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7 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
8 IN AND FOR THE COUNTY OF KING

9 JEFFREY ROBINSON; DAVID SURBER; LAURA  
10 MORTENSEN; CHAEJI KIM; LINDSAY MURPHY;  
11 JACLYN KELLEY; BARBARA OLDENBURGER; and  
12 KATHLEEN NOLAN

13 Plaintiffs,

14 vs.

15 CITY OF SEATTLE; and  
16 BALLARD TERMINAL RAILROAD COMPANY, LLC.

17 Defendants.

Case No.: 22-2-04125-1 SEA

COMPLAINT FOR PERSONAL INJURIES AND  
OTHER DAMAGES

18 COME NOW the individuals identified as plaintiffs in the caption above (hereinafter  
19 collectively referred to as "Plaintiffs"), and for causes of action against the entities identified  
20 as defendants in the caption above (hereinafter collectively referred to as "Defendants"),  
21 allege as follows:

22 **I. JURISDICTION, VENUE AND SERVICE**

23 1.1 At all times material hereto, each of the Plaintiffs was a resident of King County,  
24 Washington.

25 1.2 Defendant City of Seattle (hereinafter "the City") is a municipal corporation established  
under the laws of the State of Washington.

1.3 Defendant Ballard Terminal Railroad Company, LLC. (hereinafter “BTR”) is a limited liability company established under the laws of the State of Washington with its principal place of business in King County, Washington.

1.4 The injuries giving rise to the damages alleged in this Complaint all occurred in Seattle, King County, Washington.

1.5 This Court has jurisdiction over this cause.

1.6 Venue is properly before this Court.

1.7 Each Defendant has been properly served with a Summons and this Complaint.

1.8 As to the claims of plaintiff Jeffrey Robinson, each of the Defendants agreed in writing to toll the statute of limitations through July 23, 2022.

1.9 Pursuant to RCW 4.96.020, each Plaintiff, through counsel, properly served a completed and signed valid Claim for Damages form on the City.

1.10 More than sixty (60) days have elapsed since the date of service of each Plaintiff’s Claim for Damages form on the City, and therefore the Plaintiffs’ Complaint is properly before the Court.

## II. FACTS

### Background of the Burke-Gilman Trail and the Missing Link

2.1 The Burke-Gilman Trail is a popular multi-use trail and is frequently used by people walking, running, using wheelchairs, and riding bicycles.

2.2 In the Ballard neighborhood of Seattle, the Burke-Gilman Trail is not continuous – there is an approximately 1.4-mile break in the trail in the area between the intersection of NW 45th St. and 11th Ave. NW and the intersection of 32nd Ave. NW and NW 54<sup>th</sup> St.

This break in the trail is made up of public streets and is commonly known as the Missing Link (hereinafter “the Missing Link”). The map below accurately depicts the location of the Missing Link in orange dashes:



2.3 Historically and at all times relevant hereto, the portion of the Missing Link that is at issue in this lawsuit, NW 45th St. between 14th Ave. NW and the Ballard Bridge (the street east of bridge), and Shilshole Ave. NW between the Ballard Bridge and NW 46th St. (the street west of the bridge), were public streets utilized by motorized and non-motorized vehicles, including bicycles.

2.4 At all times relevant hereto, there was no recreational trail within the Missing Link and the Missing Link was not part of the Burke-Gilman Trail. According to the City's own briefing in other litigation, the City "constructed the portions of the [Burke-Gilman]

Trail north and south of the Missing Link, leaving the Missing Link as the sole remaining gap in the otherwise continuous linear corridor.”<sup>1</sup>

2.5 A 2021 opinion in a case involving the City’s plan to complete of the Burke-Gilman Trail in the Missing Link, provides the following background<sup>2</sup>:

“The Burke-Gilman Trail (BGT) is a regional bicycle and pedestrian trail between Golden Gardens Park in Seattle and the Sammamish River Trail in Bothell. The trail has a 1.4-mile gap through the Ballard neighborhood known as the ‘Missing Link.’ Completion of the BGT’s Missing Link has been discussed and analyzed since the 1980s. In the early 1990s, the City of Seattle included the segment in its comprehensive plan. In 2001, the Seattle City Council (Council) directed the Seattle Department of Transportation (“SDOT”) to evaluate alternative routes for the Missing Link. The Council adopted a resolution identifying Shilshole Avenue NW as the preferred route for the trail in 2003. In 2008, SDOT developed a plan to bridge that gap by building the Missing Link through Ballard’s maritime and industrial district.”

2.6 Numerous bicyclists ride through the Missing Link daily, often (but not always) to continue on the Burke-Gilman Trail. This fact has been well known to each of the Defendants for well over two decades.

2.7 In describing the Missing Link in 2019 briefing to Division I of the Washington Court of Appeals, the City admitted that users “**must traverse hazards — including...railroad tracks...through an unmarked, disorganized right-of-way.**” (emphasis added)<sup>3</sup>

2.8 The area referred to herein as “the Crash Zone” is where NW 45<sup>th</sup> St. and Shilshole Ave. NW converge beneath the Ballard Bridge (a/k/a 15<sup>th</sup> Ave. NW), including the areas

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<sup>1</sup> *City of Seattle v. Ballard Terminal Railroad*, WA Court of Appeals, Div. 1, Case No. No. 82377-9-I, Appellant’s Brief, Pg. 11.

<sup>2</sup> *Ballard Terminal Railroad, et.al. v. City of Seattle, et. al.*, WA Court of Appeals, Div. 1, Case No. 79543-1-I, Unpublished Opinion 3/29/21, Pg. 2.

<sup>3</sup> *MLK Labor General Teamsters Union Local NO. 174, et. al. v. City of Seattle et.al.*, WA Court of Appeals, Div. 1, Case No. 79543-1, Respondent’s Opening Brief, Pg. 3.

immediately adjacent to each side of the bridge above. The Crash Zone is within the Missing Link.

2.9 At all times material hereto, the Crash Zone has been promoted by the City as an area in which bicyclists are encouraged to ride and has been designated by the City as part of a signed bicycle route on City published bicycle maps.

2.10 Below is a true and accurate screenshot taken of the City's "Bike Web Map" showing that the Crash Zone includes a bicycle lane (not a multi-use trail) and is part of a "Signed Bike Route."



2.11 As of the date of this Complaint, the City's plan to complete the gap in the Burke-Gilman Trail through the Crash Zone to address the dangers presented to bicyclists in the Missing Link has not been implemented.

### **The Skewed Tracks in the Crash Zone**

2.12 On the approach to the Crash Zone east of the Ballard Bridge, a set of railroad tracks run parallel along the north side of NW 45<sup>th</sup> St. On the approach to the Crash Zone west of the Ballard Bridge, the same set of tracks run parallel along the south side of Shilshole Ave. NW.

1 2.13 Within the Crash Zone itself, the orientation of the tracks to the street changes and the  
2 track rails cross the street at a perilously skewed angle (an acute angle that is  
3 significantly less than 90°). This is because, while the tracks continue more or less  
4 straight, the street curves to the northwest as NW 45<sup>th</sup> St. converges into Shilshole Ave.  
5 NW.

6 2.14 The straight tracks on a curved roadway, with a shadow-casting bridge above, creates  
7 what Peter Lagerwey, who was then SDOT's Pedestrian and Bicycle Program  
8 Coordinator, described in 2001 as "something unique here, a visual illusion."  
9 Hereinafter, the railroad tracks as they cross through the Crash Zone will be referred  
10 to as "the Skewed Tracks."  
11

12 2.15 Each of the Plaintiffs herein suffered serious bodily injuries and other damages after  
13 crashing while attempting to cross the Skewed Tracks by bicycle in the Crash Zone.  
14

15 **Creation of Two-Way Bike Lane Through Crash Zone**

16 2.16 Prior to 2001, the Defendants were aware of numerous people crashing and being  
17 injured while attempting to cross the Skewed Tracks by bicycle.

18 2.17 From approximately 2001 through late 2013, the City painted and maintained arrows  
19 and bike symbols on the roadway over the Skewed Tracks in the Crash Zone. The  
20 photos below illustrate some of these road markings over time.

21 A) The photo below is a true and accurate depiction of the Skewed Tracks, looking east,  
22 as of August 2001:  
23  
24  
25



- B) The photo below appeared in an article dated December 29, 2009 from an online publication known as *"My Ballard"*, and is a true and accurate depiction of the Skewed Tracks as of that date. The photo, which looks west, depicts a cyclist who, the article reports, crashed on the Skewed Tracks that same day:



- C) The photo below is a true and accurate depiction of the Skewed Tracks, looking east, as of April 2012:



2.18 Despite the road markings in place from approximately 2001 through 2013, the Defendants knew that people continued to regularly crash on the Skewed Tracks. Between 2005 and 2012 alone, the City received at least 18 formal injury claims from bicyclists who crashed trying to cross the Skewed Tracks in the Crash Zone. From 2001 forward, each of the Defendants was also named in at least six lawsuits involving bicyclists being injured on the Skewed Tracks in the Crash Zone.

2.19 In or about December 2013, the City began implementing modifications to NW 45th St. between 11th Ave. NW and the Ballard Bridge (the street east of the bridge), and Shilshole Ave. NW between the Ballard Bridge and NW 46th St. (the street west of the bridge) by marking out a two-way bicycle lane (hereinafter referred to as "the Bike Lane"). The Bike Lane occupied what had been the westbound lanes of NW 45<sup>th</sup> St. and Shilshole Ave. NW, and those streets became one-way eastbound for motor vehicle traffic. The Bike Lane on the street runs through the Crash Zone and over the Skewed Tracks.



2.20 According to a December 17, 2013 edition of the *Seattle Bike Blog*, SDOT described its plan for the 2013 changes in and leading to the Crash Zone, in part, as follows:

Shilshole Avenue Northwest/Northwest 45th Street between Northwest 46th Street and 11th Avenue Northwest is about to become one-way eastbound for motor vehicles, with a separate two-way bicycle lane to the north. **The Seattle Department of Transportation is making the roadway change to address longstanding safety concerns.**

Crews will install striping along the Shilshole Avenue Northwest/Northwest 45th Street segment and place new signage this weekend, Dec. 20-22.

The one-way eastbound solution comes after collaboration with area businesses. Access to all businesses will be maintained, although some routings will change due to the one-way modification. New signage will direct those heading westbound on Northwest 45th Street, east of 11th Avenue Northwest, to head north to Northwest 46th Street instead.

**The identified segment of Shilshole Avenue Northwest/Northwest 45th Street is one of the highest bicycle collision locations in the city** and also a heavy industrial area.

(Emphasis added)

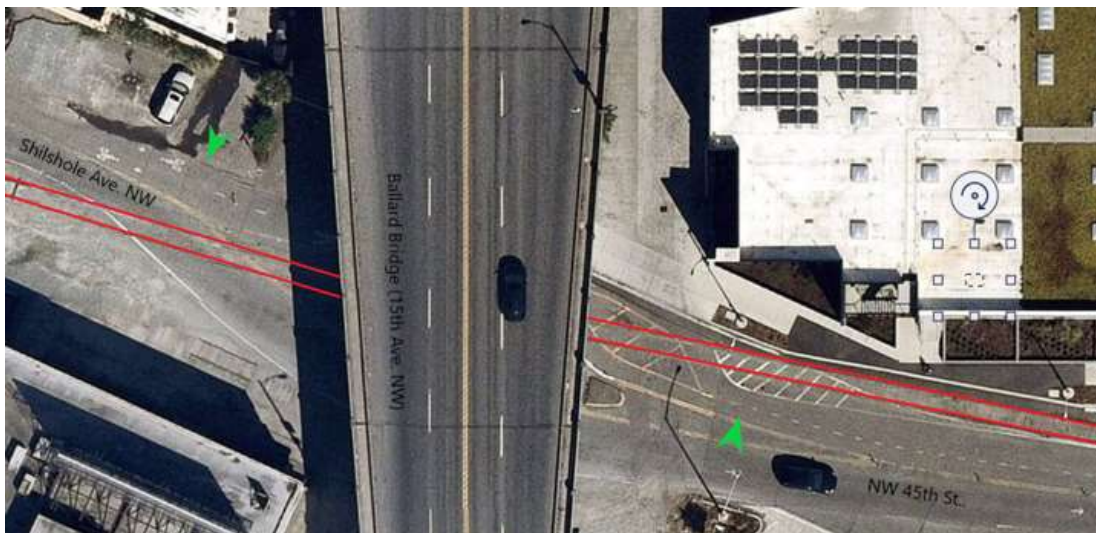
2.21 After the creation of the Bike Lane, the City made one or more modifications to it, including remarking lines on the roadway in late 2014 or early 2015, presumably in an attempt to provide additional separation in the Crash Zone between eastbound and westbound bicyclists utilizing the Bike Lane.

2.22 Below are images taken in 2018 and 2020 that accurately depict the area in and around the Crash Zone at the times stated.

