

# SMITH FREED EBERHARD P.C.

# OREGON LAW UPDATE

## Licensee or Trespasser? Deciphering a Landowner's Consent to Entry

case in point...

**From the Desk of Jeffrey D. Eberhard: When a business or property owner does not object to a bicyclist crossing through its parking lot, will the owner's inaction constitute consent to entry on its property, thereby resulting in a higher duty to prevent harm? Read on to see how the Oregon Court of Appeals ruled in the following case.**

**Claims Pointer: In this case, a bicyclist was injured while riding his bike through an unfenced car wash property open to the public to avoid a car exiting the car wash that was blocking his lane of travel. The Court held that where a business owner neither objected to nor prevented a bicyclist's entry onto its property, and where it was the community norm to allow bicyclists to enter store properties open for daily business, the jury had enough evidence to find that the business owner impliedly consented to the bicyclist entering its property.**

Currier v. Washman, LLC, 276 OR App 93 (January 27, 2016).

At the time of the accident, Washman, LLC ("Washman") owned and operated a car wash facility, which was open to the adjacent streets and did not have fences, barriers, or demarcations indicating where the sidewalk ends and the property begins. There was considerable traffic on the streets, bicycle lanes and sidewalks that adjoined the car wash. Pedestrians and bicyclists were not prevented from entering and leaving the property, and the property did not contain access controls or "no trespassing" signs.

John Currier ("Currier") was riding his bicycle and approached the car wash property. He attempted to ride around a car blocking the bike lane and sidewalk. While riding into the drive lane and parking area, Currier noticed damp pavement and proceeded, believing the condition was not dangerous. The concrete was actually wet with a combination of water, soap, and anything that dripped off the cars. Currier encountered the damp surface and his bicycle tires slid out from under him. He fell with the bicycle and sustained a hip fracture and a deep cut to his elbow, both of which required surgery. Washman was aware that pedestrians and bicyclists traversed the car wash property both for their own purposes and for the specific purpose of avoiding

Washman's customers. Washman also admitted to knowing that the area where Currier fell was the most slippery portion of the property.

At the conclusion of Washman's case in the trial court, Washman moved for a directed verdict. Washman argued that no reasonable juror could find that Washman consented to Currier's entry, and it breached no duty to Currier as either a licensee or trespasser. According to Washman, failing to object or prevent trespass does not manifest consent. The trial court denied Washman's motion and the jury awarded \$439,040 in damages to Currier.

The Oregon Court of Appeals affirmed the trial court's denial of Washman's motion for a directed verdict. The Court found that a jury could infer Washman impliedly consented to Currier's entry on the property because Washman failed to object to past and future entries by bicyclists and did not otherwise restrict access. Whether a visitor is a licensee or trespasser depends on whether the landowner consents to or invites the visitor's presence. In making this determination, the surrounding circumstances and customs of the community are taken into account. Currier presented evidence that Washman neither informed bicyclists they were unwelcome nor prevented bicyclists



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Oregon Court Clears the Path for Covenant Judgments

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case in point...

from traveling around a blocked public way. Furthermore, it was the community custom for bicyclists and pedestrians to cross the parking lots and driveways of nearby businesses. The Court rejected Washman's arguments that Currier got away with trespass and that there was insufficient evidence to show custom. Rather, the evidence was sufficient to create a jury question and support a determination of implied consent.

The trial court's ruling to deny Washman's motion for directed verdict was affirmed.



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