

68156-7

68156-7

No. 68156-7-1

**COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON**

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**Katti Hofstetter, Appellant**

**v.**

**City of Bellingham, Respondent**

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**BRIEF OF APPELLANT**

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**ORIGINAL**

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## I. INTRODUCTION

This appeal concerns an outdoor premises liability action brought by Katti Hofstetter against the City of Bellingham (City) seeking damages for catastrophic injuries she suffered in a popular municipal park. While walking up an undeveloped “social” trail located in the “whirlpool area” of Whatcom Falls Park, she slipped on a slick wet spot near the top of the trail and immediately lost her balance, causing her to fall backwards and sideways over the edge of a cliff. She dropped an estimated 25 to 30 feet to the rocks below, landing on her back. As a result, she suffered permanent spinal injuries and is now a paraplegic. These events occurred on August 3, 2005 when Katti was 16 years old.

The crux of plaintiff’s appeal is that the court twice erred in separate rulings that the City’s affirmative defense that it was immune from liability by virtue of the recreational use statute (“RUS”)<sup>1</sup> was an issue of fact to be determined by the jury. These errors enabled the City to present evidence at trial in support of recreational use immunity and to advocate this position during closing argument. The initial error was a ruling denying plaintiff’s pretrial motion for partial summary judgment

<sup>1</sup> See Appendix (A) at A1-A3 for the full texts of RCW 4.24.200-210.

seeking an order that, as a matter of law, the RUS had no applicability in this case. This motion was based on undisputed evidence that for a period beginning in 1999 and ending several years after the date plaintiff was injured, the City had continuously attempted, albeit often unsuccessfully, to exclude the public from a large portion of the park, including the whirlpool area, by posting numerous Do Not Enter signs.

As a result of this ruling, the plaintiff was effectively precluded from cogently presenting and arguing her theory of the case in that the trial became largely swallowed up by evidence relating to the issue as to whether the City “allowed” park visitors to engage in recreational activities in the whirlpool area. Subsequently, despite overwhelming undisputed evidence presented at trial that the area in which the plaintiff was injured was closed to the public, the court denied plaintiff’s motion for a directed verdict that the statute was inapplicable.

The inevitable result of both rulings was a set of jury instructions which were confusing, as well as inharmonious, and contained an instruction (no. 18) which, by itself, is a clear misstatement of the law, particularly when considered within the context of this case. (A13)

The plaintiff maintains, inter alia, that improperly instructing the jury that the plaintiff had the burden to prove that the RUS did not immunize the City from liability and that the City had no duty to post a

warning sign unless the condition that caused her injuries was known, dangerous, artificial and latent, was a prejudicial instruction which deprived her of her right to a fair trial. The argument below supports this conclusion notwithstanding that the jury, in effect, determined that the City was not entitled to recreational use immunity.

## II. ASSIGNMENTS OF ERROR

1. The court erred in denying plaintiff's pretrial motion for partial summary judgment striking the City's affirmative defense that it was entitled to recreational use immunity. CP at 921 ¶ F, 600-01, 445-47.

2. The court erred in denying the plaintiff's motion for a directed verdict regarding the recreational use statute. CP at 122-35; Verbatim Report of Proceedings (RP)<sup>2</sup> at 1295-97.

3. The court erred in refusing proposed Instruction 38. CP at 100 (A9).

### Issues Pertaining to the Assignments of Error

1. Does the recreational use statute afford a landowner immunity from liability for unintentional injuries which occur within an

<sup>2</sup> For reference purposes, "RP" refers to the proceedings reports prepared by reporter Rhonda Jensen, consisting of pages numbered 1-1443. These reports comprise the bulk of the trial testimony. "PRP" is intended to refer to what is entitled "Partial Verbatim Report of Proceedings" numbered 1-112, dated October 24, 2011 and prepared by reporter Margaret Watts. All other reports will be designated as RP with the appropriate dates noted.

area which the owner intended and attempted to prohibit the public from entering? (Assignments of Error 1 - 2)

2. What meaning should be ascribed to the word, “allow” as it appears in RCW 4.24.210? (Assignments of Error 1 - 2)

3. Is the court’s ruling denying plaintiff’s motion for partial summary judgment subject to review? (Assignment of Error 1)

4. Did the evidence presented at trial establish, as a matter of law, that there were any genuine issues of material fact as to whether the City allowed the public into the whirlpool area on the day the plaintiff was injured? (Assignment of Error 2)

5. If a defendant is permitted to present evidence in support of an affirmative defense which, as a matter of law, should have been stricken or dismissed, can such an error constitute prejudice to the plaintiff notwithstanding a jury verdict which, in effect, rejects the affirmative defense? (Assignments of Error 1 – 2)

6. Is instruction 18 a clear misstatement of the law? (Assignments of Error 1 – 2)

7. With respect to a premises liability action against a municipality, should the knowledge of the municipality’s employees about a dangerous condition be imputed to the municipality? (Assignment of Error 3)

8. Under what circumstances does instructional error result in prejudice? (Assignments of Error 1 & 2)

9. What is the appropriate standard of proof for determining whether the refusal to give a proposed jury instruction constitutes prejudicial error? (Assignment of Error 3)

### III. STATEMENT OF THE CASE

#### A. Procedural History

Complaint. On November 26, 2007 plaintiff Katti Hofstetter filed against the City of Bellingham a complaint which, in essence, amounted to a negligence claim alleging that the City was negligent in failing to post conspicuous signs warning her of the risk of a “known dangerous condition,” i.e. the trail from which she fell. CP at 923-25, ¶ 3.2.

Answer. The City denied that it failed to post conspicuous signs. CP at 920 ¶ 3.2. One of the City’s affirmative defenses, which became the primary focus of both pretrial proceedings and the trial, was that the City is “immune from liability based on the Recreational Use Statute, RCW 4.24.200-210.” CP at 921, ¶ “F”.