A) The first image, captured by satellite in August 2020 (oriented with north at the top), shows NW 45<sup>th</sup> St. to the east of the Ballard Bridge, Shilshole Ave. NW to the west of the bridge, the Bike Lane, and the Skewed Tracks:



B) For illustrative purposes, the next photo is the same satellite image, with annotations included for the street names, the Bike Lane (green arrows) and the approximate position of the Skewed Tracks (red lines):



1 C) The photo below depicts the Crash Zone in September 2020 (looking west):  
2



11 D) The photo below depicts the Crash Zone in August 2018 (looking west):  
12



2.23 At all times relevant hereto, the City has known that the optimum safe crossing angle for bicycles over track rails is at 90 degrees. For example, a June 2011 document entitled "Basis of Design – DRAFT, Seattle Two-Way Cycle Track along Broadway" prepared by DKS Associates at the request of the City, includes the following:

### Track Crossing Angles

Another design objective along the two-way cycle track is providing bicyclists with safe crossing angles over streetcar tracks. Ideally, a bicyclist should cross tracks at 90 degrees, with 70 to 90 degrees being the preferable range. An angle closer to 90 degrees reduces the chances of catching a bike tire in the tracks, and improves bicyclist safety when tracks are wet.

The referenced DKS Associates recommendation was relied upon by the City in designing the First Hill Streetcar Project. For example, in a document entitled "First Hill Streetcar Project Preliminary Hazard/Security Analysis Report" dated April 2011 (and updated May 2012), the following appears:

SYSTEM: Traffic Control Bicycle/Pedestrian SUBSYSTEM: Interface at Streetcar Stops FHSBQ: F.4 REVNO: 0		CITY OF SEATTLE DEPARTMENT OF TRANSPORTATION FIRST HILL STREETCAR PRELIMINARY HAZARD & SECURITY ANALYSIS				PERFORMED BY: LWS DATE: 09/15/12
GENERAL DESCRIPTION		HAZARD CAUSE/EFFECT		HAZARD RISK INDEX		CORRECTIVE ACTION
No.	Hazard Description	Potential Cause	Effect on Subsystem/System	Initial Severity-Probability	Residual Severity-Probability	Possible Controlling Measures and Remarks
F.3.b	Bicyclist slips on rails/bike tire caught in flangeway	Distracted cyclist Cyclist not crossing rails at appropriate angle Cyclist trying to race streetcar	Possible injury and/or death	I-D	I-E	Follow recommendations/Criteria outlined in the Basis of Design – Seattle Two-Way Cycle Track along Broadway, prepared by DKS Associates, distributed to the City of Seattle June 2012. Provide bicycle crossings of track as close to 90 degrees as possible, as indicated on the Channelization plans (CH series).

2.24 On information and belief, prior to designing and installing the Bike Lane as it was configured and implemented at the time each Plaintiff crashed, the City did not conduct a formal safety or hazard analysis of the Crash Zone or of the Bike Lane design

1 and did not consider and/or analyze alternatives using the approach commonly  
2 referred to as Safety Hierarchy of Controls.

3 2.25 At all times relevant hereto, the Crash Zone, including the crossing of the Skewed  
4 Tracks, was not reasonably safe for ordinary travel by bicycle. None of the changes  
5 made by the City in the Crash Zone before the Plaintiffs' crashes that are the subject  
6 of this action, including installation of and modifications to the Bike Lane, corrected  
7 the perilous angle of the Skewed Track crossing, nor did they make the crossing of the  
8 Skewed Tracks reasonably safe for ordinary travel by bicycle.  
9

10 **The Plan to Complete the Burke-Gilman Trail in the Missing Link**

11 2.26 The process to complete the Burke-Gilman Trail has been a long one, extending over  
12 decades and continues with no clear end in sight. City employees, consultants, bicycle  
13 advocacy groups, businesses, and private citizens have all provided input. Eventually,  
14 the City put forward a plan known as the Ballard Multimodal Corridor Project  
15 (hereinafter "BMCP"). The BMCP included detailed plans for eliminating the Missing  
16 Link by finally completing the Burke-Gilman Trail, including completion of the trail  
17 through the Crash Zone.  
18

19 2.27 Full implementation of the BMCP has been delayed due to legal actions against the City  
20 by various entities, including BTR. If and when the BMCP is fully implemented, the  
21 completed Burke-Gilman Trail is likely to eliminate many of the hazards that bicyclists  
22 have faced in the Missing Link for decades. In particular, implementation of the full  
23 BMCP is likely to significantly reduce or eliminate the past (and ongoing) danger of  
24 crossing the Skewed Tracks in the Crash Zone by bicycle.  
25

2.28 According to the City's May 2017 Final Environmental Impact Statement for completion of the Burke-Gilman Trail in the current Missing Link:

"Along Shilshole Ave NW and NW 45th St, existing tracks would be relocated to provide for the trail design under the Preferred and Shilshole South Alternatives."

2.29 In a Seattle City Council Sustainability & Transportation Committee meeting held on February 15, 2017<sup>4</sup>, the following colloquy took place as part of SDOT's detailed explanation of the City's plan to complete the Burke-Gilman Trail in the Missing Link (found at 14:01 through 14:24):

Mark Mazzola, SDOT's Environmental Manager [while circling the Crash Zone on a plan drawing]: *"Continuing along NW 45<sup>th</sup>, under the Ballard Bridge, so this is where we would eliminate the conflict point with the railroad tracks that is happening here currently."*

City Councilmember Mike O'Brien: ***"So that's where the current trail crosses the railroad tracks and that's where we have a lot of crashes."***

Mark Mazzola: ***"That's correct."***

(Emphasis added)

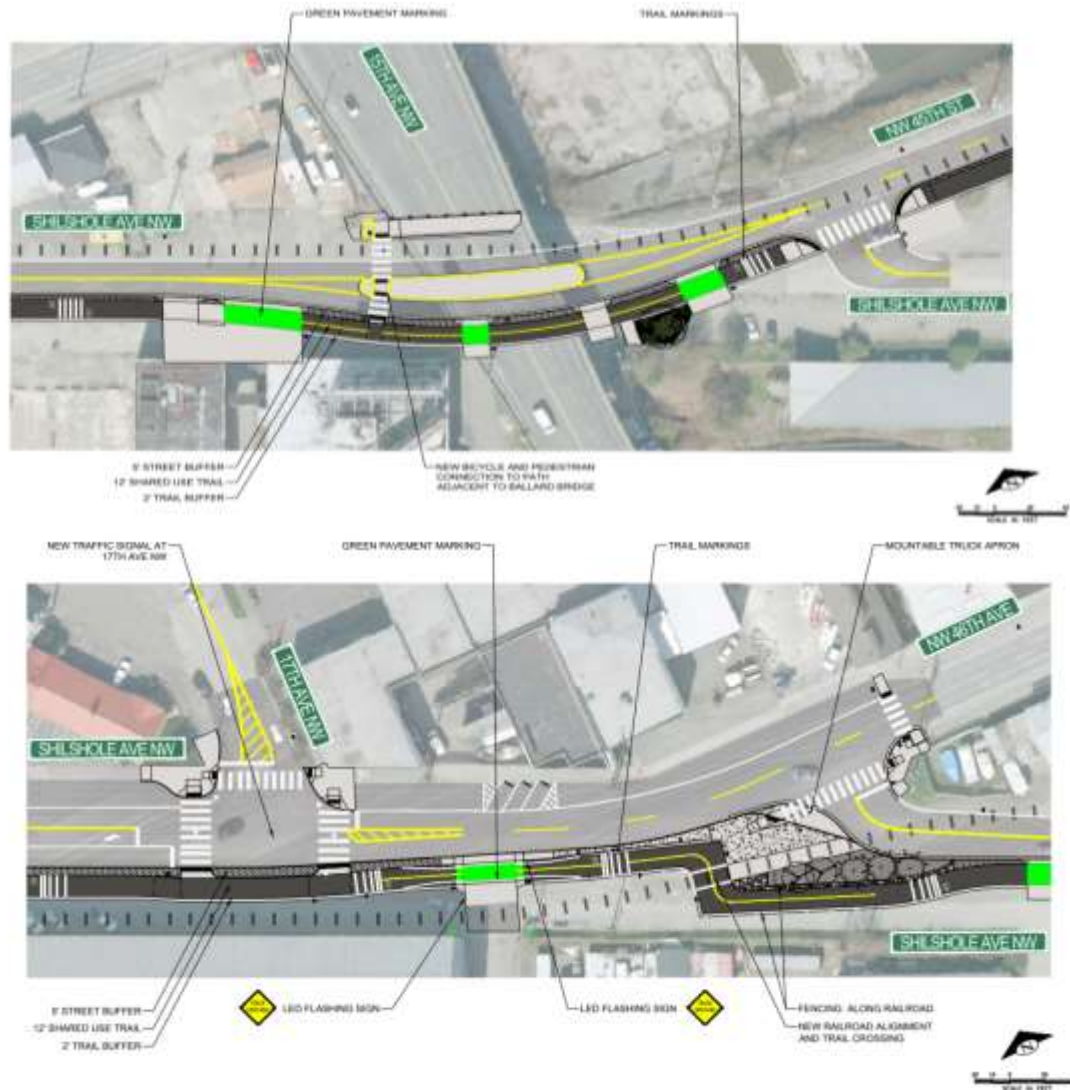
2.30 Per the City's 2018 "Ballard Multimodal Corridor Graphic Design Plans"<sup>5</sup>, the following two drawings depict how the continuation of the Burke-Gilman Trail in the Missing Link had, until recently, been planned: 1) through the current Crash Zone (first drawing); and 2) over the Skewed Tracks (second drawing):

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<sup>4</sup> Found at: [www.seattlechannel.org/mayor-and-council/city-council/2016/2017-sustainability-and-transportation-committee?videoid=x70666](http://www.seattlechannel.org/mayor-and-council/city-council/2016/2017-sustainability-and-transportation-committee?videoid=x70666).

<sup>5</sup> See: [www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/BGT\\_95GraphicPlans\\_2018-0323.pdf](http://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/BGT_95GraphicPlans_2018-0323.pdf)





2.31 On November 1, 2021, SDOT announced a revised plan for the BMCP that is different from the plan depicted in paragraph 2.30 above (which was the subject of the May 2017 Final Environmental Impact Statement)<sup>6</sup>. The new plan shows the to-be completed Burke-Gilman Trail as crossing the Skewed Tracks at a different location from the earlier plan and is said to “[eliminate] the need to relocate railroad tracks on

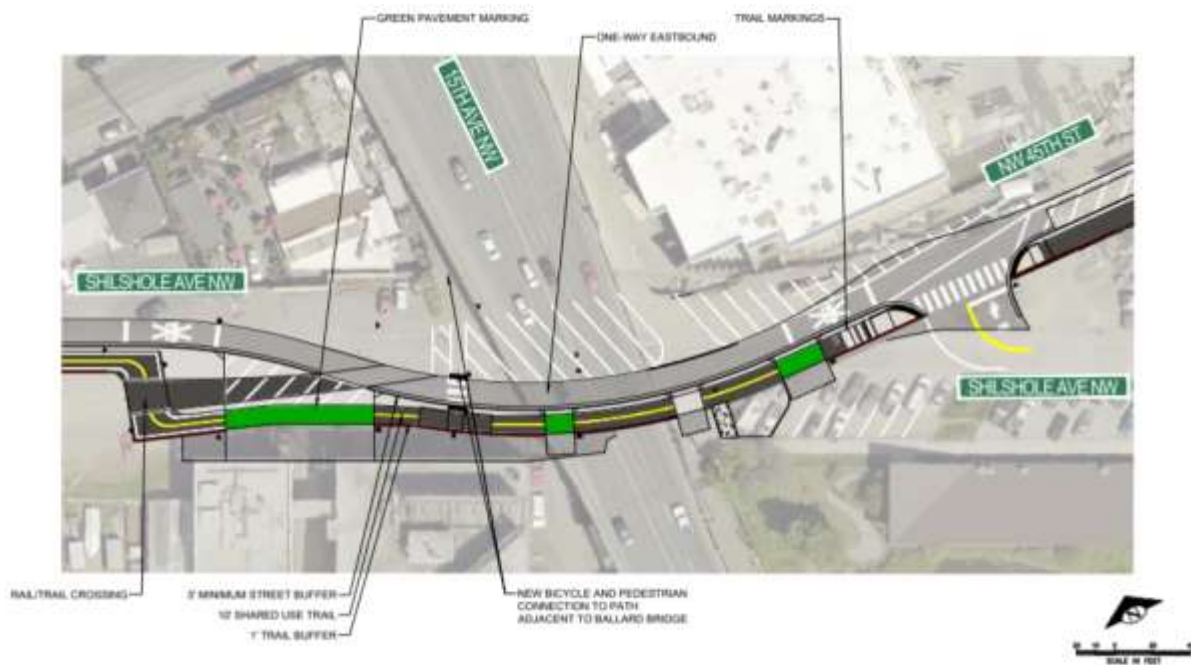
<sup>6</sup> See: [Sdotblog.seattle.gov/2021/11/01/levy-dollars-at-work-refined-burke-gilman-trail-missing-link-design-allows-us-to-move-this-safety-project-forward-and-resume-construction-as-soon-as-next-year/](https://sdotblog.seattle.gov/2021/11/01/levy-dollars-at-work-refined-burke-gilman-trail-missing-link-design-allows-us-to-move-this-safety-project-forward-and-resume-construction-as-soon-as-next-year/); and [www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/BMCPlans1\\_2.pdf](https://www.seattle.gov/Documents/Departments/SDOT/BikeProgram/BGT/BMCPlans1_2.pdf)

Shilshole Ave NW and NW 45th St.” According to SDOT’s announcement of the revised plan, Mayor Jenny Durkin said:

***Completing the Burke-Gilman Trail Missing Link is an important and too long delayed piece of safety infrastructure in Seattle. By redesigning the Missing Link we will finally be able to give the bike, walking and rolling community a safe route to enjoy the treasure that is the Burke-Gilman trail. After continued legal challenges, these next steps will bring us tangibly closer to finishing this crucial project.***

(Emphasis added)

2.32 The drawing below, publicly released by SDOT on November 1, 2021, depicts how the continuation of the Burke-Gilman Trail in the Missing Link is being planned (as of the filing of this Complaint) both through the Crash Zone and over the Skewed Tracks at approximately a 90° angle:



2.33 On or about December 9, 2021, the coalition of Ballard businesses (including BTR) that have, for many years, been actively opposing plans to complete the Burke-Gilman Trail



1 in the Missing Link, instituted a new legal challenge to the revised plan discussed in  
2 paragraphs 2.31 and 2.32 above.

