dangers inherent in the sport. Owen v. R.J.S. Safety Equip., 591 N.E.2d 1184, 1185 (N.Y. 1992).

The doctrine of “primary assumption of risk” facilitates “free and vigorous participation” in athletics and recognizes a person’s choice to participate or not. Turcotte at 439. Overall, athletic participants consent, by their participation, to

those “injury-causing events which are known, apparent, or reasonably foreseeable consequences of participation.” Maddox v. City of New York, 487 N.E.2d 553, 557 (N.Y. 1985). Because inherency is essential, a plaintiff need not foresee the exact manner of his injury but only the potential for injury. Id. at 278-79.

When a plaintiff was thrown from his dirt bike after hitting a twelve-inch hole on a trail, the defendant landowner had no duty to repair that hole. Schiavone v. Brinewood Rod & Gun Club, Inc., 283 A.D.2d 234, 235-37 (N.Y. App. Div. 2001). The court reasoned that the possibility of such a hole being on an irregular dirt path is inherent in the sport of dirt biking and is not a “unique danger over and above the usual dangers.” Id. Additionally, the plaintiff was aware that the trail, by its very nature, would have an irregular surface and it is that very challenge that attracts dirt bikers to the sport. Id. In another case, a defendant landowner was not liable when a hiker was killed after losing her footing and falling off of a rock cliff. Bouchard v. Smiley Bros., Inc., 258 A.D.2d 548, 549 (N.Y. App. Div. 1999). Holding the property owner was not negligent, the court stressed that the danger was not concealed or unreasonably enhanced and that risk of injury was inherent in recreational hiking on an advanced trail. Id.

Similarly, Essex County and the Essex County Department of Parks and Recreation had no duty to Cowher in the present case because of the dangers inherent to mountain biking. Cowher may not have foreseen that he could be

injured by a portion of the trail that had been washed out by rain any more than the plaintiffs in Schiavone and Bouchard could foresee that they would be injured by a hole in a trail or by slipping off a cliff while hiking. It suffices, however, that Cowher was aware of the potential for injury from bicycling on rugged terrain, just as it sufficed that the plaintiffs in Schiavone and Bouchard were aware the dirt bikes and hikes on advanced trails were dangerous. Moreover, the County had posted a warning sign at the trailhead which said, in bold, red letters, “Ride at your own risk!!!” (R. at 56.) It is, however, the rugged nature of the trails that attracted Cowher to the advanced trail in the first place. (R at 14.)

Furthermore, the washout was not unique and above normal dangers because mountain bikers routinely are required to navigate debris, steep hills, roots, holes, trees, and puddles. (R at 24.) Much like the twelve-inch hole in Schiavone, washouts such as this one may not have been commonplace, but the risk of riding over rugged terrain and encountering unexpected obstacles is not only inherent in mountain biking, it is the very rush from encountering unexpected obstacles that attracts so many people to the sport. (See R. at 32 (“Part of the fun of it comes from riding over rough terrain and challenging yourself to overcome unexpected obstacles.”)) Cowher, who was inexperienced in the sport of mountain biking, may not have subjectively expected that he was at risk of encountering a washed

out section of trail, but his expectations are not dispositive when such obstacles and their potential to cause injury are inherent risks of the sport.

- B. The County did not have a duty to repair a washed-out portion of the trail in that Cowher assumed the risk of injury because the wash-out was open and obvious to a reasonable mountain biker.

Cowher assumed the risk of injury because the wash-out was open and obvious to a reasonable mountain biker. Generally, if the risks of an activity are fully comprehended or obvious, the plaintiff has consented to them and defendant has performed its duty. Turcotte at 439. In other words, “there is no duty to warn against a condition that can be readily observed by the reasonable use of senses.” Olsen v. State of New York, 30 A.D.2d 759, 759 (N.Y. App. Div. 1968).

A city does not have a duty to close a beach when a swimmer observes that the waves are high but proceeds to enter the water and become injured. Cimino v. Town of Hempstead, 110 A.D.2d 805, 805-06 (N.Y. App. Div. 1985). The court in Cimino reasoned that the conditions of the ocean were “readily observable to all at the beach” and had actually been experienced by the plaintiff. Id. In another case, a municipality did not have a duty to repair a depression in a road when a bicyclist fell and was injured. Dobert v. State, 8 A.D.3d 873, 873-74 (N.Y. App. Div. 2004). The court reasoned that the depression was readily observable and the plaintiff had no reason to expect a perfectly smooth roadway. Id. at 874.

The County had no duty to repair the washout for similar reasons. First, like the plaintiff in Cimino, Cowher observed that the previous night's storm had left the trail in poor condition, covering it with debris and leaving puddles and soft spots. (R at 14.) Furthermore, Cowher knew that the trail was the most difficult of the three at the park, and he knew before approaching the washed-out section that the trail he was riding was a very hilly, curvy, and rugged trail. (R at 14.) Cowher fully appreciated that he was riding on a very difficult trail rendered more challenging by the storm, but he continued to ride aggressively. Much like the bicyclist in Olsen, Cowher had no reason to expect a perfectly maintained trail. Not only was this trail advertised as the most rugged of the three, but Cowher had already ridden over steep hills, sharp curves, and rugged terrain. (R. at 14.) He knew that more hazards were ahead.

Because of Cowher's speed, this particular hazard may not have been obvious to him until it was too late to avoid it, but that is not dispositive. A property owner is not liable for injury from a hazard that is "open and obvious" to a reasonable person under the circumstances, meaning, in this case, a reasonable person riding a mountain bike on a difficult trail after a heavy rainstorm. The washed out section of this trail was open and obvious to three other bicyclists using the same trail on April 19, 2009, and they avoided injury. (R at 20-25.) This

hazard was in the middle of the trail (R at 43.). It was readily observable to a reasonable bicyclist traveling at a reasonable speed under the circumstances. Despite conditions that day, Cowher rode like a “daredevil.” (R. at 22.)

Overall, the County owed no duty to Cowher to repair the trail because, under the doctrine of primary assumption of risk, the County is not liable for injuries caused by inherent dangers of the sport which include falling after encountering a washed out section of trail. Alternatively, Cowher assumed the risk of injury because the wash-out was open and obvious to a reasonable bicyclist under the circumstances. Based on his knowledge of the trail’s difficulty and conditions, Cowher had no reason to expect perfectly maintained terrain.

CONCLUSION

For the reasons stated herein, Appellants Essex County and the Essex County Parks and Recreation Department respectfully request that the Order Granting Summary Judgment for the Plaintiff be overturned on the grounds that genuine issues of material fact exist as to whether the Defendants are liable for negligence in maintaining and operating the Essex County Park.

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CERTIFICATE OF SERVICE

I certify that on _____, 2009, I delivered copies of this brief to the Attorney for Plaintiff and the Clerk of the Supreme Court of New York, Third Appellate Division.

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