COURT OF APPEALS NO. 68156-7-I

89427-2

SUPREME COURT OF THE STATE OF WASHINGTON

KATTI HOFSTETTER,

Petitioner,

v.

CITY OF BELLINGHAM, a municipal corporation,

Respondent.

CITY OF BELLINGHAM'S ANSWER TO PLAINTIFF'S PETITION FOR REVIEW

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Table of Contents

Table of Authorities

I. INTRODUCTION

The Court of Appeals' unpublished decision properly affirmed the jury verdict in this case. The Court of Appeals correctly held, based on the record, that there were material facts in dispute and Plaintiff's late-hour summary judgment motion was therefore appropriately denied. The Court of Appeals also correctly held that the trial court was not in error in denying a jury instruction based on vicarious liability. The Court of Appeals' decision is not in conflict with any Supreme Court or Court of Appeals decision. Nor does the Court of Appeals' decision present a significant constitutional question or an issue of substantial public interest. Consequently, there is no basis for this Court to accept review under RAP 13.4(b). The Court should therefore deny the petition for review.

II. COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the Court of Appeals decision affirming the jury verdict in this case because there was a material fact in dispute that precluded summary judgment for Plaintiff is in conflict with other appellate decisions.

2. Whether the Court of Appeals decision to uphold the trial court in refusing a jury instruction on vicarious liability conflicts with existing appellate decisions.

3. Whether the Court of Appeals' decision regarding CR 51 and the review of one proposed jury instruction on appeal is a matter of public interest.

4. Whether the established case law governing the review of a denial of a summary judgment motion post-verdict is a matter of public interest.

III. STATEMENT OF THE CASE

A. Background - Whatcom Falls Park and the "Burn Zone."

Whatcom Falls Park ("the Park") is a 251 acre recreational, public park that is open to the public free of charge. RP 1055, CP 504, 841. The City has designated the entire park for recreation and open space use and offers a variety of recreational opportunities to park visitors. CP 504.

Within the Park is a popular natural, undeveloped area known as the "whirlpool," where a creek flows in between two large rocks/bluffs and forms a pool of water. RP 492-93. The whirlpool is essentially a swimming hole located in a natural bowl that is used for swimming and jumping from the rock bluffs. RP 493. There are bluffs abutting the whirlpool on the north and south side of the creek from which users jump. RP 97-98.

There was a red "do not enter" sign located at the whirlpool site during the time period of Plaintiff's injury. RP 708, RP 1022, Ex. 1. The "do not enter" sign also contained language warning "hazardous area." Ex.1.

The existence, purpose, and intent of the red "do not enter" sign is explained by the 1999 Olympic Pipeline explosion that occurred at Whatcom Falls Park. RP 248-49, RP 686, CP 504-509. As a result of the explosion and fire, a large portion of the park was damaged and the entire park was closed for a period of time due to environmental concerns. RP 248, RP 688, CP 504-509. Eventually, the Park was opened, but through the decisions of an emergency multi-agency incident command team, a portion of the park directly impacted by the explosion was closed and was referred to as the "burn zone." RP 248, CP 504-509, RP 563. Initially, the burn zone was cordoned off and was surrounded by several "do not enter" signs. RP 248-49, RP 560. As mentioned above, one of the red "do not enter signs" was placed on the north side of the whirlpool. RP 560, RP 1022.

After the explosion and the establishment of the "burn zone," access to the Park and the "burn zone" itself was gradually permitted. RP 732, RP 1134, CP 506-507. Security guards, which

had been hired immediately after the explosion to enforce the exclusion of users from the area, stopped patrolling after approximately ten months. RP 1134. Eventually, yellow ropes and cables that surrounded the "burn zone" came down as well. PRP 33-34, RP 255. In fact, on July 26, 2005 (8 days prior to Ms. The Plaintiff's injury), the park operations manager for the City wrote an email stating that: the red "do not enter" sign at the whirlpool should stay up as a warning sign for dead trees; use at the whirlpool had not waned and that the area had sufficiently rehabbed; and the whirlpool was part of the park and any fencing should be removed. Ex. 23, PRP 33-34, RP 255. From the City's perspective, the intent of the sign at the whirlpool during the relevant period was to warn users, not prohibit them. RP 33-34, RP 255, RP 1143.