3 **With BMCP Implementation Stalled, Bicyclists Continue Being Injured in the Crash Zone**

4  
5 2.34 Despite the creation of the Bike Lane in or about late 2013, bicyclists continued to crash  
6 on the Skewed Tracks in the Crash Zone. Each of the Defendants has been aware of  
7 this fact.

8 2.35 On information and belief, in the five years between mid-2015 and mid-2020, the  
9 Seattle Fire Department responded to approximately 39 incidents involving bicyclists  
10 crashing on the Skewed Tracks in the Crash Zone. On further information and belief,  
11 there were numerous additional unreported bicycle crashes on the Skewed Tracks in  
12 the Crash Zone during this timeframe to which Seattle Fire Department was not  
13 dispatched.  
14

15 2.36 An article in the Seattle Times dated August 17, 2016 confirmed that SDOT does not  
16 collect “solid data” on bicycle crashes on track rails imbedded in roadways and noted  
17 that: “Wrecks go unreported.” Consistently, in a September 4, 2019 report prepared  
18 by SDOT’s Seattle Bicycle Advisory Board entitled Streetcar Spot Enhancements: How  
19 SDOT is Improving Bicycle Safety, the City acknowledged that bicycle crashes involving  
20 imbedded track rails are underreported.  
21

22 2.37 The City received notice of at least four formal injury claims from bicyclists who crashed  
23 at the Skewed Tracks in the Crash Zone between May 2014 and May 2016 (City of  
24 Seattle Claim Nos. C-92730, C-89875, C-91880 and C-90834), with one of those claims  
25 (C-92730) becoming the subject of a lawsuit against both of the Defendants.

1 2.38 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
2 Zone after the City received notice of the claims referenced in paragraph 2.37 above,  
3 and after the City and BTR were named as defendants regarding Claim No. C-92730.

4 2.39 On June 1, 2014, after the City began installing the Bike Lane, Michael Marian, the  
5 owner of a business adjacent to the Crash Zone, sent the email shown below to SDOT's  
6 then Chief Traffic Engineer, Dongho Chang, and sent courtesy copies of the email to  
7 the media and most or all of the members of the Seattle City Council. The email  
8 included photos and a video link documenting numerous people who had crashed on  
9 the Skewed Tracks in the Crash Zone:  
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From: Michael Marian

<[mike@marianbuilt.com](mailto:mike@marianbuilt.com)<<mailto:mike@marianbuilt.com>><<mailto:mike@marianbuilt.com>>>

Date: June 1, 2014, 9:25:13 AM PDT

To: Dong Ho Chang

<[donghochang@seattle.gov](mailto:donghochang@seattle.gov)<<mailto:donghochang@seattle.gov>><<mailto:donghochang@seattle.gov>>>

Cc: "<[getjesse@king5.com](mailto:getjesse@king5.com)<<mailto:getjesse@king5.com>><<mailto:getjesse@king5.com>>>"

<[getjesse@king5.com](mailto:getjesse@king5.com)<<mailto:getjesse@king5.com>><<mailto:getjesse@king5.com>>>,

"<[tom@seattlebikeblog.com](mailto:tom@seattlebikeblog.com)<<mailto:tom@seattlebikeblog.com>><<mailto:tom@seattlebikeblog.com>>>

<[tom@seattlebikeblog.com](mailto:tom@seattlebikeblog.com)<<mailto:tom@seattlebikeblog.com>><<mailto:tom@seattlebikeblog.com>>>,

"<[684-road@seattle.gov](mailto:684-road@seattle.gov)<<mailto:road@seattle.gov>><<mailto:road@seattle.gov>>>"<[684-](mailto:684-road@seattle.gov)

<[road@seattle.gov](mailto:road@seattle.gov)<<mailto:road@seattle.gov>><<mailto:road@seattle.gov>>>,

"<[construction.coordination@seattle.gov](mailto:construction.coordination@seattle.gov)<<mailto:construction.coordination@seattle.gov>><<mailto:construction.coordination@seattle.gov>>>

<[construction.coordination@seattle.gov](mailto:construction.coordination@seattle.gov)<<mailto:construction.coordination@seattle.gov>><<mailto:construction.coordination@seattle.gov>>>

<[construction.coordination@seattle.gov](mailto:construction.coordination@seattle.gov)>>, <[nick.licata@seattle.gov](mailto:nick.licata@seattle.gov)<<mailto:nick.licata@seattle.gov>><<mailto:nick.licata@seattle.gov>>>,

<[sally.bagshaw@seattle.gov](mailto:sally.bagshaw@seattle.gov)<<mailto:sally.bagshaw@seattle.gov>><<mailto:sally.bagshaw@seattle.gov>>>

<[sally.clark@seattle.gov](mailto:sally.clark@seattle.gov)<<mailto:sally.clark@seattle.gov>><<mailto:sally.clark@seattle.gov>>>,

<[tim.burgess@seattle.gov](mailto:tim.burgess@seattle.gov)<<mailto:tim.burgess@seattle.gov>><<mailto:tim.burgess@seattle.gov>>>,

<[bruce.harrell@seattle.gov](mailto:bruce.harrell@seattle.gov)<<mailto:bruce.harrell@seattle.gov>><<mailto:bruce.harrell@seattle.gov>>>

<[jean.godden@seattle.gov](mailto:jean.godden@seattle.gov)<<mailto:jean.godden@seattle.gov>><<mailto:jean.godden@seattle.gov>>>,

<[mike.obrien@seattle.gov](mailto:mike.obrien@seattle.gov)<<mailto:mike.obrien@seattle.gov>><<mailto:mike.obrien@seattle.gov>>>,

<[tom.rasmussen@seattle.gov](mailto:tom.rasmussen@seattle.gov)<<mailto:tom.rasmussen@seattle.gov>><<mailto:tom.rasmussen@seattle.gov>>>

<[Kshama.Sawant@seattle.gov](mailto:Kshama.Sawant@seattle.gov)<<mailto:Kshama.Sawant@seattle.gov>><<mailto:Kshama.Sawant@seattle.gov>>>

Subject: PEOPLE ARE GETTING HURT

To anyone at the Seattle Department of Transportation concerned with public safety,

Shilshole Ave NW under the Ballard bridge is a very dangerous place for bicycles. SDOT has made Shilshole a one way street in an attempt to make it safer. They have installed islands, repaved, and re-painted existing traffic lines. But they have done nothing, NOTHING to direct bicycles across the tracks perpendicularly. I would think some cones glued to the roadway to direct this, while still letting the train through, would be sufficient. Whatever the solution is, it needs to happen today.

I will be actively using social media to get the word out about this, as well as taking as many pictures and getting as many statements as possible. I have cc'd various contacts in the local media. To them I would say 'bring your cameras down, you WILL see people fall and get hurt'. I will also be more than willing to be a witness to any lawsuits brought forth against the city.

This is so bad I just can't believe it's going on.

2.40 In response to the email discussed in paragraph 2.39 above, Mr. Chang responded the same day on behalf of SDOT by saying: *"Our crews have been repainting and installing signs yesterday and should be finishing up under the bridge today. Thanks for letting*

1 me know. This is exactly the reason why we are making the **temporary changes along**  
2 **45th**. I appreciate your concern.” (Emphasis added).

3 The same day, Mr. Marian responded:

4 “Did you see the attached pictures?!

5 *Painting lines IS NOT SUFFICIENT!*

6 *There are lines there now, repainting is not good enough!*

7 *Get there today and install glue down cones to force the bicycles to*  
8 *cross perpendicularly.*

9 *I have met you before, and I think highly of your character, but I will do*  
10 *everything I can to see that you are held accountable for the hundreds*  
11 *of injuries because you refuse to better direct traffic.*

12 *Painting lines is not a sufficient answer.”*

13 (Emphasis original)

14 Mr. Chang then replied:

15 “This is a high priority location to address and I am very committed to  
16 making the street safe. Please hold me accountable, as my job is to  
17 ensure our streets are safe for all users. I'll review the location once  
the work is done to see how the location is working.”

18 The next day, June 2, 2014, Mr. Chang replied further:

19 “Thank you for your time yesterday talking with me. I definitely heard  
20 you loud and clear and am taking your concerns seriously. Safety is  
21 SDOT’s highest priority and we have a goal of zero fatality and serious  
22 injury by 2030. I sincerely understand your urgency and outrage about  
23 the bicycle riders who have difficulty and fall crossing the rail road  
24 tracks under the Ballard Bridge on NW 45<sup>th</sup> Street. I am directly  
25 accountable for addressing this situation and am committed to doing  
exactly that. I talked with our field crews and they confirmed that all  
riders were following the newly marked crossing that was completed  
yesterday afternoon. This section of the NW 45<sup>th</sup> Street has been one  
of the highest bicycle fall locations in our city. I am hoping that the  
interim changes that have been made will help our residents navigate

1                    *this street safely and more easily as we continue to finalize the*  
2                    *environmental review of the Burke Gilman Trail project."*

3        2.41    All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
4                    Zone after the email correspondence referenced in paragraphs 2.39 and 2.40 above.

5        2.42    On June 4, 2014, KIRO TV News aired a story on the Crash Zone which can be found at  
6                    the    following    link:    [https://www.kiro7.com/news/sdot-makes-temporary-fix-](https://www.kiro7.com/news/sdot-makes-temporary-fix-dangerous-bike-path/81705910/)  
7                    [dangerous-bike-path/81705910/](https://www.kiro7.com/news/sdot-makes-temporary-fix-dangerous-bike-path/81705910/). The report recounts the concerns Mr. Marian raised  
8                    in his correspondence with Mr. Chang. Mr. Chang was interviewed for the story and,  
9                    in the written version of the report is quoted as saying: ***"It's a temporary fix absolutely.***  
10                    ***It's something that we want to solve ASAP."*** (Emphasis added)

11  
12        2.43    All of the Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the  
13                    Crash Zone after the news report discussed in paragraph 2.42 above and more than  
14                    four years after Mr. Chang described the Bike Lane as a "temporary fix."

15  
16        2.44    The following appeared in a March 2015 edition of the Cascade Courier, the newsletter  
17                    of the Cascade Bicycle Club, a Seattle-based non-profit and the largest statewide  
18                    bicycling organization in the United States:

## THE MISSING LINK



The missing link continues to be the most dangerous, crash-filled section in the city. In just 4 years, emergency responders attended to 45 bicycle crashes, many more went unreported.

2.45 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after the publication of the newsletter referenced in paragraph 2.44 above.

2.46 On information and belief, on June 26, 2015, Brock Howell of Cascade Bicycle Club and Kevin Carrabine, of the group Friends of the Burke-Gilman Trail, met with SDOT's Mr. Chang under the Ballard Bridge to discuss safety issues. Then BTR owner Byron Cole was invited to the meeting but failed to appear. At the meeting, the group discussed, among other things, the ideas of SDOT applying green paint in the Bike Lane across the Skewed Track and adding more plastic flex posts to encourage crossing the Skewed Tracks at closer to a 90° angle.

2.47 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after the meeting described in paragraph 2.46 above. Further, SDOT did not actually add any green paint to the Bike Lane or make any consequential changes to the plastic flex posts until October 2020, after each of the Plaintiffs herein crashed.

2.48 The following photograph, which depicts a banner hanging from the Ballard Bridge directly over the Crash Zone with the words "FIX THE MISSING LINK", appeared in a July 11, 2016 "Friends of the Burke-Gilman Trail-Ballard" Facebook group post:



2.49 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after the hanging of the banner pictured in paragraph 2.48 above.

2.50 On January 5, 2016, an individual named Saskia de Vries submitted a comment/request to SDOT regarding the Bike Lane in the Crash Zone, which stated, in part:

About two years ago, you put in a terribly designed bike lane on Shilshole/45th Ave NW. This is dangerous piece of infrastructure that puts people's lives in danger...Please...remove the bike lane on Shilshole/45th Ave. This is poorly designed, and moreover, the laws have never been enforced on this stretch of road. So long as cars continue to drive in the wrong direction and illegally cross into the bike lane, this will always be a death trap. If you insist of keeping this piece of crap, for the love of God replace the [plastic flex posts]. How many are still standing? Do you even know? Why would you put them in there if you weren't going to keep them there? You should be there every week replacing [plastic flex posts]... Please? Pretty please? Why should I even have to beg. It's appalling and disgraceful.

1 2.51 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
2 Zone after SDOT received Ms. de Vries' comments in paragraph 2.50 above.

