Court of Appeals No. 46875-1-II
Trial Court No. 12-2-00113-0

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

JOHN A. HIVELY,

Appellant,

v.

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

Respondent.

APPELLANT'S OPENING BRIEF

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On the 20th day of March, 2015, a copy of APPELLANT'S OPENING BRIEF was delivered via email and First Class United States Mail, postage prepaid, to the following person(s): 22

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I. INTRODUCTION

Bathrooms in public parks matter.[1] And paths, even those less traveled, to bathrooms matter.[2]

The 79-year old Plaintiff, John Hively suffered serious and permanent injuries when he tripped and fell over a latent pothole and other defects in a blacktopped public pathway that led to the public restrooms at the Port of Skamania's park.

The Port does not deny it failed to maintain the path. It instead seeks absolute immunity under Washington's recreational use statute (RCW 4.24.210(1)). But because it charged "a fee" to use the park, the Port is not entitled to immunity.

The trial court erred when it rejected Hively's motion for partial summary judgment and granted the Port immunity. The trial court also erred granting the Port's Motion for Summary Judgment by finding that the path was "sufficiently attenuated" from the fee generating areas of the park.

II. ASSIGNMENTS OF ERROR

A. The Trial Court erred denying Hively's Motion for Partial Summary Judgment

B. The Trial Court erred granting the Port's Motion for Summary Judgment

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[1] Just ask anyone with children

[2] *Robert Frost, The Road Not Taken*

C. The Trial Court erred by making findings of fact in a summary judgment proceeding.[3]

III. STATEMENT OF THE CASE

A. Hively trips and falls on a poorly maintained public path leading to the park's public restrooms.

On September 26, 2009, Hively, an Ohio resident, came to Stevenson, Washington with a friend to scatter his son's ashes[4] on the Columbia River at the Port's Waterfront Park (Teo Park). Hively arrived at the park to conduct his somber duty in the late afternoon.[5]

After parking in the Port's parking lot, Hively walked through the park down a wide paved area that ended at the pier/dock.[6] He then continued through the park by heading east along the river bank upon a paved path that led to the park's bathroom facilities.[7] Mr. Hively was looking to access the river to spread his son's ashes.[8]

After taking a few steps down the paved path, Mr. Hively suddenly tripped and fell onto the ground shattering his cheek bone and sustaining other serious injuries.[9] He had tripped over a pothole[10] or other wrinkle in the blacktop, caused by the roots of the nearby trees.[11]

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[3] Clerk's Papers 125 (summary judgment ruling) and Verbatim Report of Proceedings page 10 lines 19-25 and page 11, line 1.
[4] His son had tragically committed suicide a few weeks before this incident.
[5] CP 152 and 170
[6] CP 152 and 170
[7] CP 152, 170, and 171
[8] CP 152 and 171
[9] CP 152, 153, and 171
[10] Appendix 1
[11] CP 153 and 171

It is undisputed Hively tripped well before the steps leading to the park's restrooms.[12] In other words, the undisputed evidence shows that the area[13] where the accident occurred is on that portion of the path that the public, including those who pay to use the facilities (i.e., the park, the dock or other areas), would cross to access the public restrooms.[14]

Hively never noticed the potholes, or the uneven nature of the path, because he expected no hazards to be on the asphalt pathway.[15] He also testified his eyes must not have adjusted when he went from the bright sun into a shadow filled area where the potholes were practically hidden from view.[16]

It is also undisputed the Port maintained no signs to warn of the dangerous nature of the pathway, even though the Port was very well aware of the potholes.[17]

B. The Port is responsible for the waterfront park

The Port owns or is responsible for the "Stevenson Waterfront" park ("Waterfront Park"), which includes those areas it calls Teo Park, the Stevenson Cruise Ship Landing, Bob's Beach, East Point Kite Board Site, and other recreational and business sites.[18] The Waterfront Park is