Indeed, after the initial closure in 1999, use of the whirlpool resumed and steadily increased to its normal, heavy level. RP 731-732, RP1134, CP 506-07. The City Parks Department had no protocol or policy that prohibited the use of the whirlpool from 2000-2005 and in 2005, users were allowed to recreate at the whirlpool. RP 531-532, RP 602, RP 275, RP 276-277, RP 732, RP 1058-1059, RP 1134.

B. The Plaintiff's Injury.

On August 3, 2005, Plaintiff visited Whatcom Falls Park with her friend, Tonya Brock. RP 741. Plaintiff and Ms. Brock ended up at the whirlpool, and found it to be populated by other adolescents who were jumping and swimming. RP 746. Due to peer-pressure from the group of adolescents, Plaintiff decided to jump off the north side bluff into the whirlpool. RP 749-752. Plaintiff safely jumped into the pool and swam to the side of the pool and waited for her friend to jump. RP 752. Plaintiff then exited the water and chose to take the direct, waterside route back to the top of the north side bluff. RP 754-756. As Plaintiff neared the top of the route/path, she noticed the trail was wet. RP 757. As she neared top, she slipped on a wet spot that she saw and fell approximately 25 feet and landed on a rock. RP 758-59. Plaintiff fractured her spine and is paraplegic. CP 924.

C. Pre-Trial Litigation and Motions.

Plaintiff filed the Complaint in this action on November 26, 2007 and alleged the City was negligent for failing to post conspicuous warning signs for dangers that existed in the whirlpool area. CP 924-925. Plaintiff alleged her injuries were caused by a known, dangerous, artificial, latent condition. CP 925. The City's

Answer asserted several affirmative defenses, including recreational land use immunity under RCW 4.24.210 and trespassing.

The City filed its first motion for summary judgment on February 25, 2009 arguing that the City was immune under the recreational land use immunity statute. CP 814. Plaintiff responded by arguing there were genuine issues of material fact regarding Plaintiff's status on the land, whether the whirlpool was open to the public, and whether she was an invitee or licensee. CP 800, CP 805. The trial court denied the City's motion for summary judgment and noted in the order denying the motion that a genuine issue of material fact existed concerning whether the City intended to hold the whirlpool open to the public and concerning Plaintiff's status on the land. CP 767-768. Counsel for Plaintiff drafted and presented the denial order. CP767-68. The City filed a motion to reconsider and in her response, Plaintiff argued that "the record simply demonstrates a factual question concerning whether the City intended to hold the whirlpool cliff open to the public for recreational

use. The jury's resolution of this factual issue will determine whether the City is entitled to recreational use immunity." CP 73.[1]

Notwithstanding her previous arguments that the recreational land use immunity issue and questions concerning her status on the land should be submitted to the jury, Plaintiff filed a motion for partial summary judgment on December 9, 2010, which was a little over a month before the initially scheduled trial date, asking the court to preclude the City from presenting an affirmative defense based on recreational land use immunity. CP 600, RP 4. In direct conflict with her previous arguments to the trial court, Plaintiff was now asserting the recreational land use immunity question was a matter of law. CP 590-598. The trial court denied the motion. CP 445-447. In its oral ruling, the trial court stated "It seems to me that there's a question about, first of all, what area was closed," and that "there are still issues of fact on both sides" regarding the closed or "allowed" issue. Jan. 14, 2011 Mot. Hr'g. RP 22.[2] The trial court specifically stated the jury was going to have to determine whether the area was closed or not and then determine Plaintiff's status on

[1] The City filed a second motion for summary judgment based on assumption of risk that was also denied by the trial court, but that motion was not part of the appeal. *See* CP 602-603.