Plaintiff’s motion for partial summary judgment. On December 9, 2010 plaintiff filed a motion for partial summary judgment seeking an order striking the defendant’s affirmative defense alleging recreational use immunity under RCW 4.24.210. CP at 600-01. Plaintiff’s motion

was based on the grounds that it was undisputed that her injuries occurred within an area of the park that was closed to the public.

Among the documents identified by the court as having been considered before ultimately denying the motion (CP at 445-47) was a declaration, signed by Bellingham Parks and Recreation operations manager, Marvin Harris who had been the parks operation manager since 1997.<sup>3</sup> CP at 503-31; 446 ¶ 5. He described the June 10, 1999 Olympic Pipeline explosion and the ensuing response by various governmental entities, including the City. CP at 504-07. The resulting fire burned an estimated 26 acres of vegetation and mature forest within Whatcom Falls Park. CP at 504-05. This area and some contiguous areas within the park became known as the “burn zone”. CP at 505. In his declaration, Harris noted that although the whirlpool area [where the plaintiff was injured] had not been burned, the public was excluded due to concerns that petroleum contaminated groundwater from saturated soils was entering the area. CP at 505. To enforce the closure of the burn zone, the City placed numerous red-framed Do Not Enter signs at intervals along its

<sup>3</sup> For the sake of brevity, the Bellingham Parks & Recreation Department will be referred to as “Parks Department”. All references to “park employees” refer to employees of the Bellingham Parks and Recreation Department.

perimeter.<sup>4</sup> As can readily be seen in Ex. 20 (A15), the burn zone encompassed the whirlpool area and, according to Harris, the signs were posted to restrict “active use” within it. CP at 505.

Also attached to the Harris declaration was a copy of a July 26, 2005 email he received from the “Parks Specialist/Natural Resources” Richard Rothenbuhler inquiring about stolen pieces of cable. CP at 508, Exhibit “G”; 528 (A14). In his response, which was sent eight days before the plaintiff was injured, Harris replied, “I think we need to keep up signs indicating this is a burn area and people should stay out because of the dead trees.” CP at 528.

Plaintiff also submitted certain transcribed deposition testimony from Harris who begrudgingly admitted that if a person were on the other side of the Do Not Enter sign, he would be “violating it.” CP at 448-53. In her supportive memorandum (CP at 590-99) plaintiff cited decisional law holding that, because it is in derogation of common law, the recreational use statute must be strictly construed. CP at 595.

*Motion for directed verdict.* On November 7, 2011, after the presentation of evidence, the plaintiff filed a motion and memorandum for

<sup>4</sup> Ex. 20 (A15) indicates the boundary of the burn zone by a yellow line and also shows the general locations of the Do Not Enter signs. See Ex.17 which shows the location of the Do Not Enter sign above the whirlpool area.

a directed verdict seeking a ruling striking the City's recreational immunity defense. CP at 122-35. Plaintiff pointed out that no less than four city park employees had acknowledged at trial that if a person were to proceed past the sign, i.e. the Do Not Enter sign above the whirlpool area, he would be in an area where he was not supposed to be and/or in an area where he was not allowed. CP at 124 ¶ 11. In addition, it was noted that the word "allow" is susceptible to multiple definitions, and again the plaintiff attempted to alert the court, through citations to decisional law, that the Recreational Use Statute must be strictly construed. Further, it was emphasized that questions of statutory interpretation are questions of law, citing *Dot Foods, Inc. v. Washington Dep't of Revenue*, 166 Wn.2d, 912, 919, 215 P.3d 185 (2010). CP at 126-28.

In denying this motion, the trial judge remarked, "I think the way the statute is worded then creates a potential or the possibility for there to be a factual determination as to whether or not a person holds his property open for recreational use." RP at 1295. "We have a sign that is very specific in its language. However, we don't know and nobody has been able to testify whether it was there that day or not. Nobody noticed it.

Nobody remembers. We have absolutely no clarity on that point.”<sup>5</sup> RP at 1296. Although the court also stated that Harris had indicated by an email (Ex. 20, A15) that he believed the people should be allowed in the area (CP at 1296-97), the email contains no such statement.

Verdict & Judgment. On November 10, 2011 the jury, by a 10-2 vote, returned a “revised” verdict form<sup>6</sup> finding that the City was not negligent although the jury answered “no” to the special interrogatory asking, “At the time of Plaintiff’s accident, did the City of Bellingham allow the public to use the Whirlpool Falls area of Whatcom Falls Park for outdoor recreation?” CP at 42-45, A5-A8; RP at 1438-42. After the court denied plaintiff’s timely motion for an order vacating or setting aside the verdict (CP at 32-41, RP), judgment was entered in favor of the City on December 2, 2011. CP at 11-12.

## **B. Statement of Facts**

The facts set forth below are essentially undisputed and were all established through the evidence presented at trial.

Description of the Park and Cliff Jumping. Whatcom Falls Park is a 251 acre public park owned and operated by the City of Bellingham.

<sup>5</sup> It is the plaintiff’s position that whether the Do Not Enter sign was present or absent on the day she went to the whirlpool area is immaterial in regard to her respective motions for partial summary judgment and for a directed verdict.

<sup>6</sup> After deliberations had begun, the court amended the jury verdict form over the objection of the plaintiff. RP at 1400-37.

RP at 230-31. Most of the park consists of natural forest through which runs Whatcom Creek. Ex. 12. Near the middle of the park there is a small but turbulent waterfall known as the “whirlpool” which spills into a large pool. Situated on each side of the falls are vertical cliffs rising to a height of approximately 29 feet above the pool. RP at 155; Ex. 6 (A17). The falls, cliffs, surrounding banks and large pool comprise what is known, and referred to at trial, as the Whirlpool Falls area or simply “whirlpool area.” RP at 669. The steep banks rising up and away from the pool have the topographical effect of forming a modest canyon, shaped something like a bowl.<sup>7</sup> RP at 493, 547. Due to the characteristics of the hillside, the whirlpool area is virtually always wet. PRP at 7-8, 20-21.