[12] CP 153, 171, and 172
[13] Appendix 2
[14] CP 153, 171, and 172
[15] CP 153, 171, and 172
[16] CP 153, 171, and 172
[17] Specifically, Mr. McSherry, the Port's Manager, testified that he knew of the potholes and uneven nature of the path, and that the Port had not posted any warning or hazard signs at the time of Mr. Hively's fall." CP 153, 154, 171, 172, 180, 181, 215, 216, 217, and 218.
[18] CP 149, 150, 179, 183, and 184

comprised of Port owned or leased contiguous properties that are open to the public.[19] The Waterfront Park is served by various parking lots, trails and blacktopped paths that connect the various areas (i.e., Teo Park parking lots, the dock, and Bob's Beach).[20] The Waterfront Park also has commercial and industrial buildings on the east end of its property.[21]

The Waterfront Park is also served by a centrally located public restroom, which the Port constructed, manages, operates, and controls.[22] Two paths lead to the bathrooms, including the one at issue in this case.[23]

C. While generally open to the public, the Port charges fees for certain uses of the Waterfront property.

The Waterfront Park is generally open to the public without fee.[24] However, the Port's Manager, John McSherry, testified the Port charges mooring fees to those that moor their boats or ships[25] at the Stevenson Pier.[26] Those embarking or disembarking a boat or ship moored at the dock must use one of two paths, including the path where Hively was injured, to access the restrooms.[27]

The Manager further testified the Port regularly rents out exclusive use of Teo Park for events such as wedding parties, reunions, public

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[19] CP 150, 180, and 201
[20] CP 150, 180, and 201
[21] CP 150, 180, and 201
[22] CP 150, 180, and 202
[23] Appendix 3
[24] CP 150 and 179
[25] Various Columbia River cruise ships moor at the dock to allow its guests to debark to enjoy the local amenities.
[26] CP 150, 180, and 209
[27] CP 150 and 180

events, and other activities "for a fee."[28] And while this rent may not include exclusive use of the entire Waterfront property, Mr. McSherry repeatedly testified that the restrooms are considered an "integral part" of the entire Waterfront, including Stevenson Landing (i.e., the dock), Teo Park and Bob's Beach:

Q: So there's people that use Teo Park, right?

A: Yes.

Q: And you would agree that the bathroom is a key part of the people's ability – or amenities of Teo Park?

A: Yes.[29]

Q: So the bathrooms are kind of an integral part of people using Bob's Beach; right?

A: Of people using the whole waterfront.[30]

Q: Do you believe that the bathrooms are an integral part or an important amenity of the Stevenson Landing?

A: I think the bathrooms are an important part of all of the recreational activities that occur on the waterfront.[31]

The Manager further admitted there are directional signs to the bathrooms for those using the Park or dock—including those paying customers.[32] This includes the path where Hively was injured.

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[28] CP 150, 151, 180, and 208
[29] CP 151, 180, and 204
[30] CP 151, 180, and 208
[31] CP 151, 180, and 213
[32] CP 151, 180, and 204

Mr. McSherry also testified that, while the bathrooms are closed to the public during the winter seasons (November through May), the Port will, on a case by case basis, open the bathrooms to those **renting** the Waterfront Park.[33] This shows that even the Port believes the restrooms are an "integral" facility for those who are charged a fee to use the property.[34]

D. Procedural history and dismissal of Mr. Hively's case.

Hively sued Skamania County for negligence.[35] The Port claimed immunity under RCW 4.24.210.[36] Both sides moved for summary judgment on whether the Port was entitled to immunity under the statute.[37]

The court denied Hively's Motion for Partial Summary Judgment but granted the Port's Motion.[38] In announcing his decision, the judge "found" that because the restrooms could be reached by another path, and because the restrooms were "sufficiently attenuated" from the fee generating areas, the Port was entitled to absolute immunity.[39] The court also determined the pothole causing Mr. Hively's fall was not latent.[40]