[2] Pretrial motions are documented in a report of proceedings separate from the RP for the trial. For clarity, the City is referring to the report of proceedings that document motions prior to the trial by the date of the hearing and as Mot. Hr'g RP (Motion Hearing Report of Proceedings).

the land. Mot. Hr'g RP 22-23. The trial court noted it was "exactly the same set of issues" that were brought before the court during the City's first summary judgment motion. Mot. Hr'g RP 23.

D. The Trial.

This matter proceeded to trial on October 11, 2011. RP 1. At the trial, Plaintiff testified about the day she was injured at the Park. RP 738-779 and *supra*. Park Operations Manager Marvin Harris and the Park employees did not dispute the actual language on the red "do not enter sign" and testified that the sign was in place at the whirlpool due to the burn zone. Ex. 1. RP 279, RP 168, RP 230, and RP 231.

Harris further testified that on the day of Plaintiff's injury, the sign was there as an informational warning and that the City considered the whirlpool to be part of the Park. RP 168, RP 230, RP 231. Harris also testified that his intent in writing the July 28, 2005 email was to express that the sign was nothing more than a warning sign. RP 255, RP 275, RP 278, RP 1143. Specifically, Harris testified several times that on the day of the injury park users were allowed in the whirlpool area. RP 275, RP276, RP 1039, RP 1055, RP 1058, RP 1059, RP 1134, RP 1141-42. The trial judge even recognized at one point during the trial that Harris had

testified users were allowed in the whirlpool area several times. RP 277.

Park employees James Luce, Wayne Carroll, and Scott Zerba testified that: they was not aware of any rule or policy to exclude users from the whirlpool, the intent of the red "do not enter" sign related to the "burn zone," as soon as security was done patrolling the "burn zone" (within 10-12 months after the explosion) use of the whirlpool resumed and steadily increased to its normal heavy level, there was no effort to exclude people from the whirlpool from 2000-2005, they were never told to prohibit users from the whirlpool, and that it was common knowledge that people did heavily use it. RP 686-708, RP 731, RP 732, RP 531-532, and RP 602.

On November 7, 2011, at the close of the evidentiary portion of the trial, both the City and Plaintiff moved the trial court for a directed verdict. RP 1291, RP 1298. The Court denied Plaintiff's motion for a directed verdict on the recreational immunity and "allowed" issue and stated the jury should decide the case because there was conflicting evidence presented on that issue. RP 1295-1297. The trial court denied the City's motion and similarly stated that, besides deciding whether recreational land use immunity

applies, the jury should also make the determination as to whether the condition at issue was known, dangerous, artificial, latent condition. RP1320-1324.

On November 10, 2011 the jury returned their verdict. RP 1438. The jury found the City did not allow the public to use the whirlpool for outdoor recreation. CP 43. The jury found that Plaintiff was a licensee. CP. 43. Finally, the jury found the City was not negligent. CP 11, 43. After the denial of her motion for a new trial, Plaintiff appealed and Division I affirmed the jury verdict and the trial court's denial of Plaintiff's summary judgment motion. CP 13, Pet. for Rev. App. A. Division I also denied Plaintiff's motion to reconsider. Plaintiff now brings this petition for review.

IV. ARGUMENT

Plaintiff makes four general arguments for why this Court should accept review under RAP 13.4(b).[3] As discussed below, each argument fails.

A. The Court of Appeals' decision does not conflict with previous decisions of the Court of Appeals.

[3] Plaintiff also appears to make arguments and assert issues in both the "Issues Presented" and "Statement of the Case" sections of her Petition. The issues in these sections appear to be addressed and subsumed in the "Argument" section, which is the section that specifically discusses the standards for accepting review.

The Court of Appeals dismissed Plaintiff's appeal, based on a summary judgment denial, because genuine issues of material fact existed in the record. The court's decision does not conflict with any Supreme Court or Court of Appeals decision. Plaintiff's argument that it does fails for four reasons.

