WASHINGTON SUPREME COURT

Supreme Court No. 93060-1

(Court of Appeals No. 46875-1-II)

JOHN A. HIVELY,

Appellant,

v.

PORT OF SKAMANIA COUNTY, WASHINGTON, a Washington municipal corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Most public parks have public restrooms. Hively (the Petitioner and Plaintiff below) contends that if a park owner charges a fee for the use of any portion of the park property, and there is a free public restroom somewhere on the park property, immunity under Washington's Recreational Immunity Statute, RCW 4.24.210, is lost regardless of where the accident took place. Because such a construction of the statute would be contrary to established authority concerning the circumstances under which a fee vitiates immunity, and would also frustrate the public policy underlying statute, Hively's argument should be rejected, and his Petition for Review denied.

II. COUNTERSTATEMENT OF CASE

A. General Nature of Case and Identity of Parties

This is a premises liability case. It arises from a September 26, 2009, fall taken by John Hively (Appellant and Plaintiff below, referred to herein as "Hively") on a public path/trail owned by the Port of Skamania County (Respondent and Defendant below, referred to herein as "the Port").

B. Pertinent Facts

The Port, a Port District created and operated under RCW Title 53, is located on the north bank of the Columbia River, within the city limits of Stevenson. (*CP 51*) The Port owns and maintains approximately six acres

of park land, 1.5 miles of waterfront, and 1.1 miles of walking paths with interpretive signs and amenities. (*CP 52*) Three of the Port's park properties abut the north bank of the Columbia River: Bob's Beach, Teo Park and Stevenson Landing. (*Id.; CP 56-59*) A path or trail along the riverbank, built in 1997, connects the parks. (*CP 52, CP 74*)

The Bob's Beach, Teo Park and Stevenson Landing amenities include a restroom, (*CP 52, 57, 59, 68*) also built in 1997 by the same contractor who built the trail. *(CP 52)* This restroom is open to the public, although it is usually winterized and closed during the winter to prevent the pipes from freezing. (*Id.*) To access the restroom, it is not necessary to use the riverbank path/trail. *(CP 93, 97-98)* The main access to the restroom is a paved walkway that extends to the restroom from the asphalt-paved, Russell Street right-of-way that leads down the pier.*(Id.)*

Bob's Beach, Teo Park, Stevenson Landing, the Stevenson Landing Pier, and the waterfront path are all open to the public, free of charge. (*CP 53*) The Port does charge cruise ships a fee for mooring at the Pier. (*Id.*) In addition, the Port has, on occasion, rented Teo Park to wedding parties or organizations that put on civic festivals such as Blues, Brews and BBQ. (*Id.*) When the Port does that, the individual or entity to whom the Port rents Teo Park is entitled to its exclusive use. However, they are not entitled to exclusive use of the waterfront path or the restroom, which remain open to

the public. (*Id.*) Likewise, although cruise ship operators are required to pay a fee for docking at the Pier, that fee does not affect the ability of members of the public to use the pier for free. (*Id.*) Members of the public visiting the park property for picnicking or sightseeing often walk out onto the pier to view the scenery and/or take pictures. (*Id.*)

When the riverbank trail was built in 1997, it was surfaced with asphalt. (*CP 53, CP 70, CP 72*) Over time, however, the roots of trees near the riverbank caused the asphalt surface to heave up, break and become irregular in places. (*Id.*) Because of this, by the fall of 2009 the path had become more like a natural trail, consistent with rough and/or natural trails in other parts of the park. *(CP 53, CP 70, CP 72, CP 76, CP 78, CP 80, CP 82)*

The accident happened when Hively was visiting Stevenson from his home in Ohio. (*CP 33-40*) He and a companion went down to the pier, and Hively waited while his companion walked out onto the pier.(*CP28-32)* When his companion returned, both began walking east on the subject path/trail, (*CP 40*) with Hively in the lead. (*Id.*) As Hively was walking along the path, he stepped into or upon an irregularity in the surface of the path and fell. (*CP 41, CP 50*)