The court denied Hively's Motion for Reconsideration.[41] This resulted in the court dismissing Hively's lawsuit.[42]

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[33] CP 151, 152, 180, 205, 206, and 207
[34] CP 152, 180, and 213
[35] CP 001-010
[36] CP 011-013
[37] CP 014, 015, 144, 145, and 146
[38] CP 125
[39] Verbatim Report of Proceedings page 9 line 2 and page 10 lines 23-24 ("My finding is that the restroom can be reached by other access routes.")
[40] Verbatim Report of Proceedings pages 9-10
[41] CP 138
[42] CP 134-137

IV. ARGUMENTS

A. The Standard of review is *De Novo*.

An appellate court reviews grants of summary judgment de novo.[43] Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[44] When the facts are undisputed, immunity is a question of law for the court.[45] However, where material facts are disputed, a trial is needed to resolve the issue.[46]

In undertaking review, the appellate court must view all facts and inferences in the light most favorable to the non-moving party, which is the Appellant/Plaintiff Mr. Hively in this case.[47] It is therefore inappropriate for a trial court to make any findings of fact when granting or denying summary judgment.[48]

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[43] *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008)
[44] *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 98-99, 249 P.3d 607 (2011)
[45] *Beebe v. Moses*, 113 Wn. App. 464, 467, 54 P.3d 188 (2002) and *Botka v. Estate of Hoerr*, 105 Wn. App. 974, 983, 21 P.3d 723 (2001)
[46] *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014)
[47] *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004)
[48] *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.3d 863 (1991)

B. Washington's recreational immunity statute only applies to those property owners who don't charge a "fee of any kind."

The statute provides immunity for landowners, for unintentional injuries to users of recreational lands made available to the public for recreational use without charging a fee "of any kind" for the use of such lands or water areas:

> Except as otherwise provided in subsection (3) of this section, any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other non-motorized wheel-based activities, hang gliding, paragliding, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

Thus, to be granted immunity under RCW § 4.24.210(1), the Port must prove the Waterfront Park (1) was open to members of the public, (2)

for recreational purposes, and (3) the Port does not charge a "fee of any kind" to use its property.

Hively concedes items 1 and 2. However, because it charges a fee to some who use the Park, the Port is not entitled to immunity.

1. The Legislature enacted Wash. Rev. Code § 4.24.210 to encourage private and public landowners to open their lands for recreational purposes.

The Legislature passed the recreational immunity statute to encourage landowners to open their land for recreational use.[49] In doing so, the legislature carved out a limited exception to the common law "public purpose" invitee liability doctrine[50] by exempting outdoor recreation users from those to whom a duty was owed.[51] The legislature 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 toward persons entering thereon."[52] The common law duty owed to public

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[49] RCW 4.24.200

[50] Under Washington's common law, a landowner's duty of care to persons on the land is governed by the entrant's common law status as an invitee, licensee or trespasser. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994) and *Ertl v. Parks & Recreation Comm'n*, 76 Wn. App. 110, 113, 882 P.2d 1185 (1994). Generally, a landowner owes trespassers and licensees only the duty to refrain from willfully or wantonly injuring them, whereas to invitees the landowner owes an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition. *Ertl*, 76 Wn. App. at 113 and *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41-42, 846 P.2d 522 (1993). In regard to invitees, this includes an affirmative duty to inspect the premises and discover dangerous conditions. *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001).

[51] *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 695, 317 P.3d 987 (2014)

[52] RCW 4.24.200 (statement of purpose)

invitees would not apply to those property owners who charged no fees to the users.

2. The legislature did not intend to provide immunity to those property owners who charge a "fee of any kind"—those property owners are still subject to the common law duties owed to an invitee.