First, Plaintiff wrongly asserts the Court of Appeals decision is in conflict with decisions of the Court of Appeals. The Court Appeals was asked to review the trial court's denial of Plaintiff's summary judgment motion and her motion for a directed verdict. The Court of Appeals appropriately agreed with the trial court that there were issues of fact surrounding whether Plaintiff was allowed into the whirlpool area of the Park. Pet. for Rev. App. A-4. The Court of Appeals decision is based on a voluminous record that shows there was intense disagreement over the "allowed" fact. The Court of Appeals' ruling does not in any way conflict with precedent from this Court or the Court of Appeals and is entirely consistent with CR 56 and the countless number of cases examining whether a summary judgment motion should or should not have been granted.

Second, Plaintiff suggests that the issue that needs to be reviewed involves statutory construction. However, the issue before

the trial court and the Court of Appeals was not one of statutory interpretation. This argument is misplaced and nothing more than a red-herring.

The issue was whether the facts in the record supported summary judgment or a judgment as a matter of law. *See* Pet. for Rev. App. A. Plaintiff maintained that a red "do not enter" sign at the sight showed the City did not allow use. Pet. for Rev. at 8. The City argued that the sign was not enforced and the City did allow use. The City's argument was corroborated by the testimony of several witnesses. (*See* Statement of the Case *supra.*) Contrary to Plaintiff's assertion in her Petition, the City never admitted that physical entry into the whirlpool area was prohibited on the day Plaintiff was injured.[4] Thus, the issue before the courts below did not concern statutory interpretation. The argument was factual, not legal. Therefore, there is no basis for the Court to accept review of the decision below based on a statutory construction issue.

Third, Plaintiff has failed to show how the Court of Appeals' decision conflicts with *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 824 P.2d 541 (1992) or *Plano v. City of Renton*, 103 Wn. App.

[4] Plaintiff's citation to the record to support this contention is erroneous. The reference to CP 542 is a summary judgment pleading filed by the City where it explained physical entry was prohibited during the days following the pipeline explosion but NOT the day Plaintiff was injured (approximately six years later).

910, 14 P.3d 871 (1988). In fact, the Court of Appeals' decision does not conflict with either *Mathews* or *Plano*. In *Matthews*, the court interpreted the application RCW 4.24.210 in regards to an "outdoor event," but there was no factual dispute in that case. *See Matthews*. Similarly, in *Plano* the court held that the City of Renton was not entitled to immunity under RCW 4.24.210 because they charged a fee for moorage at the dock where the accident occurred. *Plano* at 915-916. Importantly, there was no factual dispute at issue in *Plano* either.

In contrast, there was a factual dispute in this case. The trial court correctly found there was disputed evidence surrounding whether Plaintiff was "allowed" in the whirlpool area.[5] Noting the clear record establishing the dispute about this fact, the Court of Appeals correctly decided it was not error to instruct the jury on recreational land use immunity so that they could decide this fact. *See* Pet. for Rev. App. A-4. Thus, *Matthews* and *Plano* are not in conflict with Division I's ruling in this case.

Fourth, the trial court and Court of Appeals did not "liberally" construe the recreational immunity statute as Plaintiff alleges. Both courts found that because of the factual dispute, the question was a

[5] The City argued below to the trial court and on cross-appeal (which the Court of Appeals never reached) that it was entitled to summary judgment because the incident occurred in a park.

"jury question." Pet. for Rev. App. A-4. This decision does not amount to a liberal construction on the legal application of the statute. It is a decision that recognizes there was evidence supporting both arguments on the issue of whether Plaintiff was allowed in the area.