At a point about midway into the forested area of the park, a person walking the main trail, after entering upon it from the parking lot, comes upon a maintained trail which can be taken to gain access to an area above the south cliff. Ex. 20 (A15). If one were to continue on the main trail, as

<sup>7</sup> The two cliffs as well as Whirlpool Falls and a portion of the pool below the cliffs are well depicted in Ex. 14 (A18), which also provides a sense of perspective of the height to which the cliffs rise. For the sake of clarity, the cliff located below the park’s main trail was referred to at trial as the “north cliff” or “north side cliff” and the opposite cliff, located directly across the creek, as the “south cliff” or “south side cliff”. The individual visible in the extreme upper left hand corner of Ex. 14 is standing close to the location where cliff jumping from the north cliff occurs and from where plaintiff jumped.

the plaintiff did on August 3, 2005, she would arrive at another maintained trail which leads down to a split rail fence situated a short distance up the bank from the top of the north cliff. Ex. 20 (A15).

For many years prior to August of 2005 and prior to the 1999 pipeline explosion, the whirlpool area has been the frequent scene during the summer of an activity, mostly by teenagers and people in their early 20's, known as cliff jumping, which occurs from both cliffs and entails leaping out from the relatively flat areas at the tops of the cliffs and dropping the 29 feet to the pool below. RP at 101, 155, 493, 650; PRP at 50-51, 95-99. The Marvin Harris videotaped interview, conducted shortly after plaintiff was injured, shows young people cliff jumping in the background.<sup>8</sup> Most of the cliff jumping occurs from the north cliff.<sup>9</sup> PRP 97-99.

The quickest route to return to the top of the north cliff after jumping is by means of a trail which runs diagonally across the face of the steep bank situated adjacent to the cliff. PRP at 21-22; Ex. 4 (A19). This particular trail, which is the one from which the plaintiff fell, was not built

<sup>8</sup> See Ex. 24.

<sup>9</sup> The north cliff jumping location is shown in Ex. 4 (A19), where the two boys are standing at the top (RP at 102) and in Ex. 6 (A17) where several young people are located. PRP at 54-55. The girl in the middle of the photograph which is Ex. 4 (A19) is ascending the trail from which the plaintiff fell.

by the Parks Department but, rather, is known as a “social trail” due to the fact that it has come into existence and been formed through repeated human pedestrian use. PRP at 105. It terminates at the top of the north cliff. Ex. 2 (A22) and Ex. 4 (A19). Park employees were aware that cliff jumpers used this diagonal trail to return from the pool to the top of the north cliff. RP at 496; PRP 104.

Brandon Stanley, who was a student at Western Washington University from 2001 through 2006, began visiting the whirlpool area one or two times per week in 2003 to watch the cliff jumping, which he found entertaining and interesting. PRP at 47, 49-50. He estimated that he had been in the whirlpool area on 75 occasions and had observed cliff jumping on approximately half of those occasions. PRP at 67-68. Due to his frequent and regular visits to the park, Stanley became especially familiar with the whirlpool area and observed the routes that persons engaged in cliff jumping would utilize to return to the top from the pool below. PRP at 51-52, 65. He testified that it was common for people to utilize the diagonal path. PRP at 68-69. He had also looked at the trail and observed, “it’s very narrow and the higher that you get up the more dangerous it actually seems to be. There’s tons of like loose dirt or kind of slippery mud and there’s a lot of vegetation there.” He recalled the foliage was present the evening the plaintiff fell. RP at 69-70.

Perhaps no person is more knowledgeable about the topography and characteristics of Whatcom Falls Park than Richard Rothenbuhler, who, as an employee of the Parks Department, had worked on the trail crew for many years leading up to his retirement in 2006. RP at 539-40. In his opinion, there is no easy way out of the whirlpool because “.... it’s steep all the way around. It’s a hole. It’s over an edge.” RP at 547. Because the trail curves slightly as it twists up the bank, the top of the very upper portion is not visible from the bottom. Ex. 8 (A20); RP at 373.

Along both sides of the upper portion of the trail there is considerable vegetation, which produces foliage during periods of warmer weather. Ex. 4 (A19), Ex. 9 (A21). As the trail rises it becomes somewhat steeper and narrower and angles closer to the edge of the cliff. Ex. 9 (A21); RP 373; PRP at 6, 69-70. However, the proximity of the upper portion of the trail to the edge of the cliff is not readily apparent as the edge is obscured by the foliage. Ex. 9 (A21), PRP at 7, RP at 183-84.

Surface water runs off the hillside down toward Whatcom Creek, including the whirlpool area. PRP at 8. In addition, there is underground seepage which occurs in the area and some of the water exits at the whirlpool area on a seam part way down the rock at an angle where the vegetation is growing and comes out “through any number of locations.”

PRP at 11-12. Rothenbuhler testified that, due to this seepage, the diagonal trail, which he referred to as a “path”, is always wet. PRP at 21.

For at least thirty years on the path leading to the top of the south cliff, the City maintained a conspicuous sign warning that a “fall, jump or dive may result in serious injury.” Ex. 11 (A23); RP at 197, 556-57; PRP at 101-02. A person approaching the jumping spot at the top of the south cliff would inevitably pass this sign. RP at 152, 198. This south side warning sign cannot be seen from the north cliff area so that someone who came directly to the north cliff area on the main trail from the parking lot would not see it. RP at 556.

Rothenbuhler had never seen the same sign or similar sign on the north side. RP 559. The City presented no evidence that a sign containing the same or a similar warning was ever posted in the vicinity of the north side cliff. RP at 650-51; PRP 101-02. The only sign Rothenbuhler ever saw on the north side of the whirlpool prior to August 3, 2005 was the Do Not Enter sign depicted in Ex. 1 (A16). PRP at 15.

On the basis of 911 dispatch records, Assistant Bellingham Fire Chief, Roger Chistensen, testified about numerous reported injury incidents and the specific dates on which Bellingham Fire Department emergency medical technicians (EMT’s) had responded to Whatcom Falls Park between 2001 and the date plaintiff was injured. It appeared that

most, if not all, of these incidents occurred in the whirlpool area.<sup>10</sup> RP at 68-76.

