68156-7

68156-7

NO. 68156-7-I

COURT OF APPEALS FOR DIVISION 1
STATE OF WASHINGTON

KATTI HOFSTETTER, a single woman,

Appellant,

vs.

CITY OF BELLINGHAM, a municipal corporation,

Respondent.

CITY OF BELLINGHAM'S CROSS-APPEAL RESPONSE BRIEF

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I. INTRODUCTION

On August 3, 2005 Katti Hofstetter ("Ms. Hofstetter") sustained a serious injury while at Whatcom Falls Park in the City of Bellingham ("City"). Whatcom Falls Park is a City owned park that is 251 acres in size and consists of several developed and undeveloped trails, a creek, and provides vast recreational opportunities. Within Whatcom Falls Park is a natural pool of water commonly called the "whirlpool." Ms. Hofstetter was injured at the whirlpool site. Above and bordering the whirlpool are two bluffs, both approximately 25-30 feet in height. The whirlpool itself is in an undeveloped portion of the Park and requires park users to leave the developed area of the park to reach it. The whirlpool is visible to all park users and any potential dangers at the site are open and obvious, including the bluffs and various trails around the pool.

Since time immemorial, the whirlpool area has been open for use and is a common location for jumping and swimming. The exception to open whirlpool use occurred in 1999 when a gas pipeline in Whatcom Falls Park exploded and caused severe damage to the park. For a period of time an area of the park called the "burnzone" was closed off and was marked by several red "do not enter" signs. The whirlpool was located in the "burnzone" and was closed for period of time. Gradually, as the environmental dangers subsided, use of the whirlpool resumed and from

2000 to 2005 (the year of Ms. Hofstetter's injury) users were allowed to use the whirlpool, although one of the old "do not enter" signs remained at the site.

Ms. Hofstetter filed this lawsuit alleging the City negligently caused her injuries. The City filed a motion for summary judgment based on RCW 4.24.210, the recreational land use immunity statute because Ms. Hofstetter was injured in a City park for which no fee was charged by a natural, obvious, patent condition. In response to the City's motion, Ms. Hofstetter argued that whether the City was entitled to recreational land use immunity was a question for the jury. Despite the fact Ms. Hofstetter was a park user and was undisputedly injured in the park, the trial court denied the City's motion for summary judgment. Several months later, Ms. Hofstetter, notwithstanding her previous argument that recreational land use immunity was a jury question, filed a motion for partial summary judgment regarding recreational land use immunity. The motion argued the City should not be able to present the immunity defense to the jury. The trial court expressly and clearly stated there were issues of disputed fact as to whether parks users were allowed in the whirlpool area[1] and denied the motion for partial summary judgment.

[1] Under the language in RCW 4.24.210, the trial court reasoned that the landowner (the City) must "allow" use of the recreational land and thus presented a threshold question as to whether the City was entitled to immunity.

The case proceeded to trial. At trial, several witnesses testified that users were allowed into the whirlpool area. The City argued, based on the evidence, that the City was entitled to recreational land use immunity and that, in general, the City was not negligent. Ms. Hofstetter argued that she was an invitee or a licensee and that the City breached its duty to her on either of those premises liability theories. After a lengthy trial, the jury found the City was not entitled to recreational land use immunity. The jury found Ms. Hofstetter was a licensee but that the City was not negligent.

Even though the jury ultimately agreed with Ms. Hofstetter that the City was not immune under the recreational land use immunity statute, she brings this appeal and asserts error.[2] Because there was a substantial amount of evidence indicating the whirlpool area was open for use and was in a City park, this Court should deny Ms. Hofstetter's appeal. Further, any alleged error in instructing the jury on recreational land use immunity is of no consequence because the jury agreed with Ms. Hofstetter on that point and any error is therefore harmless. This Court should dismiss the appeal and allow the jury's well-reasoned verdict to stand.

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[2] [2] As argued later in this brief, the City maintains it was immune under RCW 4.24.210.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the City's motion for summary judgment and the related motion to reconsider, and the City's CR 50 motions brought at trial because the City was entitled to a judgment as a matter of law based on RCW 4.24.210.

2. The trial court erred in instructing the jury on the exceptions that overcome immunity under RCW 4.24.210 because the City was entitled to judgment as a matter of law.

3. The trial court erred in not giving the City's proposed instruction 29 regarding trespassers and the duty owed thereto.

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 Park is an integral component of the City of Bellingham Park system. CP 504. 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 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. The whirlpool is a natural, undeveloped area of the park but there is a developed trail near the whirlpool and the bluff. Ex. 1, 7, and 13; RP 294-295, RP 856, RP 744-745. There is a split rail fence separating the whirlpool area and the main, developed trail. Ex. 1, 7, and 13; RP 294-295 RP 856, RP 744-745. There are bluffs abutting the whirlpool on the north and south side of the creek from which users jump. RP 97-98.

There are various exit paths from the whirlpool, including gentle pathways that do not require climbing or measurable labor. RP 315, RP 494, RP 852. There is a steeper path out of the water that goes directly back to the top of the north side bluff where users commonly jump from into the water. RP 315, 592, 626. This path was not built by the City and has been described as a social trial (created by use), a rough trail, a goat trail, and a route. PRP 11, RP 592-93, RP 626. This trail is typically wet and its wetness is visible to park users. PRP 21, PRP 70, RP 104-05, RP 358, RP 756, RP 931.[3] The various trails and paths around the whirlpool are social trails and were not built by the City parks department. RP 577-578, RP 352, RP 368.

[3] Following counsel's practice and for consistency, the City refers to Rhonda Jensen's report of proceedings as "RP" and the small portion of the proceedings transcribed by Margret Watts as "PRP" (partial report of proceedings).

In general, the Park contains several warning signs, including signs that encourage users to stay on developed paths and advise that there is no supervised swimming in the Park. RP 1040-1043, CP 504. There is a warning sign near the whirlpool that advises users of potential hazards. RP 631, Ex. 11. This sign (referred to as the "blue sign" at trial) is located on the south side of the whirlpool. RP 631. Users of the whirlpool who approach from the north side of the creek are unable to see the "blue sign." RP 556. There was, however, a red "do not enter" sign located at the whirlpool site during the time period of Ms. Hofstetter's injury. RP 708, RP 1022, Ex. 1. The "do not enter" sign also contained language warning "hazardous area." Ex.1. The red "do not enter" sign was a frequent target of vandals and had to be replaced several times over the years. RP 567-568.

The existence, purpose, and intent of the red "do not enter" sign is explained by the 1999 Olympic Pipeline explosion that happened 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 by a yellow rope 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. While there were no burned trees in the whirlpool area itself, the sign was placed at the whirlpool site as part of the "burn zone" perimeter and because the whirlpool, given its frequent use and proximate location to the creek canyon, was seen as a potential access point to the "burn zone." RP 708, RP 1022. While the "burn zone" portion of the Park was closed for a period of time, the Park itself, including the whirlpool area, was open for viewing. RP 1039, CP 506. In fact, the Bellingham Parks Department even built additional trails to enhance the ability of citizens to view the "burn zone" in the Park. RP 1039, CP 506.