3 2.52 On May 11, 2016, Kevin Carrabine, of the group Friends of the Burke-Gilman Trail, sent  
4 an email regarding portions of the Missing Link to SDOT's Mr. Chang. The email stated,  
5 in part:

6 *It's been a while since you, Brock, myself met along the NW 45th Protected*  
7 *Bike Lane and looked at the volumes of people bicycling and walking along*  
8 *the route. You might remember, you wondered then about ...:*  
9 *- 'green striping' the RR track crossing under the Ballard Bridge*

10 *. . .*  
11 *Well, since then, use has only increased along this corridor and people*  
12 *bicycling continue to crash.*

13 2.53 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
14 Zone after Mr. Carrabine's email. Further, SDOT did not add any green paint to the Bike  
15 Lane until October 2020, after each of the Plaintiffs herein crashed.

16 2.54 In or about 2016, SDOT collected hundreds of public comments for the Environmental  
17 Impact Statement that was part of the process for completion of the Burke-Gilman  
18 Trail. A large number of comments raised concerns about the dangers of crossing the  
19 Skewed Tracks in the Crash Zone and described experiences of crashing on the tracks  
20 or knowing about others who have crashed in that location.

21 2.55 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
22 Zone after the City received the comments referenced in paragraph 2.54 above as part  
23 of the Environmental Impact Statement process.

24 2.56 On information and belief, in late July 2016, SDOT's Mr. Chang was in the vicinity of the  
25 Bike Lane in the Crash Zone when he encountered and spoke to an individual named



Kenneth (or Kevin) Smith. Mr. Smith was staying in an RV parked beneath the Ballard Bridge in the Crash Zone and became concerned about the frequency of bicycle crashes on the Skewed Tracks. Mr. Smith had taken it upon himself to place traffic cones and construction ribbons in order to help better guide cyclists over the Skewed Tracks. Below is a true and accurate copy of the photograph taken by Mr. Chang of the cones and ribbons placed by Mr. Smith:



2.57 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after the encounter between Mr. Smith and Mr. Chang described in paragraph 2.56 above.

2.58 At the February 15, 2017 Seattle City Council Sustainability & Transportation Committee meeting discussed earlier in this Complaint, citizens and groups had a chance to express their views on completion of the Burke-Gilman Trail. Several shared their experiences of crashing on the Skewed Tracks in the Crash Zone. At video time

1 stamps 50:39 through 51:02, Kelsey Mesher, a representative of Cascade Bicycle Club,  
2 made the following plea to the committee members and leaders at SDOT:

3 What really needs to be prioritized is fixing the crossing underneath the  
4 Ballard Bridge over the tracks. We don't need to talk about why, this has  
5 gone on for too long. But we've waited to fix that and so if there can be a  
6 priority to fix that first as implementation begins, that would be a win for  
7 everyone in this room and in our city.

8 2.59 In closing out the City's Sustainability & Transportation Committee meeting of  
9 February 15, 2017, City Councilmember Mike O'Brien asked the following of SDOT  
10 representatives (at video time stamps 1:03:35 through 1:03:59):

11 I'm interested in seeing if there are pieces of this that could be  
12 accelerated, certainly the current railroad crossing beneath the Ballard  
13 Bridge is an area of ongoing concern...I'm really interested, as you work  
14 on final design, if there are pieces of this that can start sooner rather than  
15 later.

16 2.60 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
17 Zone after the February 15, 2017 City Council Committee meeting.

18 2.61 As part of the safety considerations for completing the Burke-Gilman Trail, the City's  
19 May 2017 Final Environmental Impact Statement ("FEIS") admitted as follows:

20 Nonmotorized safety in the study area is also affected by roadway  
21 conditions, including the presence of railroad tracks and other obstacles.  
22 Incident response data provided by the Seattle Fire Department indicate  
23 locations in the study area where roadway conditions could create unsafe  
24 passage for bicyclists and pedestrians (Seattle Fire Department, 2015).  
25 Between January 2012 and December 2014, there were 45 incidents in  
the study area. However, it is likely that additional incidents caused by  
roadway conditions occurred but were not recorded. As shown in Figure  
7-10, incident responses have been concentrated along NW 45th St and  
Shilshole Ave NW, and at the intersections of NW 45th St/14th Ave NW  
and under the Ballard Bridge. **The presence of railroad tracks in these  
locations presents a safety concern for nonmotorized users, particularly  
bicyclists, as bicycle tires can become trapped between the railroad  
tracks and the street.**

(Emphasis added) The below illustration is a true and accurate copy of Figure 7-10 referenced in the FEIS:



Figure 7-10. Study Area Nonmotorized Incident Responses

BURR-GILMAN TRAIL, MISSING LINK

7-24  
MAY 2017

2.62 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after the publication of the May 2017 Final Environmental Impact Statement.

2.63 On or about July 12, 2019, an individual named Abigail Nelson called SDOT to report her boyfriend's bike crash on the Skewed Tracks. According to an SDOT call log:

Caller Abigail is reporting that her boyfriend had a serious injury as he was riding his bike under the North side of the Ballard bridge in the bike lane. At this location the bike lane crosses over the rail for Ballard Terminal Railroad. He fell off his bike and was injured because of the rails in the road here. Abigail notes that the doctor had Swedish Medical Center in Ballard said the medical center sees hundreds of such accidents per year often involving this exact location. Abigail would like to know what steps will/may be taken to make bike travel through this area and in particular over the rails safer and to mitigate risk of injury.

1 2.64 Plaintiffs Kim, Mortensen, Murphy, Kelley, Oldenburger and Nolan all crashed while  
2 attempting to cross the Skewed Tracks in the Crash Zone after Ms. Nelson placed her  
3 call to SDOT described in paragraph 2.63 above.

4 2.65 On or about April 13, 2020, an individual named Michael Smuga was injured while  
5 attempting to cross the Skewed Tracks in the Crash Zone. Mr. Smuga later made a  
6 formal injury claim to the City (Claim No. C-98904). He sent the following inquiry to  
7 SDOT's Mr. Chang on May 1, 2020:  
8

9 Hi Dongho - I was biking in the missing link area (Burke Gillman under  
10 Ballard bridge) on [April 13, 2020] and my front wheel got caught in the  
11 unmarked train track. As a result, I crashed, hitting my head against the  
12 pavement and ended up with injuries all over my right side of my body. I  
13 also damaged my shifters, front derailleur, helmet and bike clothes (about  
14 \$2300 in damages total). I filed a claim with the city, hoping to recover  
15 some of the damages. The next day I texted with a couple of friends and  
16 they all had stories about either crashing in the same spot, or their  
17 friends/family crashing in the same spot. That stretch of the road is really  
18 dangerous: the bike trail seems to be crossing the train track at such an  
19 angle where it's not hard to get your bike wheel to get caught without  
20 realizing that possibility. Do you happen to know if there any efforts to fix  
21 that bike trail?

22 On May 5, 2020, Mr. Smuga received a response from "Claire," believed to be Claire  
23 Wendle, writing on behalf of SDOT's BMCP team (SDOT's Darrell Bulmer was copied on  
24 these emails):  
25

26 Thank you for reporting your bicycle accident and sharing your concerns.  
27 The Ballard Multimodal Corridor project includes completing the missing  
28 section of the Burke Gilman Trail along Shilshole Ave NW and NW Market  
29 St. Much of the future trail alignment along Shilshole Ave NW will not  
30 intersect with the train tracks and when it does, it will be at a 90-degree  
31 angle. We've attached some draft plans for your reference. Construction  
32 on this section of the trail is not scheduled to begin until at least 2021. **In  
33 the meantime, we will look into signage to make the train tracks more  
34 visible to bicyclists.**

(Emphasis added)

Mr. Smuga responded to Ms. Wendle on May 6, 2020, in part, as follows:

Thank you for looking into making the tracks more visible. To be perfectly frank, I did see them (as I bike that path about once a week) but the crash resulted from the front wheel somehow slipping into one of the tracks.

I think the real issue is the angle at which the bike lane is crossing the tracks; it's not a perfect 90 degree angle, so there's a high probability that just turning your handlebars a little bit while crossing the tracks, or the bike skidding in all the dust caused by nearby construction, will result in the wheel accidentally slipping into the track. Once it's in track, the crash is guaranteed.

Are the tracks still in use? If not, would it be possible to fill them with some sort of material, eliminating the possibility of the bike wheel getting caught?

Ms. Wendle responded on May 11, 2020, in part, as follows:

We understand your concerns for bicycle safety along that section of Shilshole Ave. The tracks are privately owned by the Ballard Terminal Railroad Company and are still actively used, so we are not able to fill them with material. **In the meantime, we can look into additional safety measures such as signage that advise caution leading up to the tracks.**

(Emphasis added)

2.66 Plaintiffs Kim, Mortensen, Murphy, Kelley, Oldenburger and Nolan all crashed while attempting to cross the Skewed Tracks in the Crash Zone after Mr. Smuga placed the City on notice of his crash and after Mr. Smuga's correspondence with Mr. Chang and Ms. Wendle, discussed in paragraph 2.65 above. Further, no additional safety measures were taken or signs placed by the City in the Crash Zone until after all Plaintiffs suffered their crashes.

2.67 In May 2020, Plaintiff Chaeji Kim wrote to SDOT about her crash on the Skewed Tracks: "[M]any passing bikers had told me they fell on the same exact place. It baffles my

1 mind that there are open train tracks that cause a hazard to bikers ON a bike trail.”

2 SDOT’s Gretchen Conrad responded to Ms. Kim with stock language used in responses  
3 to others who have complained about the Skewed Tracks in the Crash Zone (admitting  
4 that the area of concern is on the “roadway,” not the Burke-Gilman Trail):

5 This is a challenging section of roadway due to the limited right-of-way  
6 and the active railroad tracks...We will ask SDOT inspectors to review and  
7 have the area checked for missing pylons, monitored and cleaned. We  
8 understand it can still be a challenge negotiating the roadway at this  
9 particular location and when the Ballard Multimodal Corridor project  
completes its work in this area, it will provide a much better crossing for  
cyclists heading into Ballard on this trail...

10 2.68 Plaintiffs Murphy, Kelley, Oldenburger and Nolan all crashed while attempting to cross  
11 the Skewed Tracks in the Crash Zone after the correspondence between Ms. Kim and  
12 Ms. Conrad discussed in paragraph 2.67 above.

13 2.69 In early August 2020, SDOT received the following inquiry/comment from a concerned  
14 citizen named Jennifer Doscher:

15 Hi! I’ve been working at PCC Ballard for about four months now and I’ve  
16 seen so many people fall, or after they’ve fallen, while cycling behind the  
17 store on Shilshole Ave NW, under the 15th Ave bridge, right before/after  
18 it joins with NW 45th St. There are train tracks in this spot that curve  
19 slightly. Between the tracks, sand, fading paint, and strong shadows  
20 (contrasting with bright sunlight,) even experienced cyclists fall here,  
21 often. Just today, as I went to take trash to the dumpsters, a woman was  
22 there attending to her injuries with a friend, and a moment later an avid  
23 cyclist (expensive bike, clip shoes, full riding outfit,) fall and skid on his  
24 shoulder. The jersey was shredded but saved his skin. He accepted first  
25 aid from the other woman. Please, please consider posting signs and  
painting something bright or reflective alongside the tracks so people  
don’t get their tired caught. The asphalt is also not even/level with the  
tracks, and bike traffic is bi-directional right where the curve is. I do hope  
you’ll visit the area to watch for an hour or more, as well as bike past it  
yourselves, so you can fully understand the issue. The falls could be minor  
or severe, and the same can be said for bicycle damage as well. Thank  
you! A concerned bystander and resident.

1 A member of SDOT's BMCP team responded, in part, as follows:

2  
3 *"The Ballard Multimodal Corridor project includes completing the missing*  
4 *section of the Burke Gilman Trail along Shilshole Ave NW and NW Market*  
5 *St. Much of the future trail alignment along Shilshole Ave NW will not*  
6 *intersect with the train tracks and when it does, it will be at a 90-degree*  
7 *angle. We have attached some draft plans for your reference.*

8  
9 *Construction on this section of the trail is not scheduled to begin until at*  
10 *least 2022. In the meantime, we will look into signage to make the train*  
11 *tracks more visible to bicyclists."*

12 (Emphasis added)

13  
14 2.70 Plaintiffs Kelley, Oldenburger and Nolan crashed while attempting to cross the Skewed  
15 Tracks in the Crash Zone after Ms. Doscher's submission discussed in paragraph 2.69  
16 above. Further, no new signs were posted by the City until after all Plaintiffs crashed.

#### 17 Failure to Maintain Crash Zone Infrastructure

18 2.71 The City's process for full implementation of the BMCP was delayed (and continues to  
19 be delayed) by litigation between the City and a coalition of various businesses  
20 (including BTR). Meanwhile, in the years after the City created the Bike Lane,  
21 infrastructure in the Crash Zone over the Skewed Tracks deteriorated. For example,  
22 the paint on the roadway faded or was otherwise obscured, and warning signs were  
23 vandalized or removed. Many of the plastic flex posts, which had ostensibly been  
24 installed to delineate the Bike Lane and help channel bicycle traffic over the Skewed  
25 Tracks, were broken or missing. The deterioration in the Crash Zone made this already  
complex and dangerous roadway even more confusing and dangerous for bicyclists.

2.72 From at least mid-2018 through late-2020, the deterioration of the Crash Zone  
infrastructure had become excessive. The City did not perform significant maintenance

or repairs or make meaningful updates or safety improvements to the streets in the Crash Zone over the Skewed Tracks (including signs, road markings and plastic flex posts) until after all Plaintiffs crashed on the Skewed Tracks.