However, the legislature also made clear its intent for this immunity to be limited to those landowners that **did not** charge a "fee of any kind" for the use of their property.[53] In creating this exception to the exception, the legislature recognized that landowners charging fees should be held to the common law's duty of care.[54] A landowner that charges a fee to any user must treat all persons entering upon the land as invitees.[55] This rule applies whether the particular person that suffered the injury paid or not.[56]

In summary, the legislature only intended to relieve those landowners from common law liability who allow free access to their lands for recreational purposes. The legislature, however, did not intend to grant immunity to those property owners who actually receive some economic benefit from those who enter their property ("invitees"). This is true regardless of whether the particular injured party had to pay the fee or

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[53] RCW 4.24.210

[54] For an in-depth discussion regarding the status (invitee, a licensee, or a trespasser) of a plaintiff, please see CP 156.

[55] An invitee is owed the duty of reasonable care to prepare and make the premises safe, and landowners further owe invitees an affirmative duty to discover dangerous conditions. Thus, the duties owed to an invitee are different than those owed to a licensee. *Mucsi v. Graoch Assocs. P'ship # 12*, 144 Wn.2d 847, 31 P.3d 684 (2001)

[56] *Plano v. City of Renton,* 103 Wash. App. 910, 914, 14 P.3d 871 (2000)

not. Perhaps the legislature envisioned that those who charge fees should use at least a portion of the revenue to maintain their property in a reasonably safe condition.

3. Washington's Recreational Use Statute must be construed narrowly because it is in derogation of common law.

Washington courts have determined that because **immunity is not favored in the law,** statutes that grant immunity should be narrowly construed.[57] And so no intent to change the common law will be found unless it appears with clarity.[58] In addition, because recreational use immunity is an affirmative defense, the landowner must carry the burden of proving entitlement under the statute.[59]

C. Because the Port charged a fee to at least some of those who used the Waterfront Property, it is not entitled to immunity under the recreational use statute.

The parties and the trial court agreed that the Washington Court of Appeals decision in *Plano v. City of Renton*[60] governs the outcome in this case. But they disagree on how to apply that ruling to the facts here.

In *Plano*, the plaintiff suffered injuries when she slipped and fell on a public ramp that led to a moorage dock at a public park owned by the City of Renton. It was undisputed that, when the plaintiff fell, she had not paid, nor was she required to pay, any fee to be on the City's property. It

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[57] *Tennyson v. Plum Creek Timber Co.*, 73 Wash. App. 550, 557, 872 P.2d 524 (1994)
[58] *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980)
[59] *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014)
[60] 103 Wash. App. 910, 14 P.3d 871 (2000)

was also undisputed that the City charged no fee to enter the park, to use most of the park's facilities, or to enter or walk on the ramp where the plaintiff was injured. In other words, the area where the plaintiff was injured was open to the public and that the plaintiff was simply a non-paying member of the public when she was injured.

However, the City charged a fee for certain users of the public dock —those that moored their boats overnight. Day users were not charged a fee and it was undisputed that no fee was charged for the public to use the ramp or park. But because it found the ramp was a "necessary and integral part" of the dock, the court concluded that, while the particular plaintiff was merely a non-paying member of the public, the City was not entitled to statutory immunity. Also key, at least for the case at hand, is that the City of Renton has two separate ramps that led to the dock:

> Renton charges a fee for the use of the particular area where *Plano's* injury occurred--the ramp leading to the dock. But the metal ramp where *Plano* fell is a necessary and integral part of the moorage. The reason why the two ramps and the connecting gangways exist is to provide access to the floating dock, a fee-generating portion of the park. These facts establish that the ramp where the injury occurred is in the recreational area for use of which Renton charges a fee.[61]

The undisputed facts show that Mr. Hively was injured on one of two paths that lead to the public restrooms. The Port admits the restrooms, and the paths leading to the restrooms, are an "integral part" of

[61] *Plano*, 103 Wash. App. 910, 915

the Port's property, including those areas (i.e., Teo Park and the dock) for which the Port charges a fee. [62] Therefore, as in *Plano*, the bathroom facilities, and the pathways leading to them were an integral part of the park and the dock. You can't have a park without bathrooms.