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, the yellow ropes and cables surrounding the "burn zone" came down as well. PRP 33-34, RP 255. In fact, on July 26, 2005 (8 days prior

to Ms. Hofstetter's injury), the park operations manager for the City wrote an email, in response to a question from a park employee, indicating the red "do not enter" sign at the whirlpool should stay up as a warning sign for dead trees. Ex. 23,PRP 33-34, RP 255. But, the email went on to recognize that use at the whirlpool had not waned and that the area had sufficiently rehabbed. Ex. 23, PRP 33-34, RP 255. Further, the email stated that 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 began 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. MS. HOFSTETTER'S INJURY.

On August 3, 2005 Katti Hofstetter visited Whatcom Falls Park with her friend, Tonya Brock. RP 741. Ms. Hofstetter and Ms. Brock parked in a park parking lot and walked through the park. RP 743. Ms. Hofstetter and Ms. Brock ended up at north side of the whirlpool, and

found it to be populated by other adolescents who were jumping and swimming. RP 746. While walking through the park and during her presence at the whirlpool, Ms. Hofstetter did not recall seeing any signs in the Park, including the red "do not enter" sign at the whirlpool. RP 743, 751.

Ms. Hofstetter and her friend stood and watched a group of adolescent males jump and swim and eventually the males began to peer-pressure the girls to jump. RP 750. Due to the peer-pressure, Ms. Hofstetter decided to jump off the north side bluff into the whirlpool. RP 749-752. Ms. Hostetter safely jumped into the pool and swam to the side of the pool and waited for her friend to jump. RP 752. After realizing Ms. Brock was not going to jump, Ms. Hofstetter exited the water and chose to take the direct, waterside route back to the top of the north side bluff. RP 754-756. As Ms. Hofstetter 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. Ms. Hofstetter fractured her spine and is paraplegic. CP 924.

C. PRE-TRIAL LITIGATION AND MOTIONS.

Ms. Hofstetter 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.

Ms. Hofstetter alleged her injuries were caused by a known, dangerous, artificial, latent condition. CP 925. The City Answered the Complaint on January 11, 2008 and 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. Ms. Hofstetter responded by arguing there were genuine issues of material fact regarding Ms. Hofstetter'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 Ms. Hofstetter's status on the land. CP 767-768. Counsel for Ms. Hofstetter drafted and presented the denial order. CP767-68. The City filed a motion to reconsider and in her response, Ms. Hofstetter 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.

After conducting some discovery, the City filed its second motion for summary judgment based on land owner duties and implied assumption of risk. CP 722. Ms. Hofstetter responded to the motion and argued there were questions of fact still at issue, namely questions concerning whether Ms. Hofstetter was an invitee or a licensee. CP 622-623. The trial court again denied the summary judgment motion and in the order denying noted there were genuine issues of material fact regarding plaintiff's status on the land. CP 603. Counsel for Ms. Hofstetter drafted and presented the denial order. CP 602-603.

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, Ms. Hofstetter 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, Ms. Hofstetter 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.[4] The trial court specifically stated the jury was going to have to determine whether the area was closed or not and then determine Ms. Hofstetter's status on 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, Ms. Hofstetter testified about the day she was injured at the Park. RP 738-779 and *supra*. Several employees from the City of Bellingham Parks Department testified. The Park Operations Manager and the Park employees did not dispute the actual language on the red "do not enter sign." Ex. 1. RP 279.

However, the Park Operations Manager Marvin Harris testified that the red "do not enter" sign was in place at the whirlpool due to the "burn zone." RP 168, RP 230, RP 231. He further testified that on the day of Ms. Hofstetter'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,

[4] 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).

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 court even recognized at one point during the trial that Harris had testified users were allowed in the whirlpool area several times. RP 277.

Park employee James Luce, who was very familiar with the Park, testified that he was not aware of any rule or policy to exclude users from the whirlpool and that the intent of the red "do not enter" sign related to the "burn zone". RP 686-708, RP 731. Luce further testified that 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. RP 732. Further, Luce testified there was no effort to exclude people from the whirlpool from 2000-2005. RP 732.

Similarly, Park employee Wayne Carroll testified that he was never told to prohibit users from the whirlpool and that it was common knowledge that people did heavily use it. RP 531-532. Fellow Park employee Scott Zerba likewise testified he was never told to exclude users from the whirlpool area, nor did he. RP 602. He further explained that he had seen users regularly use the whirlpool, and the that the City's attitude

about the "burn zone" changed over time, implying after the initial closure users were allowed access. RP 595, RP 601. One Park employee, Richard Rothenbuehler, testified that he was never told the "burn zone" was open for use and that he did, for a period of time, ask people to leave the whirlpool. RP 32. But, he also testified that area was used heavily and that the concerns about the whirlpool (and the "do not enter sign") were based on potential "burn zone" hazards and a general denuding of the area. RP 572, RP 577-578. Ms. Hofstetter's own expert, Paul Green, also testified that the area appeared to be "heavily used" as evidence by the lack of vegetation. RP 352, RP 368.

Regarding the condition of the path used by Ms. Hofstetter, Rothenbuehler testified that the trail was wet and the wetness was easy to see. PRP 12, PRP 21. Similarly, Scott Zerba testified that the wetness on the trail was visible. PRP 108. Marvin Harris and City experts Dr. Erin Harley and Randy Person likewise testified they could see wetness at the top of the trail. RP 931, RP 1000, RP 1093. Ms. Hosftetter's own expert agreed the trail was noticeably wet. RP 358. As did witness Brandon Stanley, who testified the path in question was "moist." PRP 70. Finally, Ms. Hofstetter testified that the trail was wet and that she saw a wet spot as she was slipping. RP 757.

The trail in question is located on the side of the cliff and extends from the water to the top of the north side bluff. Ex 2, 4, and 17. Ms. Hofstetter testified that she saw the trail before she jumped from the top of the bluff and that it was light out and had no trouble seeing the condition of the trail. RP 788-789. Ms. Hofstetter spent several minutes sitting near the bottom of the trail looking up at Tonya Brock who was standing at the top of the bluff where the path ended. RP 753. While witnesses testified there was some vegetation on the side of the trail, not a single witness testified that the edge of the waterside path was obscured or hidden or that the cliff side nature of the path was not apparent. See RP 1098, Ex. 2, 4, and 17.

Ms. Hofstetter called Assistant Fire Chief Roger Christensen as a witness and he testified about previous 911 calls to the Park. RP 69. He testified about six incidents. RP 69-72. The first incident occurred "near" the whirlpool; the second at the whirlpool; the third at "the falls;" the fourth at the "lower falls;" the fifth at the "falls;" and the sixth at the "bottom of the falls." RP 69-72. There was not any further specification as to where the incidents occurred. RP 69-72. He also testified that there is more than one "falls" at the Park. RP 77. Marvin Harris corroborated that testimony and explained in detail the many other "falls" in the park. RP 1024-1028. Finally, Christensen testified that he compared the number of

emergency response calls to Whatcom Falls Park to three other large City parks and the Mt. Baker Ski area. RP 81. Compared to the other recreational areas, Whatcom Falls Park was in the "middle" in terms of the volume of calls. RP 81.