**Changes Made by the City in the Crash Zone After Plaintiffs' Crashes**

2.73 Starting in or about October 2020, after each of the Plaintiffs crashed on the Skewed Tracks in the Crash Zone, the City made what it likely intended as safety-related changes to the area. These changes included the delineation of a different pathway/angle across the Skewed Tracks with new Bike Lane markings (including green paint). Plastic flex posts were also added. Further, the City installed (or reinstalled) warning signs that were not present when each of the Plaintiffs crashed. On information and belief, at least some of these changes had been the subject of SDOT Work Order No. 799117.

2.74 Some of the changes discussed in paragraph 2.73 above can be seen in images below, which accurately reflect conditions at the time each photo was taken:

A) The satellite image below, taken in March 2021, shows Bike Lane markings applied in or about October 2020 under Work Order No. 799117:





1 B) Shown in the next two images, each taken in February 2021 looking east toward  
2 the Ballard Bridge, are three warning signs in or approaching the Crash Zone, none  
3 of which were present when any of the Plaintiffs herein crashed while attempting  
4 to cross the Skewed Tracks:  
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15  
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23  
24 C) For comparison, the next three photos highlight the eastbound path of the Bike  
25 Lane beneath the Ballard Bridge. The first photo, taken looking east, shows the  
road markings applied by SDOT in late 2020 (Google Street View image captured

1 in July 2021). The second photo (also a Google Street View image captured in July  
2 2021) shows road markings from a different angle (taken looking north). The third  
3 photo, taken looking east, shows the road markings that existed at the time each  
4 of the Plaintiffs crashed (photo taken on September 14, 2020):





D) The photo below, taken on December 13, 2020 looking west, shows the road markings applied in late 2020 just east of the Ballard Bridge. The photo also shows a railroad crossing sign in the Crash Zone that was not present when any of the Plaintiffs herein crashed while attempting to cross the Skewed Tracks:





- 1 E) The next photo, also taken on December 13, 2020 and looking west, shows  
2 another sign on the approach to the Crash Zone that was not present at the time  
3 each of the Plaintiffs herein crashed while attempting to cross the Skewed Tracks:



- 19 F) By comparison, the first photo below, taken in early September 2020, shows the  
20 same westbound view as the two photos directly above, but with no signs in place  
21 at that time. The second photo below, which is captured from a July 16, 2020 King5  
22 TV video news story about the Missing Link, shows the same area from a different  
23 angle, again with no warning signs in place at that time:  
24  
25



2.75 None of the changes described in paragraph 2.74 above or depicted photos in subparagraphs A-F above, constitute “subsequent remedial measures” under Washington Rule of Evidence 407. This is because, among other reasons, the City had begun planning for these very changes in the Crash Zone before many of the Plaintiffs crashed. Further, the stated purpose of Work Order No. 799117 was to address changes to the area after completion of a PCC Market adjacent near the Crash Zone. Paragraphs 2.76 through 2.80 below highlight some of the history of the late 2020 changes in the Crash Zone.

1 2.76 A document entitled "TRH Transportation Operations Work Order #799117" shows  
2 that Work Order No. 799117 was "initiated" on December 23, 2019:  
3 "Problem/Deficiency Description:" shows as "No Problem or routine." The "Work  
4 Description" of the document states the purpose the work order to be: "Additional  
5 channelization to clarify two-way bike lane and one-way vehicular operations, given  
6 improvements constructed by the Ballard Blocks development on the north side of  
7 45th." (Emphasis added).

8  
9 2.77 Plaintiffs Kim, Mortensen, Murphy, Kelley, Oldenburger and Nolan all crashed after  
10 the initiation date of Work Order 799117.

11 2.78 In a September 2, 2020 email, SDOT's Andrew Merkley wrote to SDOT's Venu  
12 Nemani, that Work Order No. 799117:

13 *...was approved 1/6/20 and I added to the layout request list and asked*  
14 *Jason/Chris to layout, and that is where it has sat since. I think weather*  
15 *and COVID has contributed to the delay.*

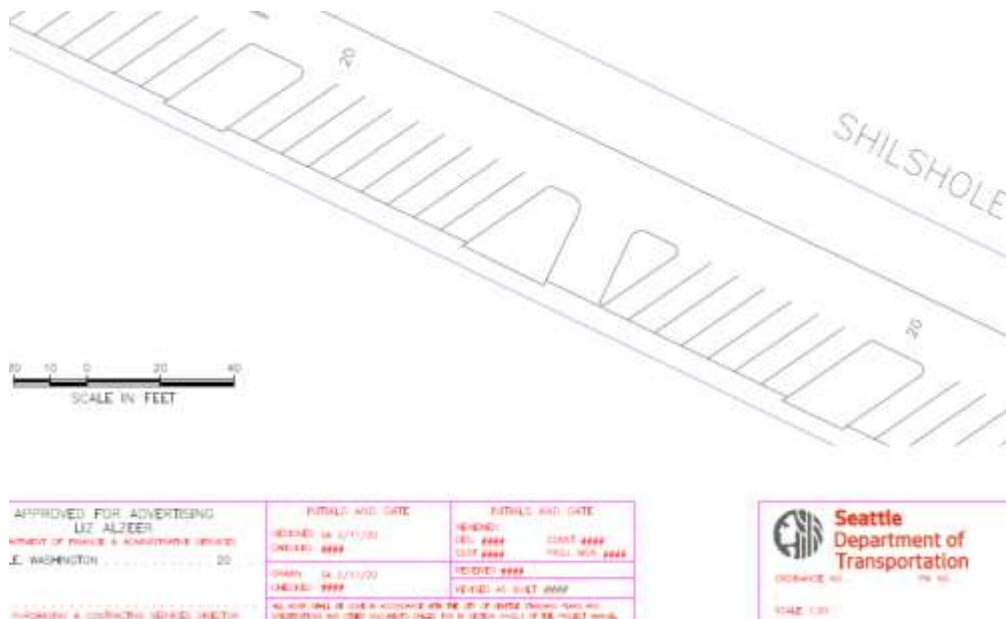
16 *Since the request originally stemmed from clarifying parking and wear*  
17 *from the construction of PCC, we minimized the scope as Burke Gilman*  
18 *Missing Link was anticipated to make larger changes to the street in the*  
19 *near term. The design mostly just hatched out the dead space next to*  
20 *PCC. I'll work on getting the design updated to better reflect the refresh*  
21 *of bike lane chann we discussed.*

22 (Emphasis added)

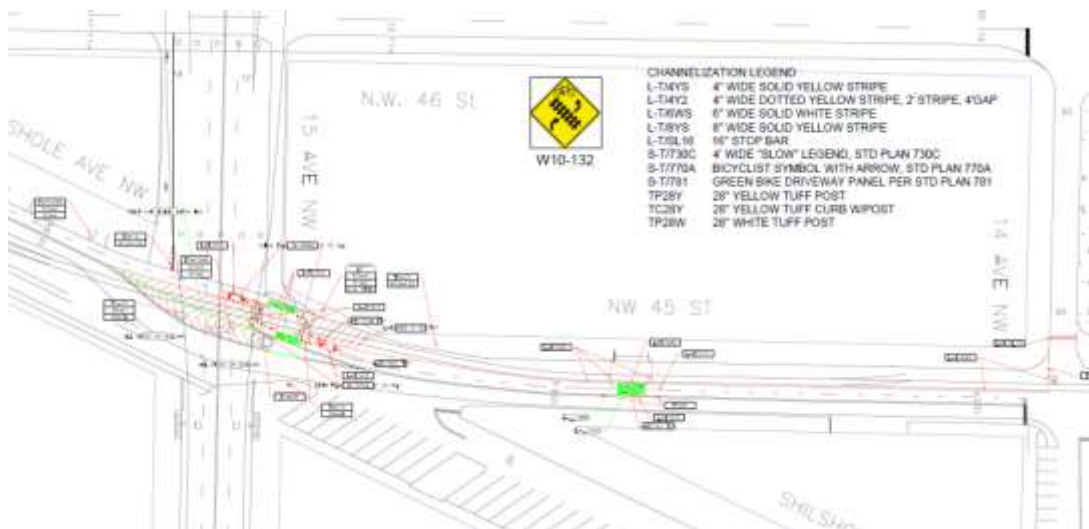
23 2.79 Plaintiffs Kim, Mortensen, Murphy, Kelley, Oldenburger and Nolan all crashed while  
24 attempting to cross the Skewed Tracks in the Crash Zone after the approval date of  
25 Work Order 799117.

2.80 The images below are true and accurate excerpts from SDOT Work Order 799117 identified as "799117-Sign-Chann Inst1" depicting planned changes in and near the Crash Zone.

A) The first image shows that the original design/drawn date for Work Oder 799117 was February 11, 2020:



B) The next image depicts elements of the changes in the Crash Zone that were being planned at the time:



2.81 In an August 27, 2020 email sent to Matt Beaulieu of SDOT's Traffic Operations and to SDOT's then Chief Traffic Engineer, Dongho Chang, SDOT's Burke-Gilman Trail Project Manager Louisa Miller wrote:

As you probably know, we continue to see injuries under the Ballard Bridge where bicyclists cross the railroad track...Given that the [BMCP] project won't be built for at least another year, senior staff (including [SDOT Director Sam Zimbabwe]) would like to see safety improvements at this location before the wet season. I think they are open to modifications of the existing bike lane design and I wanted to talk with you about how these types of maintenance projects typically get designed. Is this in your court? Laeth's group?

2.82 Plaintiffs Nolan and Oldenburger crashed while attempting to cross the Skewed Tracks in the Crash Zone after Ms. Miller's August 27, 2020 email, referenced in paragraph 2.81.

2.83 SDOT's Marilyn Yim sent a series of social media screenshots via text message on August 31, 2020 to Louisa Miller<sup>7</sup>. The numerous screenshots describe the extreme dangers to bicyclists in the Crash Zone and the text messages between Ms. Yim and

<sup>7</sup> This according to an October 6, 2020 internal SDOT email.



Ms. Miller show that there had been then-recent discussions within SDOT about making changes in this location.

2.84 Plaintiff Nolan crashed while attempting to cross the Skewed Tracks in the Crash Zone after the August 31, 2020 text correspondence between Ms. Yim and Ms. Miller.

2.85 In a September 11, 2020 internal SDOT email with the subject "BGT: Safety Improvements", Louisa Miller wrote the following:

Following up on our last meeting with Sam [SDOT's Director Sam Zimbabwe], I've been working with Matt and his team to get safety improvements for the BGT bike/rail crossing under the Ballard Bridge. We've met several times to discuss design options and expect a design and [work order] to be complete sometime next week.

I wanted to confirm what I heard from Sam - that due to the crashes at this location, this area should be prioritized for maintenance improvements this year. This work was not part of the prioritized lists, so I just wanted to confirm before we issue the WO. The thought was to label it as an "emergent issue" due to the circumstances.

The planned improvements include: realignment of [channel], RPMs, new posts, green driveway markings, and rail/bike crossing signage.

#### **Flangeway Gaps and Gap Fillers**

2.86 A flangeway is the gap between the rail and the pavement which runs along the length of each embedded track rail. This gap is designed to accommodate a railcar's wheel flange as the car rolls along the rail. Like a typical flangeway gap, the width of the flangeway gap on the Skewed Tracks in the Crash Zone presents significant hazards for the relatively narrow width of most bicycle wheels/tires. Hazards to bicyclists due to flangeway gaps include deflection and entrapment of bicycle wheels/tires that cause a rider to lose dynamic stability and crash. At all times relevant hereto, each of the Defendants was aware of these hazards.

1 2.87 Apparatuses often referred to as flangeway gap fillers (usually made of a compressible  
2 rubber or polymer compound) are used throughout the United States at railroad  
3 crossings as a relatively inexpensive way to protect against bicycle wheel/tire  
4 deflections, entrapments and other mishaps because they provide a nearly flush  
5 surface for bicycles to traverse, yet they compress under the weight of a rail car's wheel  
6 flange, allowing for normal railway operations.

7  
8 2.88 Below is photo taken in September 2020 that accurately depicts a portion of the  
9 flangeway gaps of the Skewed Tracks on the street within the Crash Zone:



21 2.89 Despite the opportunity and feasibility to do so, at no point in time did either of the  
22 Defendants install flangeway gap fillers in the area where the street crosses the  
23 Skewed Tracks in the Crash Zone.

24 2.90 The City has known of flangeway gap fillers as a safety measure for at least 18 years.  
25 For example, in a 2003 document prepared by SDOT entitled Ballard Corridor Design

Study, in referring specifically to the danger to bicyclists of the flangeway gaps at the crossing of the Skewed Tracks in the Crash Zone, the City admitted that: *“a rubberized crossing material that fills the flangeway gap, will mitigate this important safety issue.”*

2.91 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after the 2003 Ballard Corridor Design Study.

2.92 In 2003/2004, both Defendants were also defendants in the lawsuit of *Justice, et. al. v. City of Seattle and Ballard Terminal Railroad* (King County Cause No. 3-2-27338-4SEA), a case involving multiple bicyclists injured in crashes on the Skewed Tracks in the Crash Zone. In the course of that litigation, the Defendants were provided information and documents detailing the safety benefits of installing flangeway gap fillers at the Skewed Tracks.

2.93 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after the Defendants were provided the information about the safety benefits of installing flangeway gap fillers in the *Justice* case referenced in paragraph 2.92 above.