Despite these prior accidents, at the Parks Department monthly “safety meetings”, the topic of taking remedial action, such as posting warning signs, to reduce the risks attendant with the cliff jumping from the north cliff and with using the diagonal trail, was never discussed. RP at 515-17, 546, 652. These monthly meetings focused primarily on employee safety rather than public safety. PRP at 93-95.

The reason, as Rothenbuhler stated, for the City taking no action to post warning signs, making sure the existing signs were effective, marking an exit route or building an exit trail from the pool, was: “We did not want to lead people into and out of an area like that, and to build a trail and make it easier for it would just make our problem worse and we didn’t want to do that.” RP at 547.

One of the first and immediate actions taken after the 1999 Olympic pipeline explosion was to close the entire park. PRP at 26. Due to various concerns, including the continuing presence of hazardous petroleum derivatives, the City, prior to reopening portions of the park,

<sup>10</sup> The identities of those who had been injured were withheld on the grounds that disclosure would violate privacy (HIPPA) rights. The City was not required to produce park injury incident records prior to 2001 due to the burden of obtaining them in that the Fire Department’s record keeping system was not computerized until 2001. RP at 65; CP at 402-09.

cordoned off a large area referred to as the “burn zone”, from which the public was to be excluded. PRP at 29-30. In order to inform the public that the burn zone remained closed, numerous Do Not Enter signs were posted at intervals along its perimeter. RP at 92, 168, 520; PRP at 32-33. As noted, the whirlpool area, including the top of the north cliff from which cliff jumping occurred and the trail from which the plaintiff fell were inside the burn zone. RP at 521, 725-726; Ex. 20 (A15).

One of these Do Not Enter signs was placed directly above the whirlpool area at a location well above the top of the north cliff. RP at 658; Ex. 1 (A16). As can be seen in Exhibit 1, these signs informed the public that violation of the closure order was punishable by a fine not to exceed \$1,000 and or 90 days in jail.

It was understood by several Parks Department employees who testified at trial that the public was excluded from the burn zone. RP at 571-74; PRP at 31-32. The City did not dispute that physical entry into the burn zone was continuously prohibited up to and after the date the plaintiff was injured. PRP at 32-33. At least four park employees acknowledged that the whirlpool area was within the burn zone and the Do Not Enter signs were posted to make it clear to the public that entry into the burn zone was prohibited. RP at 163, 168, 231-33, 601, 734.

Retired Bellingham police officer David Wright is very familiar with the whirlpool area. RP at 89-102. On April 2, 2000 he wrote citations to persons he saw in the whirlpool area below the Do Not Enter sign, although ordinarily, if he saw people on the other side of the Do Not Enter sign, he merely told them to leave. RP at 87-89, 96, 98, 107-08. He understood that the purpose of the sign above the whirlpool area was to inform the public the whirlpool area was closed. RP at 108-09.

On July 26, 2005, eight days before the plaintiff was injured, Rothenbuhler sent Harris an email asking about the current city policy regarding continuation of the exclusion of the public from the burn zone. PRP at 33. Through an email response the same day, Harris instructed Rothenbuhler that the signs needed to be kept up and people should stay out [of the burn zone]. PRP at 34; Ex. 23 (A14). While he was an employee and up until his retirement in 2006, Rothenbuhler was never told or informed that the burn zone was reopened to the public. RP at 574.

The City attempted through 2009 to maintain the Do Not Enter signs around the burn zone. RP at 166-67. However, due to vandalism, the City experienced considerable difficulty maintaining the sign above the whirlpool area. According to Rothenbuhler, it had to be replaced on “dozens of occasions.” RP at 567-70. However, Rothenbuhler did not

keep any records of the dates the sign was missing.<sup>11</sup> RP at 566. Neither he, Harris nor any other employee, testified that the sign was present when the plaintiff was injured. RP at 165, 577; PRP at 57.

Stanley recalled seeing the red sign above the north cliff a number of times but had no idea what it said. Based on his frequent observations, it was the only sign in that area of the cliffs where people were jumping. PRP at 71. He did not know if it was present on the day plaintiff was injured. PRP at 72.

Katti Hofstetter's Activities on August 3, 2005. After leaving her job as camp counselor on August 3, 2005, Katti Hofstetter returned to her grandparents' home where she was living at the time. After her friend, Tonya Brock, arrived and they had watched television for a while, they then went in Tonya's car to Whatcom Falls Park. RP 741-42. From having been at the picnic area the previous evening, Katti was interested in, as she put it, "checking it [the park] out." RP at 742. Neither she nor Tonya had ever been in the forested area of the park. RP at 457, 740.

From the parking lot the two girls entered onto the main trail and soon came upon a maintained side trail leading in the direction of the creek. This trail led down to the split rail fence above the north cliff. RP

<sup>11</sup> The City neither produced any records nor referred to any records documenting the dates the sign was missing or the dates it was replaced.

at 744-46; Ex. 13 (A24); Ex. 1 (A16). Katti was wearing a zip-up jacket and pants and had no specific plan to participate in cliff jumping, which she had never previously seen. RP at 742, 747-48.

They stood behind the railing for an estimated five minutes while watching some boys, who were cliff jumping down below.<sup>12</sup> The boys then began encouraging them to come down and watch them jump. Katti recalled that she and Tonya then both walked around the split rail fence and went down to join the boys at the top of the cliff. RP at 746-48. After Katti had been standing for a short while at the top of the cliff watching the jumping and talking with her friend, the boys began trying to persuade the girls to jump. RP 750. Eventually, both Katti and Tonya began thinking about jumping. RP at 430. They then removed some of their outer clothing which was carried back up the bank and hung over the split rail fence. RP at 430, 752. Katti also took off the flip-flops she had been wearing. RP at 752.

