

APPELLEE 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 ISSUES PRESENTED FOR REVIEW

- I. WAS THE WASHED OUT SECTION OF THE TRAIL AN OPEN AND OBVIOUS RISK WHEN IT WAS LOCATED IMMEDIATELY AROUND A SHARP CURVE IN THE PATH AND MULTIPLE RIDERS WERE UNABLE TO SEE AND AVOID IT?
- II. WAS THE WASHOUT AN INHERENT RISK OF MOUNTAIN BIKING ASSUMED BY COWHER WHEN THE PROPERTY WAS PURPORTED TO BE WELL-MAINTAINED AND WHEN COWHER WAS COMPLETELY UNAWARE OF THE PRESENCE OF THE WASHOUT ON THE TRAIL?

STATEMENT OF THE CASE

Symon Cowher, the Plaintiff, filed a Complaint against Defendants Essex County and the Essex County Parks and Recreation Department (“the County”) on May 4, 2009. (R. at 1-3.) Mr. Cowher sought damages for injuries he sustained on April 19, 2009, when he was thrown from his bicycle after encountering a washed-

out section of a bicycle trail owned, operated and maintained by the Defendants. (R at 1-3.) The Supreme Court of Essex County, New York, entered an Order Granting Summary Judgment for Mr. Cowher, on July 20, 2009, based on findings that the condition was not open and obvious and that Mr. Cowher did not assume the risk of encountering a washed-out trail at a regularly maintained bicycle park. (R at 64.) Defendant filed Notice of Appeal on July 24, 2009, and the New York Supreme Court, Appellate Division, entered an Order Granting Appeal on August 19, 2009. (R at 66-67.)

STATEMENT OF FACTS

On April 19, 2009, Symon Cowher visited the Essex County Bike Park (“the Park”) to ride on the trails owned by Essex County and maintained by the Essex County Parks and Recreation Department. (R. at 5.) Mr. Cowher was a novice in the sport of mountain biking, but had developed enough skill to ride comfortably on trails of moderate difficulty. (R. at 10.)

On April 18 and 19, severe rainstorms struck Essex County, which prompted a warning from the National Weather Service on the afternoon of April 18 (R. at 62.) Although maintenance workers always visit the Park on Sundays and Wednesdays, they also make unscheduled inspections for dangerous conditions after severe storms, and make repairs to the trails if necessary. (R. at 38-39.) Maintenance typically consists of removing fallen tree limbs and other labor. (R at

37.) Workers did not visit the Park after the storms on April 18 and 19, however, even though a flash flood warning was issued by the National Weather Service and the rainfall totaled more than three inches. (R. at 62.) Sandy Hackson, the maintenance supervisor for the Essex County parks, did not believe the rain had lasted long enough to warrant checking the trails for damage. (R at 42.)

The weather had cleared by the time Mr. Cowher arrived at the Park on the morning of April 19. (R. at 12.) Before riding, Mr. Cowher examined a map of the trails, as well as a sign indicating that the park was closed during inclement weather and that riders were discouraged from riding immediately following inclement weather because of the possibility for hazards such as washed-out trails. (R. at 13, 56.) Mr. Cowher also saw a sign stating that county workers maintained the trails on two days each week, Sundays and Wednesdays. (R. at 58.) Mr. Cowher then began his ride on a paved trail around a lake, wearing proper safety equipment. (R at 18.) While riding, Mr. Cowher noticed leaves and other debris on the paved trail, but he completed the trail without any problems. (R at 12.)

After finishing the paved trail, Mr. Cowher met a friend, Clive Davidson, an experienced mountain biker who had ridden the trails at Essex County Bike Park many times. (R. at 13.) Mr. Cowher agreed to ride the difficult trail, but he first rode the moderate trail before meeting Mr. Davidson. (R. at 13.) Mr. Cowher rode

safely on the moderate trail, although he again noticed debris covering the ground.

(R at 14.)

Mr. Cowher then went to the most difficult trail to ride with Mr. Davidson. (R at 15.) Mr. Cowher noticed the trail was more challenging to ride due to steeper hills and sharper curves, but he was confident that his skill level was adequate for that trail. (R at 15.) Mr. Cowher rode quickly on sections of the trail and, despite seeing small puddles, expected the trail to be properly maintained based on the signs at the trailhead showing regular care and attention from park authorities. (R at 17. 18.)