On October 31, 2011, at the close of the Plaintiff's case, the City moved the trial court to dismiss under CR 50 for insufficient evidence. CP 136. The City asserted at that time that there was no evidence to controvert that the City was entitled to recreational land use immunity under RCW 4.24.210 and the City was therefore entitled to a judgment as a matter of law. CP 136-137. The trial court denied the City's motion. *See* CP 136-137.

On November 7, 2011, at the close of the evidentiary portion of the trial, both the City and Ms. Hofstetter moved the trial court for a directed verdict. RP 1291, RP 1298. The Court denied Ms. Hofstetter's motion of 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 Ms. Hofstetter was a licensee. CP. 43. Finally, the jury found the City was not negligent. CP 43. Ms. Hofstetter now brings this appeal.

IV. ARGUMENT

A. THE DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS NOT REVIEWABLE, AND, NOTWITHSTANDING THE LACK OF REVIEWABILITY, THE DENIAL WAS APPROPRIATE BECAUSE THERE WAS A SUBSTANTIAL DISPUTE OVER THE FACTS.

1. Plaintiff is not entitled to review of summary judgment denial.

"A summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts were disputed and must be resolved by the factfinder." *Kaplan v. Northwestern Mutual Life Insurance Company*, 115 Wash.App. 791, 799, 65 P.3d 16, 20 (2003). A denial of summary judgment is subject to review only "if the parties dispute no issues of material fact and the decision on summary judgment turned solely on a substantive issue of law." *Kaplan* at 799, *quoting University Village Ltd. Partners v. King County*, 106 Wash.App. 321, 324, 23 P.3d 1090, *review denied*, 145 Wash.2d 1002 (2001). Thus, the case law in Washington only allows review of a denied summary

judgment motion "if the parties dispute ***no issues*** of fact and the decision on summary judgment turned ***solely*** on a substantive issue of law." *Kaplan* at 799. [emphasis added]. In *Kaplan*, this Court did accept review of a summary judgment denial because the summary judgment issue was solely in regard to the interpretation of an insurance policy, which the court noted was an established issue of law for the court to decide. *Id.* at 802-803.

Likewise, in *Welch v. Southland Corporation*, 134 Wn.2d 629, 632, 952 P.2d 162, 165 (1998), the case cited in Plaintiff's Brief, the Supreme Court did review a summary judgment denial because it turned solely on the interpretation of statute and not disputed facts. *Welch* is distinguishable because the Supreme Court took direct review of the case and stayed the trial court proceedings (it had not proceeded to trial yet). *Welch* at 631.

This concept was recently affirmed by Division II of the Court of Appeals in *Washburn v. City of Federal Way*, 169 Wash.App. 588, 283 P.3d 567, 570 (2012) ("the denial of the City's first motion for summary judgment did not turn solely on a substantive issue of law") and previous cases from this Court. *See Johnson v. Rothstein*, 52 Wash.App. 303, 759 P.2d 471 (1988); *Brothers v. Public School Employees of Washington*, 88

Wash.App. 398, 945 P.2d 208 (1997); and *University Village Ltd. Partners v. King County*, 106 Wash.App. 321, 23 P.3d 1090 (2003).

The denial of Plaintiff's motion for summary judgment is not reviewable by this court because the denial was based on genuine issues of material fact, not solely a question of law. Plaintiff's trial court brief, in fact, specifically argued that she was entitled to summary judgment because there were no disputed facts in regards to whether Plaintiff was allowed into the whirlpool area. CP 590-598. In response, the City proffered evidence supporting that she was allowed, and therefore disputed the material fact Plaintiff argued was "undisputed." CP 539-553. The trial court denied Plaintiff's motion for summary judgment because it unambiguously found there were disputed facts. January 14, 2011 Mot. Hr'g RP 22.

Plaintiff's argument to this court that it involved a question of law is revisionist history. Plaintiff points out that the court refused to "apply the principles of statutory construction to interpret the recreational use statute" but the reality is the Plaintiff did not ask the trial court to construe RCW 4.24.210 in regards to the "allowed" issue. She asked the court to find there were no facts supporting its application, which is far different from asking a court to state what the meaning of a statute is. CP 590-596. She asked the court to find there were no issues of fact to support the

notion that users were "allowed" in the whirlpool area (and thus triggering the application of RCW 4.24.210). The argument is clearly an argument based on the facts, not the law. This Court should therefore deny review.

Plaintiff makes additional arguments that are ancillary to appropriateness of summary judgment review. One is that Plaintiff was forced to "radically" adjust her trial tactics based on the trial court's denial of the summary judgment motion and therefore infers she was unfairly prejudiced in some form. Pl. Br. 26. This is a surprising argument to make since the Plaintiff clearly anticipated confronting recreational land use immunity from the day the lawsuit was filed by asserting she was injured by a known, dangerous, artificial, latent condition in her Complaint. CP 924-925. Furthermore, the parties argued a summary judgment motion brought by the City in the spring of 2009 that was solely about recreational immunity and Plaintiff's summary judgment motion was denied ten months before the trial commenced. CP 767-768, CP 814, CP 600, RP 1,CP 445-447. It is disingenuous to say the least that Plaintiff had to radically alter her trial strategy based on the trial court's ruling.

Plaintiff also alleges the City failed to respond to the argument about statutory construction as cited in *Mathews v. Elk Pioneer Days*, 64 Wash.App. 433, 824 P.2d 541 (1992). Pl. Br. 32. Plaintiff is wrong on this in two ways. First, Plaintiff made a statutory construction argument in

their motion for summary judgment based on the issue of whether "cliff jumping" was included in RCW 4.24.210 (not the "allowed" issue). CP 596-598. Plaintiff has waived this argument by not arguing it in her brief. *Kaplan*, 115 Wash.2d at 801 n.5. Second, the City did directly respond to the *Mathews* argument in its reply brief. CP 553.

Finally, Plaintiff argues the City argued to the trial court to give a liberal meaning to the term "allowed." Pl. Br. 31. But, the City did not argue for an "elastic" meaning of the word and instead argued the word should be given its plain meaning. CP 545-546. The City's argument in this regard is consistent with Washington law that courts derive legislative intent from the ordinary meaning of words used. *State v. Davis*, 144 Wn.2d 612, 617, 30 P.3d. 460, 462 (2001) (court gave plain meaning to term "artificial" under RCW 4.24.210); and *Tesoro Refining and Marketing Co. v. State Dept. of Revenue*, 164 Wn.2d 310, 317-18, 190 P.3d 28, 32 (2008).

2. Even If Reviewable, There Were Substantial Facts Showing Plaintiff Was Allowed Which Made Denial Of The Motion Appropriate.