2.94 Long before the crashes that are the subject of this lawsuit, the City possessed a report entitled Bicycle Interactions and Streetcars: Lessons Learned and Recommendations.

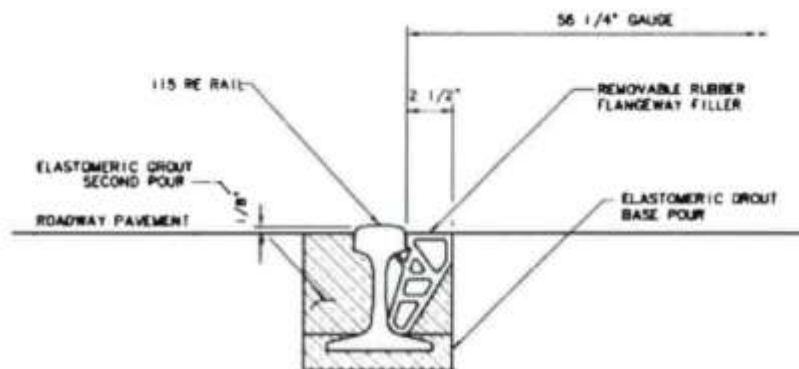
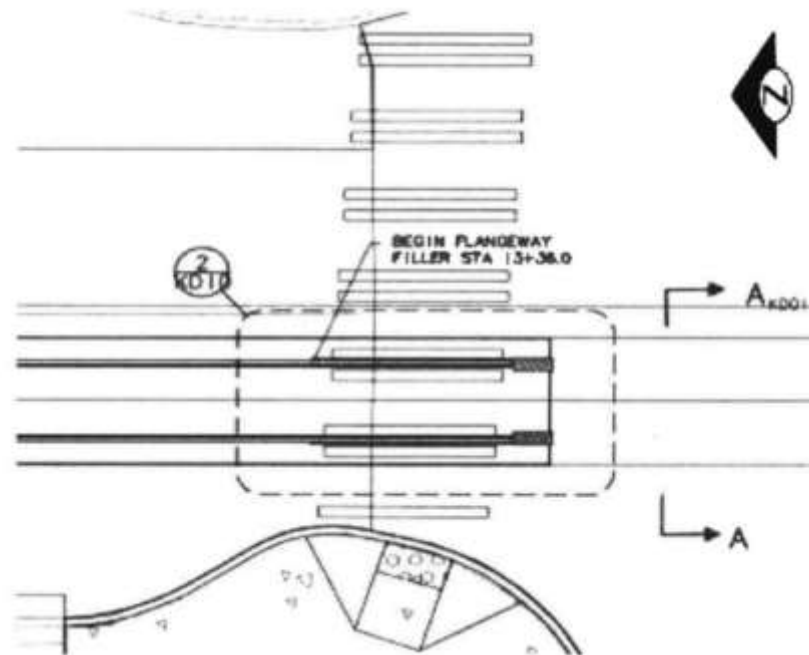
That report, dated October 17, 2008 and prepared by a company called Alta Planning & Design, discussed the feasibility of using flangeway gap fillers in different applications. At page 8, the report confirms that “Flange filler material used for heavy rail can reduce [bicycle] crash danger.” The report’s “Summary of Literature Reviewed” includes discussion of flangeway gap fillers being successfully utilized at rail crossings in several locations in North America and Europe.

1 2.95 In or about 2011, the City retained a company called URS to act as a consultant with  
2 respect to the then-planned development of the First Hill Streetcar system. Among  
3 other things, URS was tasked by the City to investigate the viability of using flangeway  
4 gap fillers in a small section of streetcar rail located near the streetcar maintenance  
5 facility and a housing facility for the elderly. In a report dated October 27, 2011  
6 directed to SDOT, URS advised the City as follows:

7 [F]langeway fillers are only used for T-rail applications such as freight  
8 railroads. One application identified in use today is the Cherry Avenue  
9 Bridge in Chicago, Illinois. This railway bridge was modified for  
10 pedestrian and bike use in 2009, while still accommodating infrequent  
11 passage by freight trains. Because the freight trains use T-rails rather  
12 than the girder rails that are used for in-street rail applications, the  
existing T-rail was retrofitted with flangeway filler to make the bridge  
more bike and pedestrian friendly.

13 2.96 The rails making up the Skewed Tracks in the Crash Zone are of the T-rail type.

14 2.97 On information and belief, below are images showing planned use of flangeway gap  
15 fillers in the First Hill Streetcar system. These images are true and accurate excerpts  
16 from the City's plans for the "First Hill Streetcar Project" Sheet No. 126 of 424 (2011):  
17  
18  
19  
20  
21  
22  
23  
24  
25



2.98 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after the City received the 2011 URS Report confirming the feasibility of utilizing flangeway gap filler in applications like the Skewed Tracks in the Crash Zone and after the City developed plans for use of flangeway gap fillers in the First Hill Streetcar project.

1 2.99 In or about 2013, the City took steps to purchase and install flangeway gap filler  
2 material for the small portion of track near the First Hill Streetcar maintenance facility  
3 that was made up of T-rail.

4 2.100 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
5 Zone after the City took steps in 2013 to purchase and install flangeway gap filler  
6 material near the First Hill Streetcar maintenance facility.

7 2.101 On September 26, 2014 (after installation of the Bike Lane), Brock Howell of the  
8 Cascade Bicycle Club, sent an email to SDOT's Mr. Chang, which included the following:  
9

10 Maybe you've already heard the news about this recent crash on the  
11 Missing Link tracks. If not, the email below tells the story of a couple's  
12 recent crash while riding tandem.

13 The rainy season is bound to bring a greater rate of crashes there (by  
14 percentage of bicyclists riding through). Painting the track area yellow (or  
15 rave green) and installing [flange gap fillers] might be good  
16 improvements.

17 I know you're skeptical that the [flange gap fillers] will hold up. But with  
18 no car traffic and very little rail traffic, I'm sure [they] can last at least 3  
19 years, by when the proposed city capital improvement plan says the BGT  
20 will finally be completed. In the meantime, we'll at least prevented a few  
21 serious crashes, like the crash in the below email.

22 2.102 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
23 Zone after Mr. Howell sent the email to Mr. Chang referenced in paragraph 2.101  
24 above.

25 2.103 On October 6, 2014, an individual named David Rowe sent an email to SDOT's Mr.  
Chang, following up on a meeting they had regarding safety in the Missing Link.  
Regarding the Skewed Tracks in the Crash Zone beneath the Ballard Bridge, Mr. Rowe  
wrote:

1 A Filler Strip product...was repeatedly proposed to SDOT for this location  
2 for some years now. It would eliminate the many injuries that occur here,  
3 one of the highest locations of bicycle falls in Seattle. It should be  
4 installed. Only a short length of a few dozen feet would be needed.

5 . . .  
6 You indicated that Sound Transit was opposed to the filler strip product  
7 because of durability issues. I pointed out that is irrelevant, under Ballard  
8 Bridge, rail traffic averages just one engine about four times a week at  
9 about 3 MPH, and no vehicles would cross the rails, so durability should  
10 not be a problem. I request that SDOT install a permanent or pilot filler  
11 strip at this location as a matter of urgency. There seem to be several  
12 available products. As an example, the VeloStrail product. The Strail  
13 product line is in use at over 43,000 crossings around the world. Another  
14 option is the Getzner product. It also appears that SDOT has plans in place  
15 for use of a filler strip on First Hill.

16 You also pointed out the Right of Way owners have historically been  
17 opposed to making safety improvements for bike riders. I asked if you  
18 would be prepared to approach the ROW owners to install or allow a filler  
19 strip under the Ballard Bridge. You committed to make a request to them  
20 to have this filler strip installed at the bike trail crossing. After our  
21 meeting, I was informed that in fact the City of Seattle owns this right of  
22 way.

23 I look forward to your response and request that because these are all  
24 issues relating to reducing physical injury of unprotected cyclists, that you  
25 treat this with urgency and plan to implement your solutions within 30  
days after your planning period of two weeks.

Mr. Chang's replied to the above on October 22, 2014 as follows: *"Encourage you to  
contact [BTR] with your flange idea for the rail."* The same day, Mr. Rowe requested  
clarification: *"With regard to the rail, I assume you seek an approval from [BTR] for  
SDOT to install a flange. Please confirm and indicate in what form that approval should  
come."*

2.104 All of the Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the  
Crash Zone after the correspondence between Mr. Rowe and Mr. Chang regarding  
flange gap fillers referenced in paragraph 2.103 above.

1 2.105 On October 29, 2014, an individual named Joe Kadushin sent an email to BTR's Byron  
2 Cole, with SDOT's Mr. Chang copied. On information and belief, this email was sent at  
3 the suggestion of David Rowe after his email exchange with Mr. Chang a few days  
4 earlier. A true and accurate excerpt from Mr. Kadushin's email follows:

5 I am writing to encourage you to facilitate Dongho Chang's suggestion  
6 from Seattle DOT to improve the Ballard Rail/Bike Trail intersection.

7 On 9/15/14, Merri Ann Osborne and I were riding a tandem bicycle  
8 heading south on the Burke Gilman trail. When we arrived upon the  
9 railroad tracks under the Ballard Bridge our tires got caught in the tracks,  
10 causing us to fall. An aid car was summoned and we were transported to  
11 Virginia Mason hospital. Aside from cuts and bruises, Merri Ann sustained  
12 a wrist fracture. As for me, cuts, bruises, stitches, cracked ribs and a  
13 collapsed lung resulting in a 3 day hospital stay.

14 I have become aware that this particular location...has had numerous falls  
15 due to the railroad tracks. In fact, Merri Ann's doctor told her he has  
16 treated 14 people this year for falls in that exact location! Moreover, my  
17 doctor was well of the that location too.

18 After my accident, I learned that a fellow cyclist requested that the City  
19 install a train friendly flexible filler strip that is common both in Europe  
20 and the USA. This would significantly reduce the number of falls from tires  
21 getting caught in the railroad tracks.

22 It has also come to my attention that Dongho Chang is seeking your  
23 approval before the City can begin to implement the filler strips.

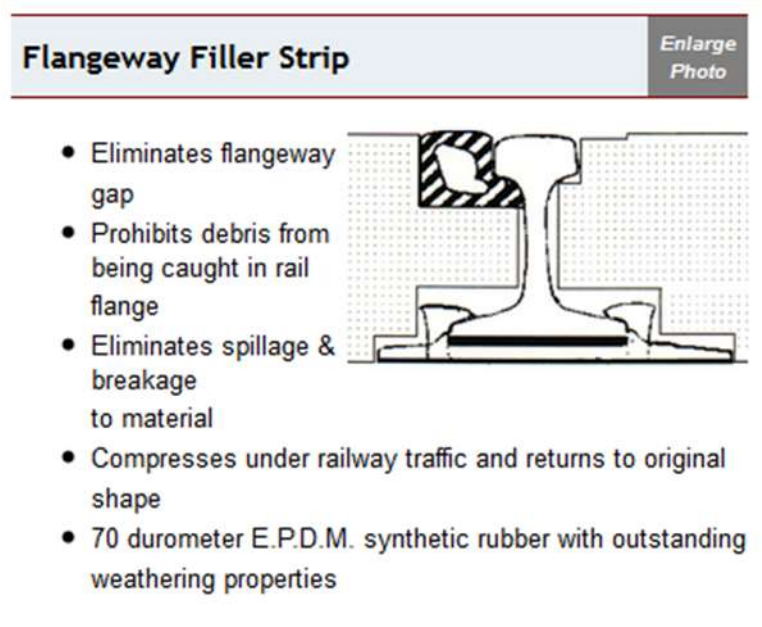
24 In closing, I am pleading with you to approve the installation of a flexible  
25 filler strip in the areas of the Rail/Bike Trail intersection under the Ballard  
26 Bridge.

27 2.106 On information and belief, on November 21, 2014, David Rowe spoke to BTR's Byron  
28 Cole over the phone about bicycle crashes on the Skewed Tracks. Mr. Cole stated his  
29 strong belief that the only solution to the problem was rider behavior and expressed  
30 skepticism about the use of flangeway gap fillers.



2.107 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash Zone after Mr. Kadushin sent email referenced in paragraph 2.105 above to Mr. Cole and after Mr. Rowe's discussion with Mr. Cole referenced in paragraph 2.106.

2.108 On August 18, 2016, Heather McAuliffe, Coordinator of the City's Ballard Avenue Landmark District Board, received an email from Rob Hyman at Interplay Inc. that described a "flangeway filler" product and included the following illustration:



The same day, Ms. McAuliffe forwarded Mr. Hyman's email to SDOT's Dongho Chang and asked: "I wonder if you have heard about this design feature being used in Europe to help making crossing tracks safer?"

2.109 All Plaintiffs crashed while attempting to cross the Skewed Tracks in the Crash Zone after the August 18, 2016 correspondence from Ms. McAuliffe to Mr. Chang referenced in paragraph 2.108.