Neither girl saw a Do Not Enter sign like the one depicted in Ex. 1 (A16); RP at 428, 751. Katti testified that if it had been in place as shown in Ex. 1 she likely would have seen it and probably would not have

<sup>12</sup> Ex. 13 (A24) depicts the split rail fence and the end of the fence around which the girls walked to approach the top of the north cliff. A sign is barely visible below this railing in the location where the City attempted to continuously maintain one of the Do Not Enter signs.

jumped. RP at 751-52. Likewise, Tonya Brock stated that she could not say for certain whether the sign was present but feels she would have noticed it had it been there because “it’s bright red so I think it would have caught our eye pretty quickly, and it says something about a thousand dollars and 90 days in jail. Pretty high stakes right there.” RP at 477.

After several minutes Katti decided to jump. RP at 750. She landed in the water without incident, got out of the water and sat on a rock to wait for Tonya to jump down and join her. RP at 753-54. After yelling a short while up to Tonya to jump, Katti realized that Tonya was not going to jump. Because she began getting cold, Katti decided to return to the top. RP at 754-56. When she stood up to leave, she noticed two boys start up a trail and assumed it was the trail to use as it appeared to lead back to the top where her friend was located and from where she [Katti] had just jumped. RP at 756. This trail is the same diagonal trail described above and depicted in Exhibit 4 as well as other exhibits.

It is undisputed that there were no exit or warning signs of any kind in the immediate area or signs directing her to a different trail or route. There was still adequate ambient sunlight to provide reasonably good visibility. PRP at 63. Katti then entered barefoot on to the trail and began walking up. RP at 795-96. She did not find it necessary to grab on

to anything to pull herself up. RP at 799. She recalled that at a point near the top, she felt her foot start to slip, looked down and saw that she had stepped upon a wet spot but by the time she saw it, it was too late as she had already lost her balance and was falling backward. RP at 797-802. The entire incident, i.e. slipping, losing her balance and falling back, happened very quickly. RP at 799.

The only eyewitness who actually saw Katti fall to the rocks below was Brandon Stanley, who was sitting on the south side of the whirlpool area when the incident occurred. PRP 57-58. Although he did not recall seeing the plaintiff jump from the cliff, exit the water or walk up the trail, he did see her drop from the cliff and both saw and heard her land on the rocks. PRP at 58-61. He estimated that she dropped 25 to 30 feet before striking the rocks. PRP at 62. When he initially noticed the plaintiff she was “kind of hanging” on the edge for a very short moment before she fell back into the pool area. PRP at 58. With the aid of a trial exhibit (Ex. 4, A19) he pointed out Katti’s location on the trail when he first saw her and stated she was “Just shy of where this young lady is in the photograph.” PRP at 59-60.

#### **IV., ARGUMENT**

Because an important consideration regarding appeals based on instructional error is whether the instructions allow counsel to argue their

theory of the case,<sup>13</sup> a discussion, at the outset, of plaintiff's theory of this case is warranted. However, it may be initially observed that the phrase "allow counsel to argue their theory of the case" as used in *Anfinson, infra*, and in many other Washington decisions,<sup>14</sup> requires some further explication for purposes of a meaningful analysis. Perhaps the test is better stated in those opinions in which the court has said the instructions must allow counsel to "sensibly" argue their theory of the case.<sup>15</sup> Plaintiff suggests that the opportunity to argue one's theory of a case means an opportunity unimpeded by instructions relating to an affirmative defense that should have been excised from the trial proceedings long before closing argument.

After filing her complaint, the plaintiff's theory became a traditional one that as the owner and operator of Whatcom Falls Park, the City breached the duties it owed to her as an invitee or licensee and, as a proximate result thereof, she suffered injuries. Specifically, it was her theory that the City, through knowledge gained by its employees, knew

<sup>13</sup> See *Anfinson v. FedEx Ground*, 174 Wn.2d 851, 860, -- P.3d -- (July 29, 2012) quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

<sup>14</sup> See *Thompson v. King Feed & Nutrition Serv*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005); *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000).

<sup>15</sup> See e.g. *Samuelson v. Freeman*, 75 Wn.2d 894, 899, 454 P.2d 406 (1969); *Jensen v. Beaird*, 40 Wn.App. 1, 15, 696 P.2d 612 (1985).

that park visitors were frequently utilizing the trail, that it presented a risk of grave harm, particularly to first time users, and that because it knew, or should have expected, these users would not realize the risk, the City should have taken remedial action, which, at a minimum, would have included the posting of a warning sign.<sup>16</sup>

Due to the court's denial of her motion for partial summary judgment regarding the recreational use statute, she was forced to present, as a safety net, the additional, and somewhat inconsistent, theory that the condition which caused her injuries was known, dangerous, artificial and latent so that, pursuant to RCW 4.24.210(a), the City should nevertheless be held liable for her injuries even if the jury somehow determined that the City was "allowing" outdoor recreation in the whirlpool area on the day she was injured.

*Denial of Motion for Partial Summary Judgment.* A threshold issue with respect to the trial court's denial of plaintiff's motion for partial summary judgment is whether this ruling is appealable. In *Johnson v. Rothstein*, 52 Wn.App. 303, 759 P.2d 471 (1988) the court explained the rationale for the general rule that a denial of a motion for summary judgment is ordinarily not reviewable. *Id.*, at 305-09. However, the

<sup>16</sup> See Restatement (Second) Torts §342 (A4); *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994)

*Johnson* opinion limited its analysis to the denial of a summary judgment motion *when such denial is based on a trial court's determination of the presence of disputed, material facts.* [emphasis added] *Id.*, at 305.

The *Johnson* court described two independent grounds for refusing appellate review of pretrial orders denying summary judgment. The first is based on the policy that a litigant would essentially get two bites at the apple with the potential that the adverse party might be deprived of a favorable jury verdict. [citations omitted] *Id.*, at 306-07. The other reason for this rule is that the primary purpose of summary judgment proceedings is to avoid a useless trial. [citations omitted] *Id.*, at 307. The opinion reflects that the court left unanswered the issue as to whether denial of a summary judgment motion is subject to review if the denial is based upon a substantive legal issue. *Id.*, at 305 n. 4. The Court of Appeals, Division One, engaged in such a review in *McGovern v. Smith*, 59 Wn.App. 721, 737, n. 3, 801 P.2d 250 (1990). See also *Bullo v. City of Fife*, 50 Wn.App. 602, 611 n. 1, 749 P.2d 749 (1988).