Summary judgment should only be granted if the pleadings, depositions, answers to interrogatories and affidavits show no issue of material fact and that the moving party is entitled to judgment as a matter of law. *Kaplan* at 799. When reviewing an order of summary judgment,

the Court engages in the same inquiry as the trial court. *Van Scoik v. State,* 149 Wash.App. 328, 333, 203 P.3d 389, 390 (2009). The Court must consider all evidence and reasonable inferences therefrom in the light most favorable to the non-moving party. *Van Scoik* at 333.

Plaintiff's entire argument is based on the premise that the evidence was "undisputed" by the parties that park users were not allowed in the whirlpool area. Pl. Br. 32. This is an incredible argument to make based on the declarations submitted by the City that users were allowed in the Park. Evidence refuting Plaintiff's argument included a declaration from Marvin Harris which stated the intent of the "do not enter" sign was not to prevent jumping or swimming or to keep park users from swimming on a long term basis. CP 505-506 ¶ 7. The Harris Declaration also stated that on an annual basis there were thousands of visitors to the whirlpool from 2002-2005 and that the City **allowed** swimming in the whirlpool and there was no rule prohibiting it. CP 506 ¶10 [emphasis added]. The Harris Declaration also stated that the City generally discouraged the public from going off the formal trails through signs, and that the "do not enter" sign was meant to be a warning sign. CP 508-509 ¶ 11. The Harris Declaration acknowledged the whirlpool was open. CP 508-509 ¶ 11.

Consistent with Harris' Declaration, park employee James Luce's Declaration's stated, in pertinent part: the "do not enter" sign was not

placed to prevent swimming or jumping in the whirlpool; after the security patrol ended, public use of the whirlpool resumed; and the City allowed use of the whirlpool during 2005, including August of that year. CP 533-34 ¶¶ 3,4. City employee Clare Fogelsong's Declaration was also submitted and stated, in pertinent part: the "do not enter" sign at the whirlpool was not intended to prevent jumping or climbing in the area; and as early as the Fall of 1999, public use of the whirlpool resumed. CP 536-537 ¶¶ 7, 9.

Finally, the City also submitted deposition testimony from Plaintiff's own expert, Dr. Paul Green. CP 569, 578. Dr. Green was asked if, in his opinion, people were allowed in the whirlpool area and his response was "correct." CP 578. He was also asked if people were allowed to jump and use the random trails in the area and he responded "correct" to both questions. CP 578.

The evidence presented to the trial court, including statements from Plaintiff's own expert, contradicted Plaintiff's assertion that users were not allowed because of the sign. Based on the evidence from four witnesses that users were allowed, the trial court rightly denied the motion for summary judgment because there were disputed facts. Plaintiff's repeated argument that the facts were "undisputed" is difficult to understand given the obvious evidence against her position. Regardless,

while Plaintiff ignored all evidence contrary to her case in her Brief, the trial court did not and appropriately denied the motion based on the factual discrepancies.

B. Based On Substantial Evidence Users Were Allowed To Use The Whirlpool, The Court Appropriately Denied Plaintiff's Motion For A Judgment As A Matter Of Law At The Close Of Evidence.

Under CR 50, judgment as a matter of law is appropriate only when no competent and substantial evidence exists to support a verdict. *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208, 1212 (2009). In reviewing a ruling on a motion for judgment as a matter of law, the appellate court engages in the same inquiry as the trial court. *Albertson* at 538. One who challenges a judgment admits the truth of the opponent's evidence and all inferences which can reasonable be drawn from it. *Id.* at 537. The court must interpret the evidence "against the moving party and in a light most favorable to the opponent. *Id.* at 537-38.

A judgment as a matter of law "requires the court to conclude, as a matter of law, there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party." *Albertson* at 538. "The court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence." *Id.*

Review is de novo. *Weber Construction, Inc. v. County of Spokane*, 124 Wash.App. 29, 33, 98 P.3d 60, 62 (2004).

Plaintiff's motion for a judgment as a matter of law as to the recreational immunity issue is premised on the fact that the City employees who testified at trial agreed that the red "do not enter" sign was present at the whirlpool and that all the employees did not dispute what the sign said. CP 122-131. Plaintiff submits this alone is reason to grant a motion under CR 50. Plaintiff's argument fails because she ignores the rest of the evidence at trial regarding the sign and the rampant use at the whirlpool site. Plaintiff focuses on one piece of evidence and utterly ignores the rest of the testimony in the trial. Because there was an overwhelming amount of evidence indicating the public was allowed in the whirlpool area, the trial court appropriately denied the motion for judgment as a matter of law. This Court should affirm that decision.

There were several witnesses who testified that the public was allowed to use the whirlpool area. Park Operations Manager Marvin Harris testified multiple times throughout the trial that users were "allowed" and specifically used that term. RP 275, RP276, RP 1039, RP 1055, RP 1058, RP 1059, RP 1134, RP 1141-42. In fact, Plaintiff's counsel asked Harris whether the whirlpool was open for recreational use and he answered "It certainly was." RP 1055. He also stated, "in 2005 people

were allowed" in response to whether the area was open. RP 1058. He further testified the intent of the "do not enter" sign and the email he wrote to Richard Rothenbuehler was to warn, not prohibit, users. RP 1163. Lest there be any confusion about whether Harris testified users were allowed in the whirlpool, the trial court cleared this up at one point of the long trial: "He [Harris] said they were allowed to go there...He said it two or three times now." RP 277.

As if Harris' testimony was not sufficient enough, several parks' employees corroborated the testimony. Parks employee James Luce testified that he was not familiar with any rule or policy to exclude users from the whirlpool. RP 686-708. He also testified that after the initial closure after the explosion, whirlpool use was heavy and there were no efforts to exclude people from 2000-2005. RP 732. Similarly, Parks employees Wayne Carroll and Scott Zerba testified that there was no policy to exclude people from the whirlpool and that use of the area was heavy. RP 531-532. RP 602, RP 595, RP 601. Even Plaintiff's own expert, Dr. Paul Green, testified that the area was "heavily used" by Park visitors. RP 352, RP 368.

Given the amount of evidence that users were allowed, there are absolutely no grounds to find the Plaintiff was entitled to a directed verdict on this issue. This is especially true since the court and moving party are

required to accept the truth of the City's evidence. *Albertson* at 538. Further, the court is required to defer to the credibility and persuasiveness of the City's evidence. *Id.*

The sum of the testimony from the City witnesses was, the sign was in place and it did say "do not enter;" but the practice and policy at the time of the injury was that users were allowed in the area. Further, that had always been the case because the City was only concerned about environmental damaged from the explosion. The court was required to accept this as true and appropriately allowed this question to go to the jury. This is especially true, since the intent of the landowner controls in recreational land use immunity cases. *Gaeta v. Seattle City Light*, 603 Wash.App. 608-609, 774 P.2d 1255, 1258 (1989).