Further, the trial court and Appellate Court's reasoning is consistent with precedent. In *State v. Davis*, 144 Wn.2d 612, 617, 30 P.3d. 460, 462 (2001) this Court held that courts should look to the ordinary meaning of words in the recreational immunity statute to discern their meaning. *Davis* at 612, 30 P.3d at 462. In that case, the court looked to the ordinary meaning of the word "artificial" to interpret its meaning in RCW 4.24.210. *Id.* Thus, allowing the jury to decide a factual issue in regards to whether Plaintiff was "allowed" under RCW 4.24.210 does not equate to a "liberal" interpretation of the statute. To the contrary, it is giving the words in the statute their ordinary meaning and allowing a jury to properly decide a factual dispute.

B. The Court of Appeals correctly affirmed the trial court's decision to exclude proposed instruction number 38. That decision does not conflict with *Crossen v. Skagit County*.

The Court of Appeals denied Plaintiff's appeal regarding proposed instruction 38 because she offered a different basis for its

admission on appeal than she did at trial and it was irrelevant. Pet. for Rev. App. A-6 - A-7. The Court of Appeals appropriately declined to review the issue because an appellate court will not consider review of a jury instruction if the basis for objection was different at the trial level. *B.J. Lasser v. Grunbaum Bros. Furniture Co.*, 46 Wn.2d 408, 414, 281 P.2d 832, 835 (1955); *see also Sulkosky v. Brisebois*, 49 Wn2d 273, 276, 742 P.2d 193, 195 (1987). The Court of Appeals, therefore, did not err.

Furthermore, the Court of Appeals' reasoning does not conflict with *Crossen v. Skagit County*, 100 Wn.2d 355, 669 P.2d 1244 (1982). The *Crossen* decision requires a party to distinctly state their objection to an instruction. *Crossen* at 359, 653 P.2d at 1247. In this case, the clarity of the objection was not at issue. Rather, the issue was that Plaintiff offered a different objection to the instruction on appeal. The court declined review because Plaintiff offered a *different* objection. Pet. for Rev. App. A-6. The court's decision is consistent with both *Crossen*, which requires an objection to preserve for appeal, and *B.J. Lasser*, which precludes raising a different objection on appeal. Therefore, there is no basis for this Court to review the exclusion of proposed instruction 38.

C. The procedural issues relating to the exclusion of proposed instruction 38 are not matters of public interest and, regardless, the instruction was appropriately excluded or was harmless error.

Plaintiff contends that the procedural issues related to objections made under CR 51 are a matter of public concern and warrants review by this Court. Pet. for Rev. at 19. Plaintiff has offered no argument to support her bare contention that this is a matter of public interest. To that end, Plaintiff has failed to articulate how the exclusion of one jury instruction that addressed an immaterial fact in the trial, that was not contested by the City, is of interest to the public. Proposed instruction 38 sought to instruct the jury on vicarious liability, which had no relevancy to the trial. Pet. for Rev. App. A-7. Plaintiff offers only a conclusory statement and has failed to articulate to this Court how an irrelevant instruction at this trial is a matter of public interest.

Furthermore, the trial court did not err in excluding the instruction. Proposed instruction 38 was a modified version of WPIC 50.01. WPIC 50.01 is "intended for use in tort actions in which plaintiff seeks to establish the vicarious liability of a principal for the tortious conduct of an agent committed while acting within the scope of employment." WPI 50.00. Contrary to Plaintiff's

argument, the trial court did understand the law and how the proposed instruction should be used. The trial court appropriately concluded this case was not about vicariously liability and excluded the instruction. *See* Pet. for Rev. App. A-7 and Jury Instruction Mot Hr'g RP 105. Finally, assuming for the sake of argument the trial court erred in refusing to give the instruction, it was harmless error because the knowledge of City employees was not contested at trial, Plaintiff was not precluded from arguing her theory of the case to the jury, and no prejudice was shown. *See* Pet. for Rev. App. A-7.

D. The case law addressing when a summary judgment denial can be reviewed after a trial is not in question and therefore not a matter of public interest.