In *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990), the Supreme Court stated, “ “The general rule, set forth in RAP 2.4(a), says that the appellate court will review, at the instance of the appellant, “the decision or parts of the decision designated in the notice of appeal...” A partial summary judgment order is a “part of the decision”

ultimately rendered in the case. Additionally, RAP 2.4(b) expressly permits the appellate court to review any earlier order or ruling, “including an appealable order,” regardless whether it is designated in the notice of appeal, if it prejudicially affects the decision designated in the notice.” ” *Id.*, at 505. See also the recent opinion in *224 Westlake, LLC v. Engstrom Properties, LLC*, -- Wn.App. --, 281 P.3d 693, 697 (July 30, 2012) (Division 1).

Plaintiff’s motion for partial summary judgment sought a ruling which only would have disposed of the City’s recreational use immunity defense, not obviate the need for a trial. Accordingly, the second grounds, as discussed in *Johnson, Id.*, at 307, for declining review of orders denying summary judgment motions has no applicability in this case. The other concern, expressed in *Johnson, Id.*, that a litigant might be unfairly deprived of a favorable verdict, does not apply because the jury, in essence, rejected the recreational immunity defense.

For all practical purposes, plaintiff’s motion was focused exclusively on a substantive legal issue, i.e. the proper construction of RCW 4.24.210. Although it may be noted that the trial court orally stated that there were material issues of fact in dispute, it is respectfully submitted that, based on the submissions, there were no disputed material facts that have any bearing on the applicability of the statute. As a matter

of logic, the fact that there may have been a dispute regarding the issue as to whether the whirlpool Do Not Enter sign was present on the day plaintiff was injured is immaterial with respect to whether the recreational use statute defense should have been stricken.<sup>17</sup>

The denial of plaintiff's motion for partial summary judgment should be entitled to appellate review in light of the enormous effect the ruling had on the trial itself. A review of the proceedings makes it patently clear that plaintiff's trial tactics had to be radically adjusted in order to confront and defeat the City's affirmative recreational use immunity defense. If the appellate court determines that the denial of plaintiff's pretrial motion for partial summary judgment is not reviewable, it logically follows that the effect the ruling had on the trial itself will not be reviewed. Such an outcome would be contrary to fundamental notions of substantial justice, the heart of which is the right to a fair trial.

Washington courts have long recognized that, pursuant to CR 56, the plaintiff is entitled to a partial summary judgment with respect to an affirmative defense when the plaintiff's pleadings, declarations, etc. in

<sup>17</sup> The oral finding (RP, January 14, 2011 at 21-23) by the trial judge that there were genuine issues of material fact in dispute should not preclude review of the denial of plaintiff's motion for partial summary judgment in light of the court's stated opinion that interpreting the statute, rather than being an issue of law, should be left to the jury. The language of the statute was given in Instruction 17 without an accompanying instruction defining the word "allow" as requested by the plaintiff. See proposed instruction 35. CP at 97.

support of the motion establish there are no genuine issues of material fact pertaining to the affirmative defense and that, as a matter of law, it should be stricken. *Grill v. Meydenbauer Bay Yacht Club*, 57 Wn.2d 800, 804, 359 P.2d 1040 (1961); *Clausing v. Kassner*, 60 Wn.2d 12, 17, 371 P.2d 633 (1962); CR 56.

Just as in this case, the plaintiff in *Welch v. Southland Corporation*, 134 Wn.2d 629, 952 P.2d 162 (1998) moved for partial summary judgment to strike an affirmative defense that any damages awarded with respect to Welch's tort claim should be apportioned. The motion was based upon an interpretation of the statutes [RCW 4.22 et seq.] pertaining to apportionment of damages. *Id.* at 631. The trial court in *Welch* denied the motion but its ruling was reversed and remanded by the Supreme Court upon direct review. *Id.* at 637. In reaching this result the Supreme Court stated, "Furthermore, this is a case of statutory construction which requires de novo review." *Id.*, at 632, citing *King County Fire Protection Dists v. Housing Auth*, 123 Wn.2d 819, 825, 872, P.2d 516 (1994).

The standards and principles that apply to a motion for partial summary judgment are no different than those that apply to a summary judgment motion seeking dismissal of a claim. *Welch, Id.*, at 632, citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). If no genuine issue of material fact exists as to whether the public was excluded

from the area where the plaintiff was injured, then the City's recreational use immunity defense, as a matter of law, has no merit and should have been stricken. Unfortunately, the court erred by refusing to apply principles of statutory construction to interpret the recreational use statute and thereby treated the issue of the City's affirmative defense of recreational use immunity as a question of fact rather than the question of law that it is. Hence, the court's ruling denying the plaintiff's motion for summary judgment should be reviewed de novo by means of an inquiry into the evidence, issues and legal authority brought to the attention of the trial court. *Dowler v. Clover Park Sch. Dist.* 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Questions of statutory interpretation, including the meaning of immunity statutes, are questions of law reviewed de novo. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001); *Happy Bunch, LLC v. Grandview North, LLC*, 142 Wn.App. 81, 88, 173 P.3d 959 (2007).

The court's order denying the motion identified the respective memoranda and numerous declarations which it considered. CP at 445-47. However, as a practical matter, they cannot all be reviewed and discussed herein. Suffice to say, none of the City's submissions raise a genuine dispute as to whether on August 3, 2005 the public was excluded from entering the whirlpool area. The conclusion that no genuine issue

exists with respect to the material fact that the public was excluded from the burn zone is fully supported by the City's unequivocal admission in its responsive memorandum that "*physical entry*" [into the burn zone] *was prohibited.*" CP at 542. However, the City proceeded to make the incongruous assertion that "... the burn zone and the Whirlpool remained open for public viewing..." [City's emphasis] CP at 542.