Since the Port charges a fee to use the Park and the dock, and because the bathrooms, and the paths leading to the bathrooms, are, by the Port's own admission, an integral part of the fee generating areas of the Port's Waterfront Park, the Port is not entitled to immunity under *Plano.*

D. The Trial Court erred in granting the Port's Motion for Summary Judgment.

Because it is undisputed that (1) the Port charges a fee to use portions of its Waterfront Park, (2) Hively was injured on one of two paths that lead to the only restroom facility within the Park and (3) the Port admits that the restroom facilities are "integral" parts of the fee generating portions of the Park, the court should have granted Hively's Motion for Partial Summary Judgment.

However, at minimum, the court should have denied the Port's Motion for Summary Judgment because there was a material question of fact regarding whether the bathroom facility was an integral part of the fee generating areas.

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[62] Perhaps most telling is Mr. McSherry's admission that, when the Port rents out Teo Park for a fee, the Port expects those users to be able to access the restrooms. He also admits the Port will open those restrooms to paid patrons even during times (winter season) when the facilities are closed for the winter. CP 151, 152, 180, 205, 206, and 207.

1. Material questions of fact exist whether the bathrooms are a necessary and integral part of the Port's fee generating areas.

Trial courts cannot make findings of fact when granting summary judgment.[63] On the issue of whether the bathroom facilities, and the path leading to them, were integral parts of Teo Park or the dock, the trial court stated:

> "My position is -- viewing the file, and all the declarations, and so forth, is that it is not undisputed that there's only one way to get to the restroom and that that trail has to be used. **My finding** is that the restroom can be reached by other access routes."[64]

The court also found that the bathrooms were "sufficiently attenuated" from the fee generating portions of the park.

Not only did the trial court disregard the undisputed fact that the bathrooms are an integral part of the fee generating areas of the Port, it found that one access route was used more than the other. These are, at minimum, questions of fact.

As analyzed above, the plaintiff in *Plano* had the option of taking one of two gangways to the moorage. But the *Plano* court made no distinction between each gangway nor made any findings that one plank was used more than another.

Similarly, the bathroom facilities here can be accessed by one of two routes. Just because one route is less travelled does not change the

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[63] "Findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court." *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991)

[64] Verbatim Report of Proceedings page 10 lines 19-24

analysis. Because the Port used its Park, at least in part, to generate fees, the law imposes on the Port the duty to protect all of its users, regardless of whether they paid a fee or not. Because the underlying policy is for property owners to make their properties reasonably safe, it does not matter that the person injured was not required to pay a fee.[65]

If left in-tact, the trial court's decision would lead to an absurd result. If a landowner could pick and choose its immunity by asserting that one pathway is more important than another, even though both serve the same purpose, then what's the purpose of having an exception to immunity?

The legislature intended to encourage landowners to provide citizens with **free** access to recreational activities on lands. The legislature did not adopt the statute for the courts and landowners to perform linguistic gymnastics to avoid liability. The moment a landowner charges a fee, "of any kind," to patrons, the law will require the landowner to meet their common law duties. This is especially true when you consider that immunity statutes are to be strictly construed.

The trial court also erred by making a finding of fact that "[t]he path walkway is **sufficiently attenuated**, in my view.[66] Whether the path was or was not "sufficiently" attached to the fee generating parts of the property is, at minimum, a question of fact for a jury to decide.

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[65] *Plano,* 103 Wash. App. 114

[66] Verbatim Report of Proceedings page 9 lines 2-3

Therefore, Mr. Hively submits that the trial court erred in finding that the pathway where Mr. Hively was injured did not exist to provide access to the Port's fee generating areas.

2. *Voss v. United States*[67] supports Mr. Hively's position that questions of fact exist.