Finally, while Plaintiff attempted to "adopt by reference" the arguments made in her Brief regarding her summary judgment motion into the directed verdict portion, she failed to cite any authority in regards to standards this Court should apply in regards to a motion brought under CR 50. While CR 50 and CR 56 are undoubtedly similar, they are not the same and the case law logically treats them separately. RAP 10.3(a)(5) requires parties to support arguments with legal authority. *State v. Cox*, 109 Wash.App. 937, 943, 38 P.3d 371, 374 (2002). This Court is not required to review issues unsupported by authority and can consider the

issue waived. *Id.* Because Plaintiff failed to distinguish between the standards of CR 56 and CR 50, and left the Court and the City to inappropriately construct her argument and authority, the Court should deny review and treat the issue as waived.

C. THE JURY INSTRUCTIONS REGARDING RECREATIONAL LAND USE IMMUNITY WERE PROPER UNDER THE CIRCUMSTANCES, AND REGARDLESS, ANY ALLEGED ERROR WAS HARMLESS AND PLAINTIFF HAS FAILED TO PRESERVE REVIEW ON THIS ISSUE.

Plaintiff takes exception to certain jury instructions. Pl. Br. 34. Jury instructions are not erroneous if they permit each party to argue the theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. *Goodman v. Boeing Company*, 75 Wash.App. 60, 68, 877 P.2d 703, 708 (1994). Even if an instruction is misleading, and therefore erroneous, it will not require reversal unless prejudice is shown. *Goodman* at 68. Error is not prejudicial unless it affects or presumptively effects the outcome of the trial. *Id.* Further, the Court must examine the record to determine whether an instruction given on behalf of a party in whose favor the verdict was returned was prejudicial. *Blaney v. International Association of Machinists and Aerospace Workers, District No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757, 761 (2004). A harmless error is an error which is trivial, or formal, or

merely academic. *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

Plaintiff makes two arguments regarding the instructions. The first is that there was no evidence to support jury instruction 2, 8, 17 and 18, all of which spoke to recreational land use immunity. As discussed *supra*, there was ample evidence presented at trial to justify the instructions. Moreover, Plaintiff's entire argument is meritless because she cannot show prejudice because the jury *agreed* with her that the recreational land use immunity statute did not apply. Plaintiff spends several pages arguing the injustice of the recreational land use immunity question going to the jury, but only scantly mentions the irony of her whole appeal: the jury agreed with her.

Plaintiff cannot show any prejudice because, ultimately, this issue did not affect the final outcome of the case. *See Blaney* at 211. On appeal courts look at whether an issue was harmless error when the verdict was rendered in favor of the party submitting the instruction. *Id.* at 203. But in this case, the verdict about the application of the recreational land use immunity statute went *against* the City. As a matter of law, any error was therefore harmless.

Plaintiff offers only speculation, conjecture, and naked conclusions in her attempts to argue harm. Her allegations that the trial became

"confusing" and about "distracting" evidence are not supported by record. In fact, the jury's verdict is quite sensible, given the instructions from the trial court.[5]

Looking at the verdict form (which Plaintiff has not contested on appeal), the jury first found that Plaintiff was not allowed in the whirlpool area and therefore found RCW 4.24.210 inapplicable. CP 43. The jury was then asked to decide Plaintiff's status on the land: invitee or licensee. CP 43. An invitee was defined as person who is expressly or impliedly invited. CP 72. A licensee was defined as a person who goes upon the premises of another with permission or tolerance of the occupier of the premises. CP 75. The jury found Plaintiff was a licensee. CP 43.

Thus, the jury resolved the case rationally. They found Plaintiff was not allowed and because she was not allowed, she could not have been invited. But, because the evidence showed her presence was, at a minimum, tolerated on the land by the City, she fit the definition of licensee. The jury's sensible verdict, by itself, refutes the speculative arguments made by Plaintiff.

Plaintiff's second argument is that instruction 18 was a misstatement of the law because it omitted the word "conspicuous." But,

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[5] The City, as stated in the Assignments of Error and argued later in this brief, believes it was entitled to a judgment as a matter of law based on RCW 4.24.210 and maintains this despite the verdict rendered.

jury instructions are read as a whole, not in isolation. *See Goodman* at 68. Looking at the instructions as a whole, instruction 18 is not a misstatement of the law. The preceding instruction, number 17, was a general instruction that told the jury what recreational land use immunity was, and the language was taken directly from RCW 4.24.210. Jury instruction 18 discussed and defined the "four qualifiers" for when immunity is pierced and logically followed instruction 17. Read in conjunction with instruction 17, instruction 18 is not a misstatement of the law simply because it omitted the word conspicuous. The jury was clearly advised in jury instruction 17 that the warning needed to be conspicuous. CP 70. A reasonable juror would understand instruction 18 to be a related instruction dealing with a more specific definition of the qualifiers named in the statute and listed in instruction 17.

Plaintiff argues that without the word "conspicuous" the jury somehow became confused about how to use instruction 18 to determine the duty owed to a licensee. Pl. Br. 38, 41. But, Plaintiff's speculative argument is impossible because the verdict form, which Plaintiff did not object to, directed the jury to the appropriate duty instructions for a licensee. CP 48. It stated "if you determined that the Plaintiff was a licensee, apply instruction 22 and 23 to determine the City's duty." CP 47. Instructions 22 and 23 dealt with duties owed to licensees. CP 75, 76. The

jury could not have confused the duties or misapplied recreational land use instructions to duties owed to a licensee because the verdict form gave clear direction to the appropriate duty instructions.

The verdict form guided the jury through the appropriate analysis and led them to a logical conclusion (see argument *supra*). Plaintiff's arguments that they had a "formidable" task at closing argument and engaged in an "impossible" endeavor is not proof the instructions were misleading. The facts of the case were unique, and required both parties to discuss three different premises theories - recreational user, licensee, and invitee. Plaintiff was not alone in having to face this challenge. The fact that the jury returned a verdict in the City's favor does not mean the City did not face the same challenges or that the jury was somehow confused. Ultimately, the decision by the jury on recreational immunity did not affect the outcome of the trial, which Plaintiff must show to establish prejudice. Any alleged error was therefore harmless.

Furthermore, Plaintiff did not object to instruction number 18. Jury Instructions Mot. Hr'g RP 68-75, 156.[6] CR 51(f) requires the party objecting to an instruction to state distinctly the matter to which he objects and the grounds. *Walker v. State*, 121 Wn.2d 214, 217 848 P.2d 721, 723 (1993). "The pertinent inquiry on review is whether the exception was

[6] This is yet another Report of Proceedings from November 8, 2011 which memorializes the arguments on jury instructions.

sufficient to apprise the trial judge of the nature and substance of the objection." *Walker* at 217. If an exception is inadequate to apprise the judge of certain points of law those points will not be considered on appeal." *Id.*

Looking at the record, there is a discussion about the wording of the instruction and some changes are made at the request of Plaintiff's counsel but no objection, let alone a specific objection, is made. Jury Instruction Mot. Hr'g RP 68-75. Because Plaintiff did not object and preserve her appeal as to instruction number 18, this Court should decline to review, notwithstanding the instruction is otherwise proper.