When Hively stepped into or upon the irregularity, his eyes were focused straight ahead. (*CP 41*) As he was walking down the path towards

the spot where the accident happened, Hively did not notice any irregularities in the asphalt. Likewise, he did not believe he noticed any unevenness in the pavement. (*CP 42, 43*)

Hively did not see the pavement irregularity before he fell, and he has no idea why. (*CP 46, 47*) His only explanation is that he "didn't expect to have a hazard in his way." (*CP 47*)

As of September 2009, even though portions of the riverbank trail, including the area where Hively fell, were rough and irregular, the Port did not consider these areas to be dangerous, since the condition was open and obvious and consistent with other rough or natural trails on Port park property. *(CP 54)* The Port's receipt of Hively's Notice of Claim in July of 2012 was its first notice of anyone tripping and falling on the waterfront trail. (*Id.*)

C. Pertinent Procedure

The trial court granted Summary Judgment in favor of the Port based on Washington's recreational use immunity statute, RCW 4.24.210. *(CP 134-137)* Although Hively argued issues of fact existed which precluded summary judgment in favor of the Port, he nevertheless crossed-moved for summary judgment.*(CP 144-166)* The court denied Hively's motion. *(CP 138)*

Hively appealed and on March 29, 2016. Division II of the Court of Appeals affirmed in Hively v. Port of Skamania County, Court of Appeals Division II 46875-1-11.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review

A summary judgment order is reviewed de novo, with the appellate court engaging in the same inquiry as the trial court. *Highline School District No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is proper if the records filed with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law" CR 56(c).

B. Operation of and policy behind RCW 4.24.210

Washington's recreational use immunity statute, RCW 4.24.210, states, in pertinent part:

> [A]ny public or private landowners . . . or others in lawful possession and control of any lands... who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, picnicking, swimming, hiking . . . winter or water sports, viewing or enjoying historical, archeological, scenic or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users. (emphasis added).

This statute creates an exception to the common law regarding premises liability, particularly with respect to the duty owed to public

invitees. *Camicia v. Howard S. Wright Construction Company*, 179 Wn.2d 684, 694, 317 P.3d 987 (2014). The legislative purpose behind RCW 4.24.210 is to immunize landowners who allow members of the public to use certain lands "for the purposes of outdoor recreation" from liability from most injuries. *Id.* The statute carves out an exception to the common law "public purpose" invitee doctrine by exempting a particular "public purpose"—outdoor recreation. *Id.* The legislature expressly intended that the statute would "encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability for persons entering thereon." *Id.* at 695, citing RCW 4.24.210. The statute applies to public parks and trails. *See* eg. *Jewels v. City of Bellingham*, 183 Wn. 2d 388, 353 P.3d 204 (2015); *VanDinter v. City of Kennewick*, 121 Wn. 2d. 38, 846, P.2d 522 (1993); *Swinehart v. City of Spokane*, 145 Wn. App. 836, 187, P.3d 345 (2008); *Riksem v. City of Seatte*, 47 Wn. App. 506, 736 P2d 275 (1987);

C. The Subject Trail Was Open to Members of the Public, For Recreational Purposes and No Fee of Any Kind Was Charged for the Public's Use of the Trail

As a threshold matter, for immunity under RCW 4.24.210 to apply, the land in question must be "(1) open to members of the public (2) for recreational purposes and (3) no fee of any kind was charged." *Camicia,*

179 Wn.2d at 695-96, citing *Cregan v. Fourth Mem'l Church*, 175 Wn.2d 279, 284, 285 P.3d 860 (2012). *See also*, *Jewels v. City of Bellingham*, 183 Wn.2d 388, 394, 353 P3d 204 (2015).

Here, the trail where the accident occurred was open to members of the public for recreational purposes. Further, no fee has ever been charged to members of the public for using path/trail. Thus, the basic requirements for application of the statute set forth in RCW 4.24.210(1) are met.

As he did before the trial court and Court of Appeals, in his Petition Hively persistently argues the statute does not apply because the Port charges a fee for specific uses of certain areas of park property, such as the moorage fee charged to cruise boat operators for docking at the Stevenson Landing Pier. This argument was properly rejected by the trial court and Court of Appeals.