In *Voss*, four members of a family traveled to the Gifford Pinchot National Forest on vacation. After parking their car at the parking lot, **and not leaving the required $5.00 fee,** the family walked about a half-mile from the picnic area down a trail to the banks of the Muddy River. While there, one of the minor children slipped and fell into the river. His father jumped in to save his son, but both tragically fell to their deaths over a downstream waterfall. The family sued the Forest Service for negligence.

The US government filed for summary judgment claiming immunity under Washington's recreational use statute. The plaintiff argued that because the government charged a fee, the statute did not apply.

The court denied the motion because it could not determine whether the $5.00 fee -- which the family did not pay-- was a fee to park the vehicle or was intended to cover the area where the accident occurred. The court therefore denied the government's motion for summary judgment and ruled that the question of whether the fee was for use of the

[67] *Voss v. United States*, 2006 U.S. Dist. LEXIS 6024 (U.S. District Court for the Western District of Washington)

portion of the land where the father and son died, was a question of fact for the jury to decide.

Similarly, the Port charges a fee to those who wish to have exclusive use of Teo Park. Using Teo Park includes the use of the bathroom facilities. Moreover, those who embark and debark boats moored at the dock also have access to the restroom facilities.

At minimum, the question of whether the bathroom facilities are an integral part of Teo Park or the dock is a question of fact.

E. The Superior Court erred by finding that the pothole Mr. Hively tripped over was "latent" because issues of fact exist whether the pothole was (1) known (2) dangerous (3) artificial and (4) latent condition.

Even if this Court affirms the Superior Court's decision that the Port did not "charge a fee of any kind," the **Port must still prove**[68] that the condition which caused the injury does not fall under RCW 4.24.210(4)(a), which provides:

"Nothing in this section shall prevent the liability of a landowner or others in possession and control for injuries sustained by reason of a **known, dangerous artificial latent condition** for which warning signs have not been conspicuously posted."

No one disputes the Port failed to have warning signs at the time of Mr. Hively's injuries.[69] There is also no dispute that the paved pathway was comprised of artificial material or that a jury could find that the

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[68] *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014)
[69] Signs and barricades were installed after Mr. Hively's injuries.

condition was dangerous. This leaves only the issue of whether the pothole and wrinkles in the blacktop were readily apparent.

The trial court found the pothole was not latent.[70] This was an improper finding of fact that should not have been resolved through summary judgment.

The Washington Supreme Court has held that the "condition itself, not the danger it poses, must be latent."[71] A condition is "latent," if it is "not readily apparent to the recreational user."[72] Identifying the condition that caused the injury is a factual determination.[73] Whether a condition is patent (obvious) or latent (not readily apparently) is also generally a question of fact.[74]

To illustrate, in *Ravenscroft*, the boater was severely injured when his boat struck a partially submerged stump. The specific object causing the injury in the *Ravenscroft* case was a tree stump. But the Court stated that the stump must be viewed in relation to other external circumstances, such as the location of the stump in the water channel and the water level, and when considering whether the "condition" was known dangerous artificial and latent. On the latency issue, the Court ruled that the record

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[70] Verbatim Report of Proceedings page 9 lines 16-23 ("In this case, the offending pothole was neither hidden, partially hidden, or partially visible as in *Ravenscroft*. It was there for anyone who looked down at the path. It was readily apparent. So the fact that the Plaintiff himself failed to see it is not dispositive. Mr. Hively's failure to see or discover the defect in the trail has no bearing on whether the condition is latent. Likewise, the argument that a recreational user walking from a lighted area to a shaded one and failing to make the appropriate adjustments fails for the same reason.")