Plaintiff asserts that "the criteria for obtaining review of the denial of a motion for summary judgment following trial is also a matter of public interest" and that the Court should accept review to provide further clarification. Pet. for Rev. at 20. However, the law for obtaining review for a summary judgment denial after a trial is not unclear, controversial or disputed. A party can only appeal a summary judgment denial after trial if the denial was based solely on an issue of law. *Kaplan v. Northwestern Mutual Life Insurance Company*, 115 Wash. App. 791, 799, 65 P.3d 16, 20 (2003); *see*

also e.g. Welch v. Southland Corporation, 134 Wn.2d 629, 632, 952 P.2d 162, 165 (1998). The denial of summary judgment in this case was based on a question of fact. CP 445-447, Jan. 14, 2011 Mot. Hr'g. RP 22-23, and Pet. for Review App. A-4 - A-6.

This point of law needs no clarification. Additionally, Plaintiff has offered no argument as to why this point of law is a matter of public interest. The Court of Appeals acted under straight-forward precedent in denying review of the summary judgment denial.[6] Plaintiff only offers a conclusory statement to support her contention that this is a matter of public interest. Therefore, there is no basis for the Court to find this is a matter of public interest and should deny review.

E. Plaintiff's other ancillary arguments fail.

Plaintiff advances other ancillary arguments that have no merit. First, Plaintiff asserts that she was prejudiced by the court not granting her summary judgment motion. Pet. for Rev. at 13. But, Plaintiff prevailed on the "allowed" issue: the jury found the City had no recreational immunity. Thus, Plaintiff cannot claim any prejudice from the summary judgment denial or the verdict itself.

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[6] The Court of Appeals appears to have stated two reasons for affirming the trial court. One was that the record did show there was a question of material fact in dispute. The other was that the summary judgment denial was not reviewable because the appeal was brought post-trial and the denial was based on the existence of a material fact and not a legal issue.

Furthermore, Plaintiff's argument that she was prejudiced is pure conjecture. She speculates and baldly states she was prejudiced because she had to address the facts of the case at trial, but offers no proof the jury was confused. In fact, the jury's verdict was perfectly logical: they found Plaintiff was a licensee (one who is tolerated or permitted on land) and the City was not negligent (there were obvious and open dangers). *See* CP at 42-43, CP 76.

Second, Plaintiff alleges error in regards to instruction 18. But, Plaintiff waived her challenge to that issue by concession. Pet. for Rev. App. A-7 n. 9. And, that instruction was accurate. As evidenced by the verdict form, the jury was instructed to use instruction 18 only in regards to its recreational immunity decision. CP 42-43. Therefore, there is no possibility, or evidence showing, that the jury was confused by this instruction. Plaintiff's argument is speculation. The Court of Appeals did not commit error in upholding the trial court's decisions and the jury's verdict.

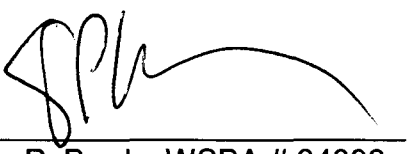
V. CONCLUSION

Plaintiff has not shown any basis under RAP 13.4(b) for this Court to accept review. The Court of Appeals decision is a straightforward decision affirming the denial of a summary judgment motion which allowed a disputed fact to be decided by the

jury. There is no basis to conclude the Court of Appeals decision is in conflict with other appellate decisions or that matters regarding jury instructions and standards for summary judgment review are matters of public interest. Review should therefore be denied.

Moreover, Plaintiff originally took the position that there was a material issue in dispute and asked that the trial court let a jury decide the case. The jury agreed with Plaintiff that the City was not entitled to recreational immunity, but found the City was not negligent. She has had her day in court, which included a lengthy jury trial, a motion for a new trial, an appeal to Division I, and a motion to reconsider Division I's decision. The case has been fully and fairly considered and affirmed based on straightforward precedent. This Court should deny review, and allow the jury's well-reasoned verdict to stand.

Respectfully submitted this 21st day of October, 2013.



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