During the ride, Mr. Cowher rode ahead of Mr. Davidson down a hill, toward a sharp curve, and momentarily disappeared from Mr. Davidson's sight. (R at 22.) When Mr. Davidson reached the curve, he was aware that the trail could be damaged based on his experience riding at the Park, which prompted him to get off of his bike and walk around the corner. (R. at 23.) After he turned the corner, he saw that Mr. Cowher had been thrown from his bicycle and that the trail was washed out and muddy. (R. at 23.) Mr. Cowher's bicycle had slid out from under him, and he had been thrown into a tree. (R at 15.) Mr. Davidson called for an ambulance and Mr. Cowher was taken to the emergency room with a broken jaw, a broken arm, and a concussion. (R. at 16.)

Earlier that morning, at least two other cyclists had been riding on the Park's trails (R at 27, 32.) Kellie Corkson was also a novice in the sport of mountain biking and decided to ride the difficult trail. (R. at 28.) She was especially careful because she knew the trail was rugged and she was not confident in her abilities. (R at 28.) Ms. Corkson was riding very slowly when she approached the washed-out trail, which allowed her to proceed around the hazard without problems. (R at 28.) After finishing the trail, Ms. Corkson stopped riding for the day because of the damage to the trails. (R at 29.) She called the office to report the wash-out, due to her concern for the other riders. (R. at 28) The Maintenance Crew chose to not tend to the wash-out until much later in the day. (R. at 43)

Rupert Studman had more experience than both Ms. Corkson and Mr. Cowher. (R. at 32.) He also encountered the washed-out portion of the trail that morning. (R. at 34.) He was riding more aggressively than Ms. Corkson but slower than Mr. Cowher. (R at 34.) When Mr. Studman approached the damaged part of the trail, he applied his brakes as hard as possible but could not stop in time to avoid the danger. (R at 34.) Because he was more experienced than Mr. Cowher, however, he was able to avoid major injuries only by laying the bicycle on its side and purposely sliding on the ground. (R at 34.) Based on his brush with injury, Mr. Studman also decided to stop riding for the day after he finished the trail. (R at 34.)

STATEMENT OF THE STANDARD OF REVIEW

The standard of review of 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. 2008). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment 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 affirm the order of the trial court if it finds that the facts, construed in the light most favorable to the Defendants, show that the danger was not open and obvious and that the risk of encountering a washout is not inherent in mountain biking.

SUMMARY OF THE ARGUMENT

A landowner owes a duty to occupants to warn of known dangers. Essex County was negligent in failing to repair or warn of the washed-out portion of its bike trail because it had actual notice of the dangerous condition caused by the rainstorms on April 18 and 19. The County was notified of the washout, yet the County failed to inspect the property or warn of the danger in a timely manner.

Essex County cannot avoid liability because the dangerous condition was not open and obvious to patrons of the Park, and therefore, the duty to warn remained. Both Mr. Cowher and another rider on the trail the morning of April 19 were unable to avoid the dangerous condition on the trail. Because the washout

occurred around a curve, cyclists in the ordinary course of riding could not be expected to notice and avoid the condition.

Further, there was no abrogation of the duty to maintain the premises under the theory of assumption of risk. A municipal landowner who opens land for recreational use owes a duty to make the premises only as safe as they appear, but the County's failure to repair or warn of the washout violated that duty. Similarly, a washout on a maintained trail is not an inherent risk in mountain biking, as tree roots and steep hills would be. Because the washout was not an inherent risk, it was not assumed by Mr. Cowher.

Because the County had a duty to repair or warn of a dangerous condition of which it had actual notice, and because it failed to do so, it was negligent. The County's alleged defenses that the condition was open and obvious and that it was an inherent risk of mountain biking are not supported by the record. Therefore, this court should affirm the trial court's Order Granting Summary Judgment to Mr. Cowher.

ARGUMENT

Private landowners and municipalities are not under the same duty for injuries sustained on property opened for recreational use. When a landowner opens his land for recreational use, New York General Obligations Law § 9-103 grants immunity to private landowners when occupants are injured by dangerous

conditions on their land. Quackenbush v. City of Buffalo, 43 A.D.2d 1386, 1387 (N.Y. App. Div. 2007). However, the New York Court of Appeals has held that a municipality is not similarly immune from suits for failure to properly maintain or warn of dangers of public parks and recreational facilities. Sena v. Town of Greenfield, 696 N.E.2d 996, 998 (N.Y. 1998). Therefore, the County owes a general duty of care to repair or warn occupants of dangerous conditions.

In New York, a negligence claim requires four elements: 1) the defendant owed a duty to the plaintiff; 2) that duty was breached; 3) an injury occurred as a result of that breach. Akins v. Glens Falls City School Dist., 424 N.E.2d 531, 535 (N.Y. 1981). The parties agree that Mr. Cowher was injured while riding on the Defendants' bicycle trail after hitting a washed-out section of that trail. The issues in this case focus on the alleged defenses to negligence raised by the County based on the obviousness of the washout and the inherent risks in mountain biking. However, this Court should reject those defenses and affirm the ruling of the trial court granting summary judgment.