Especially revealing is the City's assertion that "[T]he burn zone restriction and red 'Do Not Enter' sign were never intended to keep parks [sic] users from swimming in the Whirlpool area *on a long term basis.*" [emphasis added] CP at 542. It is submitted that, for purposes of legal analysis, the length of time the restriction on entry into the burn zone was intended to continue is immaterial. What is material, and what the City conceded, is that physical entry into the whirlpool area was prohibited on the day plaintiff was injured. CP at 542.

Respectfully, it is submitted that the suggestion by the City that posting numerous Do Not Enter signs along the perimeter of the burn zone did not indicate any intent to exclude the public from the area (CP at 542) is disingenuous, illogical and contrary to common sense, particularly when it is considered that the signs stated the area was closed by order of the director of Parks and Recreation and that violation of the order could result in a \$1,000 fine and/or 90 days in jail. The City argued that

because portions of the whirlpool area were visible from a location outside the prohibited burn zone, it qualifies for recreational use immunity in light of the RCW 4.24.210 language including the “viewing, or enjoying historical, archeological, scenic or scientific sites” as forms of outdoor recreation. CP at 542-43, n 1. Endorsing this reasoning would lead to the absurd result that a landowner would always be immune from liability for injuries occurring within an area closed to the public as long as the area, or even just a small portion of it, is visible from a location outside of it. A statute should not be interpreted in such a manner that would lead to absurd results. *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007).

When the City’s argument is distilled, it becomes apparent that it is claiming that, despite its attempts to maintain Do Not Enter signs along the boundary of the burn zone, including a Do Not Enter sign above the whirlpool area, it nevertheless “allowed” the public to enter within it for recreational purposes. Such an argument is obviously fallacious unless the word “allow” as used in the recreational use statute is given a liberal construction contrary to the fundamental principles of statutory construction, particularly the principle, as explicitly held in *Matthews v. Elk Pioneer Days*, 64 Wn.App. 433, 437, 824 P.2d 541 (1992), and

involving interpretation RCW 4.24.210, that statutes in derogation of common law must be strictly construed.<sup>18</sup>

In response to the motion for partial summary judgment, the City attempted to employ an elastic definition of the word “allow” that would lead to absurd results if it were interpreted to include the City’s failure to enforce its own ordinances, and/or its inattention and neglect and would therefore include the use of the word allow as in sentences such as, “How could you have *allowed* to let this happen?” or “He *allowed* the car to run out of gas.”

In addressing the issue of determining the meaning of a single word in a statute, the court in *Jongeward v. BNSF Ry.* 174 Wn.2d 586, 278 P.3d 157 (2012), observed that under the principle of *noscitur a sociis*, a single word in a statute should not be read in isolation. *Id.*, at 601, citing *State v. Reggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). Thus, interpreting RCW 4.24.210 requires more than simply allowing the jury to randomly select one of the multiple definitions for the verb “allow” as the court did in this case. Predictably, the jury became

18 See also *Plano v. Renton*, 103 Wn.App. 910, 911-12, 14 P.3d 871 (2000); *Michaels v. CH2M Hill, Inc.* 171 Wn.2d 587, 600, 257 P.3d 532 (2011), approvingly citing both *Plano, Id.* and *Matthew, Id.*

confused during deliberations and sent the court a note inquiring about the definition to be applied. (CP at 50).

In summary, the record reflects that there was no genuine dispute as to the critical, single material fact that, as the City itself admitted, on the day plaintiff was injured that, “physical entry [into the whirlpool area] was prohibited.” CP at 542. The city stated in its responsive memorandum (CP at 539-53) that the opinions in *Preston v. Pierce County*, 48 Wn.App. 887, 741 P.2d 71 (1987) and *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993) “implicitly reject the reasoning underpinning plaintiff’s argument.” CP at 552. However, in neither of these cases was the applicability of the recreational use statute in dispute and, accordingly, they are both inapposite.

It is also noteworthy that, in its memorandum, the City eschewed any meaningful discussion of the principle of statutory construction requiring that the recreational use statute be strictly construed. The City neither discussed nor distinguished the *Matthews, Id.* decision which was cited in plaintiff’s memorandum.

Because, as demonstrated above, and as reflected by the record considered by the court with respect to the partial summary judgment motion, the whirlpool area was closed to the public on the day that the plaintiff was injured, applying a strict construction of the statute leads to

the inescapable conclusion that, as matter of law, the City did not *allow* the public to enter the whirlpool area for recreational purposes.

*Denial of Motion for Directed Verdict.* The question whether the court erred in denying the plaintiff's motion for a directed verdict entails the same issues and launches essentially the same analysis as the question as to whether the court erred in denying the motion for partial summary judgment. Accordingly, to avoid duplication, the plaintiff, for purposes of addressing her Assignment of Error no. 2, adopts by reference the analysis above as well as the argument presented to the trial court in support of the actual motion. CP at 122-135. However, if there was uncertainty as to whether there were any genuine issues of material fact regarding recreational use immunity at the time of the hearing on plaintiff's partial summary judgment motion, the trial testimony of four of the City's witnesses fully extinguished any conceivable doubt that the public was excluded from the whirlpool area when plaintiff was injured. RP at 87-89, 96, 107, 231-32, 571-72, 601, 726; PRP at 33.

Plaintiff's detailed description, *supra*, of the evidence presented at trial is intended not only to facilitate review of the court's denial of her motion for a directed verdict but also to illustrate that the City's recreational use immunity defense improperly and unduly encroached upon the trial in several respects. To the extent a reviewing court may

balance the appellant's prospects for a favorable outcome of a retrial against considerations of judicial economy, it is submitted that a thorough examination of the record in this case reflects that, based on her theory of the case, the plaintiff's lawsuit against the City has considerable merit and, accordingly, deserves a trial that is not infiltrated by confusing and distracting evidence relating to recreational use immunity.

Instructional error resulted from the court's rulings on plaintiff's motions for partial summary judgment and for a directed verdict. The court's rulings on recreational use immunity hatched four jury instructions regarding recreational use immunity. These instructions were all given by the court to accommodate the defendant's inapplicable affirmative defense of recreational use immunity.<sup>19</sup> Initially, it should be observed that Instruction 18 (A13), which purportedly was derived directly from RCW 4.24.210(a), is a clear misstatement of the law inasmuch as it omits the word "conspicuously", or a derivative thereof, whereas the recreational use statute requires warning signs to be "conspicuously" posted if a dangerous condition is known, dangerous, artificial and latent.