[71] *Ravenscroft v. Water Power Co.*, 136 Wn.2d 911, 924, 969 P.2d 75 (1998)

[72] *Van Dinter*, 121 Wn.2d at 45

[73] *Id.*

[74] *Tabak v. State*, 73 Wn. App. 691, 698, 870 P.2d 1014 (1994)

did not support a conclusion that the submerged stumps near the middle of the channel were obvious or visible as a matter of law. Whether the particular condition was latent was one of fact and, therefore, the Court ruled that an order of summary judgment was not appropriate on that issue.[75]

Likewise, in *Cultee*,[76] a five-year-old girl drowned while riding her bike on a ranch owned by the City of Tacoma. The girl and her cousins were riding their bikes along one of the elevated roads on the ranch property. The girl fell of the edge of the road into several feet of water and drowned. The City contended that the condition that caused the girl's death was merely water on the road and this condition was not latent. The plaintiff responded by arguing that the condition which resulted in the girl's death was the muddy water on the road, hiding the eroded road edge and steep drop off into deep adjacent water, in combination with deterioration of the raised road.

The Court disagreed with the City, and found that an issue of fact existed on whether the condition was latent existed. The Court also stated that a factual issue remained on whether the general class of users would have seen the edge of the road given that it was eroded and covered by muddy waters.[77]

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[75] *Ravenscroft*, 136 Wn.2d at 926
[76] *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999)
[77] *Cultee*, 95 Wn. App. at 516-523

Similarly in our case, the question of whether or not the condition that caused Mr. Hively to fall---the submerged pothole---was latent, is a question of fact. Mr. Hively stated he did not see the condition until after he fell. He was going from a bright area into a shaded area and that his eyes had not adjusted for the darkness. Mr. Hively also stated that he did not expect to encounter any hazards or dangers because he was walking on a paved path.

Similar to the facts in *Cultee* and *Ravenscroft*, the pothole and uneven nature of the paved path were not obvious or readily apparent under the circumstances. Reasonable minds could differ on the issue and therefore summary judgment was not appropriate.

V. CONCLUSION

The Port earns fees from its Waterfront Park. The law presumes, therefore, that the Port will use those fees to make its property safe for those that use the property. The Port is therefore not entitled to immunity under the statute.

At minimum, the question of whether the bathrooms, and the paths that lead to them, are an "integral part" of the Park are questions of fact for a jury to decide.

Hively therefore requests this Court reverse the trial court and grant his Motion for Partial Summary Judgment. In the alternative, Hively

requests that the Court overturn the trial court's decision and allow a trier of fact to decide the issues.

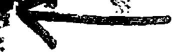
DATED this 20th day of March, 2015.

Respectfully Submitted,

LANDERHOLM, P.S.

s/s Bradley W. Andersen
BRADLEY W. ANDERSEN, WSBA No. 20640
Of Attorneys for Appellant John Hively

Appendix 1



Appendix 2

Appendix 3

STATE OF WASHINGTON)
) ss.
County of Clark)

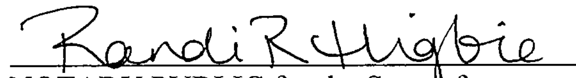
I, Melinda Bruzzone, being first duly sworn on oath, depose and state that I am now and at all times herein mentioned was, a citizen of the United States, a resident of the State of Washington, and over the age of 21 years.

On the 20th day of March, 2015, a copy of **APPELLANT'S OPENING BRIEF** was delivered via email and First Class United States Mail, postage prepaid, to the following person(s):

Christopher J. Kerley
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave Ste 250
Spokane, WA 99201-0994

MELINDA BRUZZONE

SUBSCRIBED AND SWORN to before me this 20th day of March, 2015 by MELINDA BRUZZONE.



NOTARY PUBLIC for the State of Washington, Residing in the County of Clark.
My Commission Expires: 4|15|17

RANDI R. HIGBIE
NOTARY PUBLIC
STATE OF WASHINGTON
MY COMMISSION EXPIRES
April 15, 2017

LANDERHOLM PS

March 20, 2015 - 4:43 PM

Transmittal Letter

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