II. THE WASHOUT ON THE DEFENDANTS' TRAIL WAS NOT OPEN AND OBVIOUS BECAUSE IT WAS LOCATED IMMEDIATELY AROUND A SHARP CURVE, IT WAS NOT VISIBLE FROM A REASONABLE DISTANCE, AND MULTIPLE RIDERS WERE UNABLE TO AVOID IT.

The hazardous washout on the Park's trail was not open and obvious. A landowner owes a general duty to warn of known defects on his property unless the

risks of an activity are perfectly obvious, in which case the plaintiff is deemed to have consented to the risks and the landowner's duty to warn or repair is negated. Turcotte v. Fell, 502 N.E.2d. 964, 968 (N.Y. 1986). The duty to warn or repair is in force unless the hazard can be readily observed with reasonable use of his senses. Olsen v. State of New York, 30 A.D.2d. 759, 759 (N.Y. App. Div. 1968).

In Olsen, the court held that the state was not liable for failure to warn of strong winds when a teenager drowned after being blown off a state-owned pier. Id. The teenager walked out onto the pier, which was open to the public for recreation, while the wind was blowing and waves were breaking over the pier. Id. The teenager's family, because of the strength of the wind, turned around for fear of being washed off the pier, but the teenager continued toward the end of the pier. Id. The court reasoned that the danger of strong winds was apparent to the teenager and that the danger was a warning by itself. Id. In contrast, a depression in a paved road caused by negligent repair on the opposite side of a downhill curve was not readily observable to a bicyclist who had not previously traveled the road, and therefore was not open and obvious because "a sinking repair is not an ordinary rut or bump in the roadway." Phelan v. State, 804 N.Y.S.2d 886, 898 (N.Y. Ct. Cl. 2005).

Like the cyclist in Phelan, Mr. Cowher struck a defect in his path as he rode his bicycle downhill and around a curve. Also like the cyclist in Phelan, Mr.

Cowher had never ridden his bicycle on this pathway. The washed out section of the trail was no more ordinary for a mountain bike trail than the sinking depression in Phelan was for a paved road, when compared to the ruts and bumps a rider would normally expect to encounter in either case. Unlike the danger in Olsen, the wash-out was not visible to Mr. Cowher until it was too late for him to avoid it. The teenager in Olsen had an opportunity to perceive the wind and walk away from the danger, as his family members did. In contrast, Mr. Cowher had no way of seeing the washed out trail before rounding the sharp curve. Mr. Cowher had no warning, but he was not the only one. Rupert Studman, a more experienced rider than Mr. Cowher, also encountered the hazard too late to stop safely and had to resort to intentionally sliding on the ground to avoid serious injury.

The washed out trail, therefore, was not open and obvious because it was not readily apparent to a reasonable cyclist using the trail for its intended purpose. Thus, the Defendants had an affirmative duty to warn Mr. Cowher.

II. COWHER DID NOT ASSUME THE RISK CREATED BY THE WASHOUT BECAUSE IT WAS NOT INHERENT IN MOUNTAIN BIKING AND COWHER HAD NO ACTUAL AWARENESS OF THE DANGER.

A. Washouts are not inherent risks of mountain biking and, therefore, are not assumed by riders.

Mr. Cowher did not assume the risk that he would be injured by striking a washed-out section of the Park's trail by choosing to participate in the sport of

mountain biking, because that type of hazard is not inherent in the sport when practiced on trails that are regularly maintained. The assumption of risk doctrine is divided into categories that include “primary” assumption of risk, which occurs in the recreational context when the danger that causes the plaintiff’s injuries are inherent in the activity. Turcotte, 502 N.E.2d. at 968. By engaging in a recreational activity, a participant consents to those commonly appreciated, inherent risks. Morgan v. State of New York, 685 N.E.2d 202, 207 (N.Y. 1997). A landowner owes an affirmative duty only to prevent conditions that are over and above the usual dangers inherent in the sport for which he allows the property to be used. Owen v. R.J.S. Safety Equip., 591 N.E.2d 1184, 1185 (N.Y. 1992). See also Sauray v. City of New York, 261 A.D.2d 601, 603 (N.Y. App. Div. 1999) (holding that the injury must be caused by a known, apparent, or reasonably foreseeable consequence of participation).