Regarding the other three instructions named in a footnote in Plaintiff's Brief, the Court should decline review or dismiss any arguments made about those instructions. *See* Pl. Br. 34. Plaintiff's only argument on appeal is that these instructions are "inapplicable." Pl. Br. 34. Passing argument or scant treatment of an issue is "insufficient to merit judicial consideration on appeal." *Kaplan* at 801 n.5. Furthermore, while Plaintiff argues the instructions were "inapplicable" on appeal, the grounds for objection at the trial court were different. A reviewing court will not consider an assignment of error directed to an instruction unless within the scope of the appellant's exception in the trial court. *B.J. Lasser v.*

Grunbaum Bros. Furniture Co., 46 Wn.2d 408, 414, 281 P.2d 832, 835 (1955).

At the trial court, Plaintiff objected to instruction number 2 only because she disagreed with the treatment of contributory fault within the instruction. Jury Instruction Mot. Hr'g RP 3-27. Plaintiff took exception to instruction number 8 because it placed the burden to disapprove recreational land use immunity on the Plaintiff. Jury Instruction Mot. Hr'g RP 36. And, Plaintiff objected to instruction 17 because the instruction contained a verbatim recitation of RCW 4.24.210 and because the last paragraph was "argumentative." Jury Instruction Mot. Hr'g RP 53-54.

Plaintiff is now arguing different exceptions to the instructions than she did to the trial court. This Court should follow the well tested law in *B.J. Lasser* and decline to review the arguments made as to these instructions (to the extent Plaintiff made an argument). Regardless, the instructions were proper under the circumstances because they were supported by the evidence, allowed Plaintiff to argue her case, and did not misstate the law. Moreover, because the jury agreed with Plaintiff on the recreational land use immunity issue the instructions did not affect the trial verdict and there was thus no prejudice and any error was harmless.

D. THE REFUSAL TO GIVE PROPOSED INSTRUCTION NUMBER 38 WAS NOT ERROR, AND EVEN IF IT WAS, IT WAS HARMLESS BECAUSE THERE WAS NO PREJUDICE.

The refusal to give a jury instruction is reviewed under the abuse of discretion standard. *The Boeing Company v. Harker-Lott*, 93 Wash.App. 181, 186, 968 P.2d 14, 16 (1998). The trial court abuses its discretion if its decision was manifestly unreasonable, or its decision was exercised on untenable grounds, or for untenable reasons. *Harker-Lott*, 94 Wash.App at 186. An error in instructions requires reversal only if the error was prejudicial. *Id.* An error is prejudicial if the error effects the outcome of the trial. *Id.*

Furthermore, the appellate court will not consider review of a jury instruction if the basis for objection was different at the trial level. *B.J. Lasser* at 414, see also *Sulkosky v. Brisebois*, 49 Wn2d 273, 276, 742 P.2d 193, 195 (1987).

Plaintiff has presented a different objection to proposed instruction number 38 to this Court than she did to the trial court. At trial, Plaintiff argued the instruction was necessary to prove actual knowledge in regards to recreational land use immunity. Jury Instruction Mot. Hr'g RP 103-114. Plaintiff made several arguments to the trial court about proposed instruction number 38 but confined her arguments solely to recreational land use immunity. Jury Instruction Mot. Hr'g RP 103-114. Now Plaintiff is arguing the instruction should have been given to aid the Plaintiff in

arguing the duties owed to a licensee or invitee, which is an entirely different legal analysis. Pl. Br. 45, 47. Because Plaintiff has presented a new basis for objection in regards to proposed instruction 38, this Court should decline review on this issue.

If the Court is inclined to review, the review standard is abuse of discretion, not de novo (as Plaintiff suggests). The case Plaintiff relies on, *Braden v. Rees*, 5 Wash.App. 106, 485 P.2d 995 (1971) was actually about review of a new trial motion that was granted and not review of a refusal to give a jury instruction. (hence the other case relied by Plaintiff, *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996), which cited to *Braden*, may be questionable).

Regardless of the standard of review, error and prejudice must be shown. It is clear that the refusal to give the instruction was not an abuse of discretion: it was not unreasonable and not based on untenable grounds. The proposed instruction on agency was a modified version of WPI 50.01. The WPI introduction to chapter 50 states that the agency instruction 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. Thus, Plaintiff, who proposed using the instruction to establish knowledge, was offering the instruction for a purpose not intended by the WPI. The

trial court, then, was absolutely correct in refusing to give this instruction for the purpose stated by Plaintiff and even noted the offered purpose of the instruction (imputed knowledge) was not consistent with the intent of the instruction (vicarious liability). Jury Instruction Mot Hr'g RP 105. Because the trial court's rejection was based on sound reasoning and consistent with the WPI, it cannot be an abuse of discretion or error.

Additionally, the imputed knowledge issue was not a contested issue in the trial and the instruction was therefore unnecessary. The City did *not* argue the City as an entity did not have knowledge imputed from its employees. See RP 1362-1395 (City's closing argument).[7] The City did discuss the knowledge element of recreational land use immunity, but it was in passing and did not discuss lack of knowledge to the City as an entity. RP 1382.

Because the precise issue of imputed knowledge was not a contested issue in the trial and therefore unnecessary, this case is similar to the issues presented in *Harkler-Lott. In Harker-Lott*, the trial court refused to give a WPI instruction that advised the jury special consideration should be given to the attending physician's testimony. *Id.* at 186. The appellate court found the refusal to give the instruction was not an abuse

[7] The City did refute the allegation there were several prior accidents in the whirlpool area and argued that point at trial. RP 1391 But this knowledge or lack thereof was separate and apart from the imputed knowledge instruction proposed by Plaintiff.

of discretion because the argument could still be made to the jury and the instruction was not necessary for the appellant's theory of the case (even though the instruction could have been given). *Id.* at 187. Such is the case here. Because Plaintiff was not precluded from arguing her theory to the jury and because the instruction was not necessary, the refusal to give the instruction cannot be error.

This case is distinguishable from *Kimbro v. Atlantic Richfield Company*, 889 F.2d 869 (1989), the case cited by Plaintiff, because in that case there was evidence upper management did not know of the ADA accommodation issue (See *Kimbro* at 875) thus bringing forth contested facts on the issue. That precise issue (imputed knowledge) was not contested in this case, which means Plaintiff was able to effectively make the arguments to the jury.

Finally, whether or not this instruction was given had no effect on the trial. Plaintiff wanted the instruction to prove actual knowledge, which is necessary under the recreational land use immunity case law. The jury agreed with Plaintiff that recreational land use immunity did not apply. The lack of agency and imputed knowledge instruction thus could not have affected the verdict as it relates to Plaintiff's arguments because those issues were cast aside when the jury found the City did not have

recreational immunity. If it was error, it did not affect the verdict and therefore was harmless.