A landowner may charge a fee for something other than use of the land, and still enjoy recreational use immunity. *Plano v. City of Renton*, 103 Wn. App. 910, 914, 14 P.3d 871 (2000), citing *Jones v. United States*, 693 F.2d 1299 (9th Cir. 1982) where the plaintiff injured herself in the Hurricane Ridge area of Olympic National Park while snow sledding on an inner tube she had rented from the park for a fee, the inner tube rental fee was not a fee charged for the entrance upon or use of the land on which the injury occurred).

Also, a landowner may charge a fee for public use of a portion of its recreational land without losing immunity for public use of the remainder. In *Plano* at 914, citing *Kleer v. United States*, 761 F.2d 1492 (11th Circ. 1985) where the plaintiff was injured while diving from a bridge in an undeveloped portion of the Ocala National Forest, recreational immunity statute applied despite the fact that the government charged fees in developed areas of the National Forest).

In *Plano*, *supra*, the injury occurred on a metal ramp leading to a boat moorage dock. The defendant, the City of Renton, charged fees to boaters using the moorage. Two metal ramps extending from the shore to the dock were the only means of access to the dock by someone on foot. Thus, anyone accessing or departing the dock on foot by necessity had to use the metal ramp. Because the court considered the metal ramp to be an "integral part" of the dock for which the City of Renton charged user fees, the court held the recreational immunity statute did not apply.

Hively strains to bring this case within the scope of *Plano* by attempting to tie the path/trail to the public restroom. The argument is that, because the restroom is "integral" to the public's use of the pier and/or Tao Park and because the portion of the path/trail where the accident occurred can be used to access the restroom, immunity does not apply. This argument should be rejected for a number of reasons. First, the accident did not occur

in the restroom. Second, the Port does not charge members of the public a fee to use the restroom. Third, persons using the restroom are not required to walk over that portion of that path/trail where the accident happened. Fourth, neither passengers who disembark a ferry docked at the pier or persons using Tao Park are required to use the restroom. Fifth, and finally, the logical extension of Hively's argument is that if some portion of recreational-use property, like a park, is occasionally rented out for a fee, and a restroom is located somewhere on the property that is open to all users of the entire property free of charge, the statute does not apply. That would be an absurd result. Statutes should be construed to avoid strained, absurd or unlikely consequences. *Ski Acres Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992).

In many ways this case is like *Kleer v. U.S.*, 761 F.2d 1492 (11th Cir. 1985), cited in *Plano, supra.* In *Kleer* the Court held that, under Florida's recreation use statute, immunity was not abrogated simply because the defendant charged a fee for entry to or use of one area of the property, stating:

> The statute seeks to effectuate its purpose by limiting the liability of those landowners who make their land available to the public without charge. Kleer argues that the intent of the exception found at subsection (2)(b) is to deny the statute's protection to landowners who either charge a fee for use, or conduct commercial activity on, any part of their land. Kleer overlooks two important points. First, the phrase

> "park area" denotes something less than the entire parcel of land. Second, under Kleer's construction of subsection (2)(b), a landowner could invoke the protection of the statute only if his entire parcel of land was dedicated to the public, without compensation. Clearly, this construction of the statute would not encourage landowners to make their land available to the public.
>
> Kleer's analysis of the statute is contrary both to the "plain meaning" of the language of the statute and to the express purpose of the statute." (emphasis added).