In Sauray, the Court found a bicyclist did not assume the risk of injury caused by a chain that had been stretched across a pathway, even though the rider had strayed from the designated bicycle path onto an unlit undesignated path and was equipped with neither with a light nor a helmet. Sauray, at 602-03. The chain was suspended across the path in order to prevent entry into a specific part of the city-owned park. Id. The rider was struck in the face and thrown from his bicycle. Id. The court reasoned that a chain stretched across a path was not an inherent risk

of mountain biking. Id. Therefore, because the risk was not inherent to the sport, the risk was not one assumed by participation in the activity. Id.

Like the chain stretched across a park path in Sauray, the wash-out stretched across the trail at the Essex County Park in this case was not an inherent risk in the sport of mountain biking. Although riders understand that mountain biking includes rugged terrain, steep hills, and sharp curves, they do not expect to encounter washouts. The defect was even more unexpected than in Sauray because, unlike the undesignated trail in that case, Mr. Cowher was riding on trails that are purportedly maintained by the municipality for him to use. Therefore, Mr. Cowher reasonably had a greater expectation of safety because he was on an official trail that was advertised as being well kept by the city. Mr. Cowher did not assume the risk that he would round a corner and strike a ditch in the middle of a supposedly well-maintained trail long after a rainstorm had ended.

B. Mr. Cowher could not have assumed the risk of the washout when he had no knowledge of the presence of the danger.

Primary assumption of risk requires knowledge of the injury-causing defect. In cases involving inherent risks of sport, such knowledge is imputed to the voluntary participant. In cases such as these, where the risk is not inherent, the relevant inquiry is whether the defect was known or apparent. See Weller v. Colleges of the Senecas, 217 A.D.2d 280, 283 (N.Y. App. Div. 1995). This Court

should affirm the Order of the trial court granting summary judgment because Mr. Cowher was completely unaware of the presence of the washout, and therefore did not assume the risk it posed.

In Weller, a student bicycling on a campus pathway left the path to ride on the grass and was thrown from his bike after hitting a tree root. Id. at 282. The area where the student fell had been traveled frequently as a pathway, but was not maintained by the college. Id. As a result, the student was paralyzed. Id. The student admitted to having biked at the exact location on prior occasions. Id. The court rejected the college's assumption of risk defense despite the fact that the student was riding in the dark. Id. at 284.

The court determined that a tree root was not an inherent risk of biking, even though the path was adjacent to trees. Id. The court required that a plaintiff have knowledge of the defect in order to assume the risk of the activity. Id. Because the student was not aware of the tree root, and because he could not be charged with knowledge of it due to its inherency in mountain biking, the court held that he did not assume the risk. Id.

The washout on the County's trail creates a much stronger case that assumption of risk was not present. Unlike Weller, the County purported to occupants that their trails were well-maintained. Workers twice each week inspected the trail and made necessary repairs. However, the scheduled

maintenance for Sunday morning was not performed, and as a result, Mr. Cowher was injured.

Further, the plaintiff in Weller chose to ride at night when visibility was low. In contrast, Mr. Cowher rode during the day, yet was still unaware of the risk. Similarly, the student in Weller had been on the grassy path before and admitted to prior riding at the location that caused his injury, while Mr. Cowher was riding at the Park for the first time. Both of these facts weigh more against assumption of risk than the facts in Weller.

Finally, emphasizing the nature of the danger, the tree root in Weller was closer to an inherent risk of bicycling than the washout on the trail. Tree roots on a path between trees could be expected, especially in a grass field that is not purported to be maintained by the owner. In contrast, a washout on a trail that was admittedly maintained and inspected by the owner at least twice per week is not to be expected by an ordinary rider. Therefore, because the trail was purported to be maintained, yet was not repaired on the morning of Mr. Cowher's injury, and because Mr. Cowher had absolutely no awareness of the presence of the washout because it could not be expected or seen on the trail, this Court should affirm the trial Court's decision granting summary judgment and hold the Defendants liable for Mr. Cowher's injuries.

Because the County had actual notice of the dangerous condition on their bike trails, it owed a general duty to Mr. Cowher to repair or warn of the danger. The Defendants failure to do so constituted a breach of the duty they owed to riders on trails at the Park, including Mr. Cowher, who was injured as a result of that breach. The duty the County owed Mr. Cowher was in force because the hazard was not open and obvious. Finally, the danger created by the washout was not an inherent risk of mountain biking on a county-maintained trail; therefore, Mr. Cowher did not assume the risk of being injured from such a hazard. As a result, no issues of material fact remained, and Mr. Cowher was entitled to judgment as a matter of law.

CONCLUSION

For the reasons stated herein, Appellee Symon Cowher respectfully requests that this Court find that the trial court properly granted judgment as a matter of law, and therefore requests that the Order of the Superior Court of Essex County granting Summary Judgment be affirmed.

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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 New York Supreme Court, Appellate Division, Third Department.

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