2.110 On or about September 2, 2016, an individual named Mike Sallaberry of the San Francisco Municipal Transportation Agency wrote an email to the National Association

1 of City Transportation Officials, of which SDOT's Dongho Chang was a member and a  
2 recipient of the email. The email asked if members had had "any discussion or research  
3 about the possibility of a non-skid coating for the top portion of rails/tracks?" The  
4 email attached a document that discussed the issue and included the following:

5 Three typical issues with tracks and traversing them safely  
6 with wheeled devices such as bicycles, wheelchairs, strollers,  
7 etc. are:

- 8 1) Wheels falling into the flangeway
- 9 2) Poor pavement quality around the rails
- 10 3) Slipping on the top of the metal track

11 Mr. Sallaberry's email also asked the group whether there had been any developments  
12 in flangeway filler products that could work for a streetcar/light rail system and included  
13 the following: *"I've heard of products that could work with heavy rail that travels 5mph  
14 or less on straight sections of tracks, but never yet for applications beyond that."*

15 2.111 All Plaintiffs crashed while attempting to cross the Skewed Tracks in the Crash Zone  
16 after Mr. Chang received Mr. Sallaberry's September 2, 2016 email.

17 2.112 On May 13, 2016, Desiree McCloud crashed while riding her bicycle on East Yesler Way  
18 near 13<sup>th</sup> Avenue when her front wheel became lodged in a flangeway gap of the First  
19 Hill Streetcar tracks. Ms. McCloud died 11 days later due to the injuries she sustained  
20 in that crash. Ms. McCloud's estate sued the City of Seattle in King County Cause No.  
21 17-2-32732-8. As part of that litigation, the City took the position that flangeway gap  
22 fillers were not utilized in the area where Ms. McCloud crashed because such gap fillers  
23 were not feasible for use in urban streetcar applications where girder rail (as opposed  
24 to T-rail) was used.  
25

1 2.113 In responding to discovery propounded by the plaintiffs in the *McCloud* case, the City  
2 answered (in part) in March 2018 as follows to an interrogatory on known danger to  
3 bicyclist of rail tracks in the city: "The City is aware of a couple of locations where  
4 bicycle riders have complained about PERCEIVED hazards, the rail line under the  
5 Ballard Bridge being one of them. The City has attempted to improve signage and bike  
6 routing...at those locations." (Allcaps in original).

7 2.114 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
8 Zone after the City provided the interrogatory response in the *McCloud* case  
9 referenced in paragraph 2.113 above.  
10

11 2.115 At a July 19, 2018 CR 30(b)(6) deposition in the *McCloud* case, the City's designated  
12 speaking agent, SDOT employee Jessica Murphy (who had been the Project Manager  
13 for design development and construction of the First Hill Streetcar), admitted under  
14 oath that at-grade railroad tracks present a hazard to bicyclists, especially when the  
15 crossing angle is acute. In an attempt to distinguish the use of flangeway gap fillers in  
16 streetcar applications from their use in traditional railroad tracks, the City further  
17 admitted, through Ms. Murphy's testimony, as follows: ***"There are flange***  
18 ***filler products that can be used in heavy rail lines with occasional low-speed rail***  
19 ***traffic."*** Ms. Murphy and other City witnesses made additional comments under oath  
20 in the *McCloud* case that establish that the City knew, by at least 2011, of the feasibility  
21 of using flangeway gap fillers in applications like the Skewed Tracks in the Crash Zone.  
22

23 2.116 The photograph below is a true and accurate copy of Exhibit No. 176 to the 30(b)(6)  
24 deposition of Jessica Murphy in the *McCloud* case and is "a photograph taken at the  
25

1 8th Avenue and Dearborn showing a rubber flange insert” which is used on a portion  
2 of T-rail track in the First Hill Streetcar system.



13 2.117 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
14 Zone after SDOT was aware of the feasibility of utilizing flangeway gap fillers in areas  
15 like the Skewed Tracks in the Crash Zone and after the City admitted the feasibility  
16 through Ms. Murphy’s deposition testimony in the *McCloud* case.

17  
18 2.118 Starting by no later than the summer of 2018, the City undertook an extensive study  
19 of the dangers to bicyclists of streetcar rails, including, but not limited to,  
20 considerations for using flangeway gap fillers in streetcar tracks. Professionals from  
21 SDOT, Cascade Bicycle Club and outside consulting firms were offered the opportunity  
22 to provide input in the study on how to make streetcar crossings safe for bicyclists.  
23 Other than planning for the to-be-built completion of the Burke-Gilman Trail/BMCP, at  
24 no time were similar studies or considerations undertaken by the City for the Skewed  
25 Tracks in the Crash Zone.

1 2.119 All Plaintiffs herein crashed while attempting to cross the Skewed Tracks in the Crash  
2 Zone after the City conducted the review of track safety (including the use of flangeway  
3 gap fillers) in other areas of the City, as described in paragraph 2.118.

4 2.120 On August 6, 2018, Mike Sallaberry of the San Francisco Municipal Transportation  
5 Agency wrote an email to the National Association of City Transportation Officials, of  
6 which SDOT's Dongho Chang was a member and a recipient of the email. Mr.  
7 Sallaberry's email discussed Washington D.C.'s testing of flangeway gap fillers. The  
8 email included the following link to an August 1, 2018 WAMU (American University  
9 radio station) article: [https://wamu.org/story/18/08/01/ddot-researching-rubber-](https://wamu.org/story/18/08/01/ddot-researching-rubber-flaps-streetcar-tracks-fatal-bike-crash/)  
10 [flaps-streetcar-tracks-fatal-bike-crash/](https://wamu.org/story/18/08/01/ddot-researching-rubber-flaps-streetcar-tracks-fatal-bike-crash/). The WAMU article discussed a bicyclist fatality  
11 on a set of tracks in Washington D.C. and that city's commitment "to testing and  
12 evaluating different products to make the tracks more cyclist friendly." The story went  
13 on to explain that: "In other cities, rubber flanges fill or cover the gap in train tracks.  
14 Cyclists aren't heavy enough to push the rubber down, but streetcars are." The link  
15 also included video taken by faculty at the University of Tennessee showing dozens of  
16 bicyclists crashing on skewed railroad tracks over a two-month period in 2014.

17 2.121 All Plaintiffs (other than Mr. Robinson) crashed while attempting to cross the Skewed  
18 Tracks in the Crash Zone after Mr. Chang received Mr. Sallaberry's August 6, 2018 email  
19 with the referenced link.

20 2.122 At no time relevant hereto did the City and BTR communicate with one another about  
21 utilizing flangeway gap fillers at the Skewed Crossing in the Crash Zone.  
22  
23  
24  
25

1 2.123 If flangeway gap fillers had been installed on the Skewed Tracks in the Crash Zone at  
2 the time Plaintiffs (and countless other bicyclists) crashed, the crossing of the Skewed  
3 Tracks would have been significantly less hazardous for bicyclists, including the  
4 Plaintiffs, and it is more probable than not that the presence of flangeway gap fillers  
5 would have prevented the crashes that are the subject of this action.

6 **Ownership and Control of the Skewed Tracks Crossing**

7 2.124 The tracks at issue, including the Skewed Tracks in the Crash Zone, are owned by the  
8 City. The use of the tracks by BTR is governed, in part, by a 1997 Operating Agreement  
9 (hereinafter "the Operating Agreement"). Pursuant to the Operating Agreement, BTR  
10 has the right to use the tracks, including for the business purpose of transporting goods  
11 on rail cars.  
12

13 2.125 The relationship between the City and BTR regarding the tracks is also governed by City  
14 of Seattle Ordinance No. 118734 (hereinafter "the Franchise Ordinance"), which was  
15 entered into law in 1997. The Franchise Ordinance includes the following provisions:  
16

17 A) The Operating Agreement shall provide that BTR will agree "to be fully responsible for  
18 all costs of maintenance, operation, and rehabilitation of the railroad, including but  
19 not limited to maintenance of crossings...maintenance of way, and all liability for  
20 accidents occurring on the property used by the railroad or arising out of railroad  
21 operations."

22 B) The City "shall retain the same control of the streets, avenues, multi-use trails, and  
23 other rights-of-way in and across which said railway tracks shall be laid down as over  
24 other streets, avenues, multi-use trails and other rights-of-way within the City... and  
25

1 shall have such further control and police power over such franchise rights-of way and  
2 tracks, and the use thereof, as the City Charter and the Federal and State Constitutions  
3 and laws may now or hereafter permit. [BTR] shall comply with SMC Chapter 11.66,  
4 Railroad Operation and shall erect and maintain all such safety devices, warning signs  
5 and signals, lights and appliances as may be necessary to protect and facilitate public  
6 travel across each and every track herein authorized.”

7  
8 C) The City reserves to itself and BTR “the right to construct all public improvements  
9 (including trails)...and the City reserves to itself full and complete right of access to any  
10 space occupied by such tracks and to all of said franchise right-of-way...or within said  
11 franchise right-of-way, for all purposes of construction, maintenance, repair, operation  
12 and inspection of any...public improvements which rights shall, however, be exercised  
13 in such manner as not to interfere with the safe operation of locomotives, cars and  
14 trains on said tracks.”

15  
16 D) BTR “shall be solely responsible for the maintenance and safety of the right-of-  
17 way...including all tracks and all grade crossings, and shall cooperate and coordinate  
18 with the City of Seattle Director of Transportation to assure adequate rehabilitation,  
19 repair and maintenance of all tracks and grade crossings herein authorized, all at  
20 [BTR's] sole cost and expense.”

21  
22 E) BTR “shall construct and maintain the tracks...so that the top of the rail thereof shall  
23 at all times conform to the street grade...and the City hereby reserves the right to  
24 change the grade of any streets, avenues or public places at any time, and when the  
25 City shall change such grade [BTR], by acceptance of this ordinance, hereby covenants

1 and agrees with the City, to waive any and all damages that it may sustain on account  
2 of having to readjust its tracks by reason of such change of grade. Such waiver is made  
3 upon condition that any change of grade hereafter made by the City to the streets  
4 and avenues upon which the franchise is hereby granted, shall not be unreasonable,  
5 or such as to interfere with the proper and practical operation of said track when the  
6 same shall have been adjusted to said new grade.”

7  
8 F) BTR “shall defend,...and shall fully indemnify and hold the City and its officers,  
9 employees, and agents harmless from any and all losses, claims, actions, judgments,  
10 property damages, death, personal injuries, or damages suffered by any person or  
11 entity arising out of or resulting from (1) any occurrence of property damage, death  
12 or injury in or on the franchise right-of-way...; (2) [BTR’s] operations on or off the  
13 franchise right-of-way...It is intended that the foregoing indemnity shall be broad and  
14 comprehensive.”

15  
16 G) The liability of BTR described above “shall not be diminished by the fact...that any such  
17 death, injury, damage, loss, cost, or expense may have been, or may be alleged to  
18 have been, contributed to by the negligence of the City or its officers, employees, or  
19 agents, unless such negligence is solely and entirely the fault of the City.”

20 2.126 Per the Franchise Agreement, the City has had the right to make adjustments to the  
21 tracks. Such action was feasible. In fact, as part of the BMCP, it is contemplated that  
22 tracks could be moved/adjusted in such a manner as to make the crossing of the tracks  
23 by bicycle safer. The City’s failure to earlier exercise this right in the Crash Zone (before  
24  
25



1 Plaintiffs' crashes) constitutes a breach of the City's duty to make streets reasonably  
2 safe for ordinary travel by bicycle.

3 2.127 In a June 18, 2015 document prepared by the City entitled: "Burke-Gilman Trail Missing  
4 Link Environmental Impact Statement Public House Report," the City provided the  
5 following information to the public regarding the Skewed Tracks in the Crash Zone:

6 *"Q: Why can't we pave over the railroad tracks to make the area safer?  
7 Who maintains the railroad tracks? A: The tracks are owned and operated  
8 by the Ballard Terminal Railroad Company, which has maintained its  
9 license and operational permit with the City of Seattle since 1997. **The City**  
10 **has granted a franchise to the railroad and can move the tracks within**  
11 **the right-of-way if it desires, but the City cannot obstruct the railroads'**  
12 **operation."***

13 (Emphasis Added)

14 2.128 Each of the Plaintiffs crashed while attempting to cross the Skewed Tracks in the Crash  
15 Zone after the publication of the House Report described in paragraph 2.127 above.

16 **Liability of the Defendants and Causation**

17 2.129 The reasons the crossing of the Skewed Tracks in the Crash Zone was not reasonably  
18 safe for ordinary travel by bicycle at all times relevant hereto include, but are not  
19 limited to, one and/or a combination of the following factors: (1) the perilous angle of  
20 the Skewed Tracks as oriented to the street; (2) the width and depth of the flangeway  
21 gaps; (3) the condition and height of the road surface adjacent to (inside and/or  
22 outside) the track rails; (4) the failure of the Defendants to install flangeway gap fillers;  
23 (5) the slick surface of the track rails in comparison to the roadway between and on  
24 either side of the rails; (6) the absence of physical barriers or channeling (beyond paint  
25 and a very few breakable plastic flex posts) to meaningfully reduce the risk of cyclists

1 crossing the Skewed Tracks at a dangerous angle; (7) the failure to adequately maintain  
2 the road paint, plastic flex posts and signs that had been installed in the years prior to  
3 Plaintiffs' crashes; and (8) the lack of adequate or appropriate warnings to bicyclists of  
4 the Skewed Tracks and guidance as to how to safely cross the Skewed Tracks.

5 2.130 Each of the Plaintiffs herein crashed as the result of one or a combination of the factors  
6 listed in paragraph 2.129 above.