Further, Plaintiff's argument that she was prejudiced by not being able to argue knowledge in regards to licensees and invitees is not correct. Plaintiff was free to argue based on the evidence and from those standards, which involve known and should have known duties. CP 21, CP 23. This is especially true since, as Plaintiff points out, several witnesses, including park employees, testified at trial that the pathway in question was wet. Thus, the failure to give proposed instruction 38 did not prevent Plaintiff from presenting her theory of the case to the jury that the City knew or should have known about any alleged dangers based on the evidence presented.

V. THE CITY'S ARGUMENTS ON CROSS-APPEAL

The express purpose of the recreational use statute is to encourage landowners and others in lawful possession and control of land to make them available to the public for recreational purposes by limiting their liability towards persons entering thereon. RCW 4.24.200; *Riksem v. City of Seattle*, 47 Wash.App. 506, 509, 736 P:3d 275, 277 (1987). The recreational use statute changed the common law by altering an entrant's status from that of a trespasser, licensee, or invitee to a new statutory classification of recreational user. *State v. Davis*, 102 Wash.App. 177,

184, 6 P.3d 1191, 1195 (2000) *aff'd State v. Davis*, 144 Wn.2d 612, 30 P.3d 460 (2001). Under the recreational land use statute, landowners are immune from liability for allowing the property to be used without a fee, unless a plaintiff can establish that the injury causing condition falls within the statute's exception. RCW 4.24.210. The exception to immunity is for injuries caused by a known, dangerous, artificial, latent condition for which no conspicuous warning signs have been posted. RCW 4.24.210.

In order to overcome the immunity granted to landowners, a recreational user must demonstrate that each of the four elements is present in the injury-causing condition. The elements of "known, dangerous, artificial, and latent" modify "condition," rather than modifying one another. *State v. Davis*, 144 Wn.2d 612, 616, 30 P.3d 460, 462 (2001). If any of the four elements is lacking, a claim cannot survive summary judgment. *Davis* at 616.

For the purpose of determining whether the recreational land use statute applies, the Court is required to look at the intent of the landowner, rather than a particular user's intent. *Gaeta* at 608-609; *see also Cultee v. City of Tacoma*, 95 Wash.App. 505, 514, 977 P.2d 15, 21 (1999). If a landowner opens land for recreational use without a fee, the landowner has brought himself within the protection of the recreational land use statute. *Gaeta* at 609.

Whatcom Falls Park is a City park that is open for recreational use for which no fee is required. RP 1055. Among the uses it is open for is public viewing. RP 1055. It cannot be disputed the Park is open for recreational purposes and the City therefore has recreational immunity for injuries that happen within the Park. The City has assigned error to the denial of several dispositive motions in this case in regards to recreational land use immunity and advising the jury on the exceptions outlined in the statute.

A. THE DENIAL OF THE CITY'S MOTION FOR SUMMARY JUDGMENT, MOTION TO RECONSIDER, AND CR 50 MOTIONS WERE ERROR.[8]

1. Plaintiff was "allowed" in the Park and the Court erred in not granting summary judgment as a matter of law for the City.

The City's motion for summary judgment should be reviewed by this Court because it is based solely on an issue of law. While the order presented by Plaintiff indicated there were issues of fact, the City was asking for a ruling as a matter of law on the following issues: does the City, as a recreational landowner, lose recreational immunity by closing a portion of a park, and is the condition in this case latent and artificial as a

[8] The standard of review and related authority for this section is outlined in section IV (1) & (2) of this Brief and is, for the sake of redundancy, incorporated herein.

matter of law?[9] The trial court believed there were factual issues as to whether the immunity statute applied. CP 767-768. But as a matter of law, because the injury happened in a park, the City was entitled to recreational immunity. RP 1055, RP 745. This is especially true since the City Park Operations Manager stated, eight days before the injury, that the whirlpool was "part of the park." RP 168, RP 230, RP 231.

There is nothing in the law that says a landowner loses recreational immunity by limiting access to an area of park that is open to the public. Recently, the Supreme Court affirmed this principle by stating: **"Landowners who open their lands to the public may be able to restrict some access and still qualify for recreational use immunity..."** *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285 P.3d 860, 963 (2012). [emphasis added]. The City's argument is corroborated by the Supreme Court's reasoning in *Cregan* and is the only possible legal conclusion to be derived from the statute and premises liability law. This becomes apparent by analyzing the law regarding invitees, licensees, and Plaintiff's troubled argument that she was a public invitee. CP 72, 73 and 74.

[9]The City, again, maintains the area was not closed on the day in question and that Plaintiff was allowed. For purposes of the summary judgment motion the court would have to look at the evidence most favorable to Plaintiff, who asserted the area was closed but the sign was missing.

When Plaintiff entered the Park, her status on the land was a recreational user. *Davis*, 102 Wash.App at 184. While she disputes this, the recreational user status is unassailable law in Washington: the recreational land use law created a new statutory classification of "recreational user." *See Davis and Morgan v. United States*, 709 F.3d 580, 583 (1983). Plaintiff was in the Park and was a park user, not a public invitee. Nonetheless, Plaintiff argues that when she went into the whirlpool area her status as public invitee was extended and she was therefore an invitee in the whirlpool. CP 805. Plaintiff also simultaneously argues that, even though she was invited, she was not allowed under the recreational land use immunity statute. CP 802.

Plaintiff's argument fails, first, because she was never a public invitee. Under the law in Washington, once she was in the Park she was a recreational user. *See Davis, Cregan, Morgan supra*. Because she was a recreational user and never an invitee, an "extended invitation" into the whirlpool making her an invitee could not have occurred. Second, Plaintiff's argument is flawed because if she was an invitee, she was ***allowed*** to be on the land. If she is allowed, then recreational land use immunity applies. Even if Plaintiff was a licensee while in the whirlpool, she was ***allowed*** under the definition of licensee. CP 75, 76. Plaintiff is essentially arguing she was not allowed, but she was invited. Plaintiff's

argument is therefore circular and difficult to follow, and, in any event, leads to the conclusion she was allowed.

The only conclusion is that Plaintiff was a recreational user when she entered the park and when she went off the formal trail into the whirlpool area. Because under any scenario argued by Plaintiff she was allowed into the area, the City is entitled to recreational land use immunity. This is confirmed by the Supreme Court's recent ruling in *Cregan*. Plaintiff's interpretation of the statute is indeed absurd because it is contrary to the case law in Washington and would lead to this contradictory legal conclusion: an invitee is not allowed in an area even though there is an invitation. The ruling in *Cregan* and the City's argument that RCW 4.24.210 applies even to closed areas of a park also furthers public policy and the intent of the statute. Otherwise, recreational landowners would be punished by losing immunity if they sign an area the court views as being a prohibition, such as "keep off grass." Further, landowners would loses immunity if the land was closed for certain hours or periods of time (such as city parks that close at dusk).[10]

The denials of the City's summary judgment motion, motion to reconsider, motions for judgment as a matter of law at the close of

[10] *Preston v. Pierce Cy.*, 48 Wash.App. 887, 741 P.2d 71 (1987) supports this argument as the court analyzed RCW 4.24.210 for a piece of playground equipment that was painted with "keep off." The court did not find this sign forfeited the landowner's immunity.