761 F.2d at 1495.

The instant case is also similar to *Zuk v. U.S.*, 698 F.Supp. 1577 (S.D. Fla. 1988). There, the plaintiff, a visitor to Fort Jefferson National Monument, was injured when he fell off an open arch while participating in a self-guided tour of the Fort property. No fees were charged for entrance or admission to Fort Jefferson. The plaintiff claimed Florida's recreational immunity statute did not apply, however, because the federal government charged a $50 fee for two-year special use permits used by charted sea planes as well as fishing and dive boats. Books, postcards and photographs were also sold on the premises by a non-profit cooperating organization, revenues of which went to the non-profit. The plaintiff argued, among other things, that these fees and commercial activities prevented application of Florida's recreational immunity statute. The court rejected this argument, stating:

> The clear intent of Florida statute section 375-251 is, by it terms, to encourage persons to make their land available to

> the public for outdoor recreational purposes by limiting the liability of those persons. (citation omitted). Plaintiff's construction of the statute is contrary to the very purpose of Florida statute section 371-251. *See Kleer*, 761 F.2d at 1495. In the present case, it is undisputed that no commercial activity took place in the distinct area of Fort Jefferson where plaintiff sustained injuries. As such, the "commercial activity" exception to the Florida recreational use statute does not apply to bar the statute's application in the instant case. *Kleer, supra.*
>
> Therefore, since no fee is charged by the government for entrance to or for use of the park and no "commercial activity" occurred in the distinct area where plaintiff was injured, Florida statute section 375.251 applies to bar the instant FTCA action.

698 F.Supp. at 1582.

Hively contends the Court of Appeals' Decision conflicts with *Plano, supra,* and *Voss v. United States,* 2006 WL 233746 (WD Wash). But the decision is consistent with *Plano* for the reasons set forth above.

As for *Voss,* in that case a family visited the Lava Canyon recreation site in the Gifford Pinchot National Forest. As a condition of entering the recreation site, the family was required to purchase a Northwest Forest Pass "Day Pass" and display the permit on their vehicle. Tragically, while using the recreation area, two members of the family fell into the muddy river and were swept to their deaths.

In the wrongful death case against it, the United States asserted immunity under RCW 4.24.210. The plaintiff argued the statute did not apply because the "Day Pass" was a fee charged for the public's use of the

property where the accident occurred. The United States countered that the "Day Pass" was a parking fee only, not a usage fee for the property, relying on a line of cases holding that parking fees do not abrogate recreational immunity.

The trial court denied that United States' motion for summary judgment, ruling an issue of fact existed as to whether the "Day Pass" was a parking fee or a fee for use of the property at issue.

In the instant case, again the Port does not charge a fee of any kind to members of the public for their use of the riverbank path/trail where the accident occurred. Accordingly, *Voss* is inapposite.

Finally, Hively argues the Court of Appeals decision creates confusion for landowners and the users of park property as to when immunity applies. To the contrary, the Court of Appeals decision clarifies that immunity is lost only when the area where the accident occurs is integral to the area of the property for which a fee is charged. The Court of Appeals Opinion also informs land owners and members of the public that immunity under the recreational use statute is not lost simply because portions of park property are occasionally rented out, and there is a free public restroom also located somewhere on park property.

D. Whether the Port Charged a Fee for Use of the Premises at Issue Was a Question for the Court

Hively continues to assert that whether the Port charged a fee for use of the path/trail at issue is a question of fact for a jury. On this point, Hively relies again on *Voss*, *supra*. That reliance is also misplaced. In *Voss*, the court simply held it could not resolve on summary judgment whether the "Day Pass" purchased by the family was a fee for use of the Lava Canyon Recreation site, or merely a parking fee. Here, there was no fee of any kind charged for use of the path/trail or the public restroom Hively attempts to tie to the areas where the Port sometimes charges a fee.

IV. CONCLUSION

Based on the foregoing argument and authorities, the Port respectfully submits that the Court of Appeals decision was correct, and requests that Hively's Petition for Review be denied.

DATED this 25 day of May, 2016.

EVANS, CRAVEN & LACKIE, P.S.

By _____
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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 26 day of May, 2016, the foregoing ANSWER TO PETITION FOR REVIEW was delivered to the following persons in the manner indicated:

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Shawna L Wade

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Cc: 'brad.andersen@landerholm.com'; Benjamin Yesland
Subject: RE: Hively v. Port of Skamania County -- SCT No. 93060-1

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Subject: Hively v. Port of Skamania County -- SCT No. 93060-1

Please see attached for filing Respondent's Answer to Petition for Review.

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