7 2.131 Given numerous notices, claims and lawsuits over decades from people who have been  
8 injured attempting to cross the Skewed Tracks in the Crash Zone, each of the  
9 Defendants knew or should have known of the dangers of this area long before the  
10 Plaintiffs suffered their injuries. Each of the defendants also knew or should have  
11 known generally of the dangers railroad tracks pose to people riding bicycles.  
12

13 2.132 The City owns, designs, operates, and maintains streets within the City of Seattle. The  
14 City has a duty to design, operate and maintain its streets in conditions that are  
15 reasonably safe for ordinary travel, including travel by bicycle.  
16

17 2.133 The City breached its duty to make streets reasonably safe for ordinary travel by bicycle  
18 by installing a bicycle lane over the Skewed Tracks in the Crash Zone and directing and  
19 encouraging bicyclists with signs, road markings and by other means to ride on this  
20 route.

21 2.134 At the time each of the Plaintiffs crashed, the crossing of the Skewed Tracks in the  
22 Crash Zone was not reasonably safe as designed and failed to comply with applicable  
23 standards, including, but not limited to, the Manual for Uniform Traffic Control Devices  
24 ("the MUTCD"). The design of the crossing constituted a breach of the City's duty to  
25

1 make the streets in the Crash Zone reasonably safe for ordinary travel, including the  
2 duty to provide safe passage for bicyclists over the Skewed Tracks. The design of the  
3 crossing also constituted a breach of each of the Defendants' obligations pursuant to  
4 the Operating Agreement and the Franchise Ordinance.

5 2.135 At the time each of the Plaintiffs crashed, the crossing of the Skewed Tracks in the  
6 Crash Zone was not reasonably safe as operated by the Defendants and failed to  
7 comply with applicable standards, including, but not limited to, the MUTCD. The  
8 operation of the crossing constituted a breach of the City's duty to make the streets in  
9 the Crash Zone reasonably safe for ordinary travel, including the duty to provide safe  
10 passage for bicyclists over the perilous Skewed Tracks. The operation of the crossing  
11 also constituted a breach of each of the Defendants' obligations pursuant to the  
12 Operating Agreement and the Franchise Ordinance.  
13

14 2.136 At the time each of the Plaintiffs crashed, the crossing of the Skewed Tracks in the  
15 Crash Zone was in a state of excessive wear and disrepair because the Defendants  
16 failed to take reasonable steps to maintain it. The excessive wear and disrepair  
17 constituted a breach of applicable standards, including, but not limited to, the MUTCD.  
18 The excessive wear and disrepair of the crossing constituted a breach of the City's duty  
19 to make the streets in the Crash Zone reasonably safe for ordinary travel, including the  
20 duty to provide safe passage for bicyclists over the perilous Skewed Tracks. The  
21 excessive wear and disrepair of the crossing also constituted a breach of each of the  
22 Defendants' obligations pursuant to the Operating Agreement and the Franchise  
23 Ordinance.  
24  
25

1 2.137 At the time each of the Plaintiffs crashed, the signs and road markings in and  
2 approaching the Crash Zone were absent or were inappropriate and/or inadequate to  
3 provide sufficient warning to bicyclists of the existence and danger of the Skewed  
4 Tracks and/or to provide sufficient guidance as to how to safely cross the tracks. The  
5 inadequate signs and road markings constituted a breach by the Defendants of  
6 applicable standards, including, but not limited to, the MUTCD. The inadequate signs  
7 and road markings constituted a breach of the City's duty to make the streets in the  
8 Crash Zone reasonably safe for ordinary travel. The inadequate signs and road  
9 markings also constituted a breach of each of the Defendants' obligations pursuant to  
10 the Operating Agreement and the Franchise Ordinance.  
11

12 2.138 At all times relevant hereto, the crossing of the Skewed Tracks in the Crash Zone by  
13 was inherently dangerous and/or misleading for bicyclists.  
14

15 2.139 Each of the Plaintiffs crashed while lawfully riding a bicycle in the Crash Zone and  
16 attempting to cross the Skewed Tracks. Each of the Plaintiffs crashed when their bicycle  
17 tires interacted with a track rail and/or flangeway gap in a manner which caused the  
18 bicycle and rider to lose dynamic stability. Upon crashing on the tracks and/or  
19 pavement, each Plaintiff suffered serious bodily injury and other damages. The date of  
20 each Plaintiff's crash is as follows:

- 21 • Jeffrey Robinson July 23, 2018
- 22 • David Surber June 18, 2019
- 23 • Laura Mortensen May 12, 2020
- 24 • Chaeji Kim May 27, 2020
- 25

- Lindsay Murphy August 2, 2020
- Jacklyn Kelley August 22, 2020
- Barbara Oldenburger August 29, 2020
- Kathleen Nolan September 1, 2020

### **III. CAUSES OF ACTION AGAINST CITY OF SEATTLE, INCLUDING NEGLIGENCE**

3.1 Plaintiffs reassert the allegations of paragraphs 1.1 through 2.139 as though fully set forth herein.

3.2 As a municipality, the City has a duty of care to all travelers to maintain its streets, including bicycle lanes installed on its streets, in a condition that is reasonably safe for ordinary travel, including travel by bicycle. The City breached this duty.

3.3 The City's duty to maintain its streets and bicycle lanes in a reasonably safe condition includes the duty to eliminate or correct dangerous or unsafe conditions. The City breached this duty.

3.4 The City's duties described herein are non-delegable. The City is not relieved of these duties by delegating or seeking to delegate them to another person or entity, including, but not limited to, BTR through the Franchise Ordinance or the Operating Agreement.

3.5 The City is jointly and severally liable with any and all other persons or entities who may also be at fault for causing Plaintiffs' damages, including BTR.

3.6 The abolition of sovereign immunity by the State of Washington applies to the Plaintiffs' claims against the City and, pursuant to Washington Supreme Court precedent, including *Howe v. Douglas County*, 146 Wn. 2d 183 (2002) and *Rivett v. City*

1        *of Tacoma*, 123 Wn.2d 573 (1994), the City may not shift financial responsibility for its  
2        own fault to BTR or any other person or entity.

3        3.7    At all times relevant hereto, for bicyclists, the crossing of the Skewed Tracks in the  
4        Crash Zone constituted an extraordinary condition and/or an unusual hazard to  
5        bicyclists requiring greater care by the City to correct than would be sufficient in  
6        ordinary settings. The City failed to take the steps necessary to correct this  
7        extraordinary condition/unusual hazard.

8        3.8    The City had a duty under RCW 81.53.090 to maintain and keep the subject railroad  
9        crossing in good repair. The City breached this duty.

10       3.9    Under Seattle Municipal Code 11.66.200, as the owner of the Skewed Tracks, which  
11       are open to the public for crossing by bicycle, the City had a duty to provide suitable  
12       means of protection from exposed and dangerous places. The City breached this duty.

13       3.10   At all times relevant hereto, the condition of the crossing of the Skewed Tracks in the  
14       Crash Zone constituted a nuisance under RCW 7.48.010 et. seq. and RCW 9.66.010 et.  
15       seq. for which the City is responsible and Plaintiffs are entitled to monetary damages  
16       and/or equitable relief pursuant thereto.

17       3.11   Without limitation, the City breached one or more of its duties: (1) by installing a Bike  
18       Lane through the Crash Zone over the perilous Skewed Tracks; (2) by encouraging  
19       bicyclists to ride through the Crash Zone via signage and other means; (3) by failing to  
20       properly design the Bike Lane; (4) by failing to install flangeway gap fillers on the street  
21       as it crosses the Skewed Tracks; (5) by failing to take reasonable steps to modify the  
22       Skewed Tracks in relation to the street; (6) by failing to install adequate and  
23       and  
24       and  
25       and

appropriate signs, road markings and channelization in and approaching the Skewed Tracks; and/or (7) by failing to maintain the infrastructure on the street and in the Bike Lane (including, but not limited, failure to maintain: the pavement adjacent to and between the track rails; road markings; warning signs; and plastic flex posts posts) in a reasonably safe condition.

3.12 Each of the acts or omissions of the City described herein were ministerial and/or operational in nature and none involved high-level policymaking and/or decision-making.

3.13 Pursuant to the Franchise Ordinance, the City retained the same control of the streets across which the Skewed Tracks lay as it had with other streets within the City of Seattle. The City failed to utilize that control, and therefore breached its duty to make the crossing of the Skewed Tracks in the Crash Zone reasonably safe for ordinary travel by bicycle.

3.14 As a direct and proximate result of one or more of the City's breaches of duty described herein, each of the Plaintiffs suffered serious injuries and other damages in amounts to be proven at the time of trial.

3.15 No person or entity other than Defendants caused or contributed to the Plaintiffs' injuries and damages.

#### **IV. CAUSES OF ACTION AGAINST BALLARD TERMINAL RAILROAD, INCLUDING NEGLIGENCE**

4.1 Plaintiffs reassert the allegations of paragraphs 1.1 through 3.15 as though fully set forth herein.

1 4.2 BTR had a duty under RCW 81.53.090 to maintain and keep the subject railroad  
2 crossing in good repair. BTR breached that duty.

3 4.3 Under Seattle Municipal Code 11.66.200, as the operator of the Skewed Tracks, which  
4 are open to the public for crossing by bicycle, BTR had a duty to provide suitable means  
5 of protection from exposed and dangerous places. BTR breached that duty.

6 4.4 At all times relevant hereto, the condition of the crossing of the Skewed Tracks in the  
7 Crash Zone constituted a nuisance under RCW 7.48.010 et. seq. and RCW 9.66.010 et.  
8 seq. for which the BTR is responsible and Plaintiffs are entitled to monetary damages  
9 and/or equitable relief pursuant thereto.  
10

11 4.5 BTR has a duty of care to users of public streets, including users of bicycle lanes on  
12 public streets, to maintain the crossings of railroad tracks it operates in a reasonably  
13 safe condition. BTR breached that duty.

14 4.6 At all times relevant hereto, for bicyclists, the crossing of the Skewed Tracks in the  
15 Crash Zone constituted an extraordinary condition and/or an unusual hazard requiring  
16 greater care by BTR to correct than would be sufficient in ordinary settings. BTR failed  
17 to take the steps necessary to correct this extraordinary condition/unusual hazard.  
18

19 4.7 Pursuant to the Franchise Ordinance, BTR has a duty to maintain crossings at areas  
20 where BTR railroad tracks intersect with public streets, including streets with bicycle  
21 lanes and including within the streets in the Crash Zone. BTR breached this duty.

22 4.8 Pursuant to the Franchise Ordinance, BTR has a duty to erect and maintain "safety  
23 devices, warning signs and signals, lights and appliances as may be necessary to protect  
24  
25



and facilitate public travel across” BTR railroad tracks, including the Skewed Tracks in the Crash Zone. BTR breached this duty.

4.9 Pursuant to the Franchise Ordinance, BTR is responsible for “the maintenance and safety of the right-of-way...including all tracks and all grade crossings....” BTR was also required to “cooperate and coordinate with the City of Seattle Director of Transportation to assure adequate rehabilitation, repair and maintenance of all tracks and grade crossings.” This includes the Skewed Tracks in the Crash Zone.

4.10 Without limitation, BTR breached one or more of its duties: (1) by failing to install flangeway gap fillers on the street as it crosses the Skewed Tracks; (2) by failing to take reasonable steps to modify the Skewed Tracks in relation to the street; (3) by failing to install adequate and appropriate signs, road markings and channelization in and approaching the Skewed Tracks; and/or (4) by failing to maintain the infrastructure on the street and in the Bike Lane (including, but not limited, failure to maintain: the pavement adjacent to and between the track rails; road markings; warning signs; and plastic flex posts posts) in a reasonably safe condition.

4.11 As a direct and proximate result of one or more of BTR’s breaches of the duties described herein, each of the Plaintiffs suffered serious injuries and other damages in amounts to be proven at the time of trial.

4.12 No person or entity other than Defendants caused or contributed to the Plaintiffs injuries and damages.

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**V. LIMITED PHYSICIAN/PATIENT PRIVILEGE WAIVER**

5.1 Plaintiffs hereby waive the physician/patient privilege only to the extent required by RCW 5.60.060, as limited by their constitutional rights of privacy, contractual rights of privacy, and the ethical obligations of physicians and attorneys not to engage in *ex parte* contact between a treating physician and a patient's legal adversaries.

5.2 Any contact with any of Plaintiffs' health care providers must be made pursuant to the Rules of Civil Procedure or prior stipulation with Plaintiffs' counsel.

**VI. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, and each of them, pray for judgment against Defendants, jointly and severally, as follows:

1. For each Plaintiff's past and future economic damages in such amounts as proven at the time of trial;
2. For each Plaintiff's past and future non-economic damages in such amounts as proven at the time of trial;
3. For interest calculated to the maximum amount allowable by law, including pre-judgment interest;
4. For each Plaintiff's costs and disbursements incurred herein;
5. For each Plaintiff's attorney's fees and costs; and
6. For such other and further relief, including injunctive relief to abate nuisance, as the Court deems just and equitable.

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1 Dated this 22nd day of March 2022

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3 ANDERTON LAW OFFICE-WASHINGTON BIKE LAW

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9 By:

10 Robert Levin, WSBA #18092  
11 rob@washingtonbikelaw.com  
12 Robert Anderton, WSBA #21862  
13 bob@washingtonbikelaw.com  
14 Jessica Cutler, WSBA #42281  
15 jessica@washingtonbikelaw.com  
16 Attorneys for Plaintiffs  
17 705 Second Avenue, Suite 1000  
18 Seattle, WA 98104  
19 Phone: (206) 262-9290  
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21  
22  
23  
24  
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