Plaintiff's case and the close of evidence should all have been granted as a matter of law. Under any analysis and under all the evidence presented at the summary judgment hearings and at trial, the Plaintiff was allowed in the whirlpool area. The City was therefore entitled to recreational land use immunity.

2. It was error not to grant the City's summary judgment motion and motions for judgment as a matter of law as to the "latent' and "artificial" nature of the condition and therefore was error to instruct the jury in this regard.

If Plaintiff was allowed and the statute applies, the City is only liable for injuries caused by a known, dangerous, artificial, latent condition for which no conspicuous warning signs were posted. RCW 4.24.210. Given the evidence in the case, the City was entitled to recreational immunity as a matter of law because the condition that led to Plaintiff's injury was not latent or artificial. The trial court erred on this point of law in denying the City's dispositive motions in this case.

In order to overcome the immunity granted to landowners in RCW 4.24.210, a recreational user must demonstrate that each of the four elements in the statute - known, artificial, latent danger - is present in the injury-causing condition. *Davis*, 144 Wn.2d at 616. If any of the four elements is lacking, a claim cannot survive summary judgment. *Id.*

Whether a condition is latent or not depends on "whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it." *Swinehart v. City of Spokane*, 145 Wash.App. 836, 848, 187 P.3d 345, 351-52 (2008) *quoting Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 969 P.2d 75 (1998). Injuries that result from latent dangers presented by a patent condition are not actionable under RCW 4.24.210." *Swinehart* at 848.

A condition is not latent if the condition is there to be seen and a user can take "visual reference" of it. *Swinehart* at 851. Likewise, if a condition is in plain sight and can be examined, it is not latent. *Tennyson v. Plum Creek Lumber Co. LP*, 73 Wash.App. 550, 555, 872 P.2d 524, 527 (1994). The only notable published cases in Washington that have found a condition to be latent under RCW 4.24.210 involved a tree stump submerged in water, *Ravenscroft v. Washington Water Power Co.*, the edge of a dirt road covered and submerged in tidal water, *Cultee v. City of Tacoma*, and faulty bolts underneath a floating dock that were not visible to users, *Tabak v. State*, 73 Wash.App. 691, 870 P.2d 1014 (1994).

Thus, the only way a condition can be latent is if it is hidden or submerged, i.e. not in plain sight or the user is unable to take visual reference of it. The condition in this case, whether it be the cliff side or the alleged wet spot, was open and obvious. Almost every witness at trial

testified that the wetness was visible. PRP 12, 121, PRP 108, RP 931, RP 1000, RP 1093, RP 358, RP 70. Even Plaintiff testified the wet spot was visible and this point is conceded by Plaintiff in her brief. RP 757, Pl. Br. 21. The cliff side is also visible and in plain sight, which means it cannot possibly be considered latent. To that end, there was no testimony the cliff side was latent which is supported by the pictures depicting an obvious condition. See RP 1098, Ex. 2, 4, and 17. Because the record in this case shows the condition was not hidden and was in fact obvious, under the case law interpreting RCW 4.24.210, the condition cannot as a matter of law be considered latent.

The condition at issue was also not artificial as a matter of law. The term artificial in RCW 4.24.210 is given its ordinary meaning. *Davis* 144 Wn.2d at 617. *Davis*, which held that tire tracks leading to a sand dune drop-off did not alter the natural state of the condition, squarely extinguishes Plaintiff's argument that the condition in this case was artificial. The path was undisputedly created by foot traffic and is thus a social trail (not constructed by the City). PRP 11. The whirlpool, including the cliffs and social trails, is an undeveloped, natural environment. RP 294-95.

In spite of *State v. Davis*, Plaintiff argued to the trial court that the path was artificial because it was created by foot traffic. RP 1307. In

Davis, the Supreme Court found that a sand dune drop-off was a naturally occurring condition even though tire tracks led the plaintiff to the drop-off. 144 Wn.2d at 617. The *Davis Court* stated: "the external circumstance (the tire tracks) did not transform the natural state of the specific object causing Davis' injuries (the drop-off). The tracks and the drop-off are not so closely related that they cannot be encountered independently." *Id.* at 618.

The same is true in this case. The condition, whether it be the cliff side drop off or the wet spot, has not been altered from a natural state. The social trail, created by use, did not alter the state of the cliff. And, the wet spot on the trail can be encountered independently from the cliff. For purposes of the recreational land use immunity statute, and pursuant to *Davis*, as a matter of law the condition in this case was not artificial.

Because the condition was not latent and not artificial, and because users were allowed into the Park including the whirlpool, the trial court erred in denying the City's dispositive motions outlined above. The trial court therefore also erred in instructing the jury on the "four qualifiers" from RCW 4.24.210 because the evidence and law mandated a judgment as a matter of law for the City. CP 71.

B. THE COURT ERRED IN REFUSING TO GIVE CITY'S PROPOSED INSTRUCTION 29 REGARDING TRESPASSERS.

A trespasser is a person who enters or remains upon the premises of another without permission or invitation, express or implied. WPI 120.01.; CP 949. The duty owed to a trespasser is even less than a duty owed under the recreational land use immunity statute. *See Sikking v. National Railroad Passenger Corp.*, 52 Wash.App. 246, 249, 758 P.2d 1003 (1988).

The trial court abused its discretion by not including the City's proposed instruction number 29, which instructed the jury on the law and duty owed to trespassers. CP 949. The record in the case justified the trespasser instruction. Plaintiff's claim and theory was that users were not allowed into the whirlpool area. CP 802, Jury Instruction Hr'g RP 1308-1312. Plaintiff argued and presented evidence regarding the "do not enter" sign and asserted to the jury that Plaintiff was not allowed. Ex. 1. Accepting Plaintiff's argument, if she was not allowed, then she could only be a trespasser. If Plaintiff was not allowed, and Plaintiff's own arguments and presentation of evidence attempted to prove that, then the trial court should have instructed the jury on trespass.

Any other interpretation defies logic because if Plaintiff was not allowed she cannot be an invitee or a licensee. This is proven by the simple definitions of invitee and licensee. CP 72-74. Logically, if she was not allowed, she was a trespasser. If she was allowed, then she was a

recreational user. Thus as a matter of law, Plaintiff was either a recreational user or a trespasser.

The trial court's refusal to give proposed instruction 29 denied the City from arguing its theory of the case and also did not fully advise the jury on the applicable law. The refusal to give the instruction thus constitutes an abuse of discretion. Certainly if there was evidence and argument that Plaintiff was not allowed, the next logical instruction to give is a trespasser instruction. The trial court committed error in refusing the instruction.

VI. CONCLUSION

The City asks this Court to deny and dismiss Plaintiff's appeal and affirm the jury's verdict in this case for the reasons articulated above. If the Court, despite the law and record in this case, is inclined to rule in Plaintiff's favor, the City asks the Court to review and grant the City's cross appeal based on the reasons articulated above.

DATED this 19th day of November, 2012.

CITY OF BELLINGHAM

for WSBA #24364

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