<sup>19</sup> The offending instructions are numbered 2 (CP at 55, A10), 8 (CP at 61, A11), 17 (CP at 70, A12) and 18 (CP at 71, A13).

It is perhaps equally important that, unlike the other “immunity instructions” (2, 8, and 17), Instruction 18 makes no reference whatsoever to the recreational use statute or recreational use immunity. This is highly significant in light of the jury’s determination that on the day plaintiff was injured the City did not allow the public to use the Whirlpool Falls area of the park for outdoor recreation (CP at 43) because, after making this determination, the jury would have no way of knowing that it should then disregard Instruction 18 in deciding the answer to interrogatory no. 4 asking whether the City was negligent. Thus, according to instruction 18, even if the City did not allow the whirlpool area to be used for outdoor recreation, as found by the jury, the City nevertheless had no duty to post a warning sign, let alone a conspicuous warning sign, unless, as stated in instruction 18, the injury-causing condition was known, dangerous, latent and artificial. Pursuant to the recreational use statute, these four characteristics, referred to as “qualifiers” in instruction 18, must all apply to a condition on property open to the public for outdoor recreation before the property owner can be held liable for injuries resulting from the condition; however, the owner may avoid liability by posting “conspicuous” warnings with respect to such a condition.

Clearly, instruction 18 is a misstatement of the law in regard to a landowner’s common law duties to licensees, let alone invitees.

Restatement (Second) Torts §342, A4. Based upon the evidence presented, the jury may very likely have concluded that even though the City should have realized that the trail involved an unreasonable risk of harm to first time visitors to the whirlpool area, such as the plaintiff, and should have expected that she would not discover or realize the danger and, further, that the City did not make the trail safe or warn plaintiff of the risk involved, the City had no legal duty to take either of these actions because one or more of the qualifiers described in instruction 18 did not “apply”.

In this vein, instruction 18 is inconsistent and incompatible with both instructions 22 and 23. CP at 75-76. These two instruction refer respectively to: (a) the duty of an “owner of premises” to warn licensees of a dangerous condition under specified circumstances, and (b) the circumstances under which the failure by a “possessor of land” to warn a licensee of a risk presented by a dangerous condition subjects the possessor to liability.

Because the revised jury verdict form did not contain a special interrogatory asking the jury to determine whether the evidence established that a Do Not Enter sign was present above the whirlpool on the day plaintiff was injured, there is no way of knowing whether the jury attempted to reach any agreement on this disputed issue or whether,

agreement or not, the jurors even considered the issue in deciding that the city was not negligent. For all that is known, some of the jurors may even have believed that the Do Not Enter sign was present on the day the plaintiff was injured and that because it contained the phrase “Hazardous Conditions”, the City fulfilled its duty to post a “warning sign” as referred to in Instruction 18 and, therefore, the City could not be found negligent even if the jury also found that the four qualifiers applied.

Determining whether instructional error warrants a new trial, requires careful consideration of the standards for review. As confirmed in the recent case of *Anfinson v. FedEx Ground*, 174 Wn.2d 851, 860, -- P.3d -- (July 29, 2012): “Jury instructions are reviewed de novo for errors of law.” *Id.*, at 860, citing *Joyce v. Dep’t of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). “Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, *and* when read as a whole properly inform the trier of fact of the applicable law.” *Id.*, at 860, citing *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996) and *Joyce, Id.*, at 323-325, 119 P.3d 825 (2005) [emphasis added] An erroneous instruction is reversible error only if it prejudices a party. *Joyce, Id.*, at 323. Prejudice is presumed if the instruction contains a clear misstatement of law; prejudice must be

demonstrated if the instruction is merely misleading. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 846 (2002).

As stated in *Babcock v. M. & M. Constr. Co.*, 127 Wash. 303, 306, 220 P. 803 (1923): "... where instructions inconsistent and contradictory are given involving a material point in the case, their submission to the jury is prejudicial, for the reason that it is impossible to know what effect they may have upon the verdict." *Id.*, at 306. The above rule was quoted approvingly in *Coyle v. Municipality of Metropolitan Seattle*, 32 Wn.App. 741, 743, 649 P.2d 652 (1982).

In this connection, one of the material points or issues in the instant case is whether the trail presented a sufficiently high risk of danger such that the City, at a minimum, should have warned the plaintiff about using it. Regrettably, instructions no. 22 and 23, which describe the circumstances under which a warning is required, were contradicted by instruction 18, which instructed the jury that unless the four qualifiers apply the City has no duty to post a warning sign. Because these instructions cannot be reconciled, the instructions, as a whole, are manifestly prejudicial and reversal is required. *Smith v. Rodene*, 69 Wn.2d 482, 485-87, 418 P.2d 741 (1966).

It is error to instruct the jury on an issue on which there is insufficient evidence. *State v. Thompson*, 68 Wn.2d 536, 541, 413 P.2d 951 (1966); *State v. Golladay*, 78 W.2d 121, 134, 470 P.2d 191 (1970). Here there was no evidence that the City was entitled to recreational use immunity because no rational trier of fact could find that the City allowed the public into the whirlpool area for outdoor recreation.

*State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947) describes the analysis in determining whether prejudicial error resulted from improper instructions as follows: “When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless. 3 Am. Jur. 511 § 949. However, it becomes our duty, whenever such a question is raised, to scrutinize the entire record in each particular case, and determine whether or not the error was harmless or prejudicial.” *Id.*, at 341. This rule has long been followed by Washington courts.<sup>20</sup>

An instruction that is a misstatement of the law is presumed prejudicial. *Anfinson, Id.*, at 860. *Keller v. City of Spokane, Id.*, at 249-

<sup>20</sup> See e.g., *Blaney v. International Association of Machinists and Aerospace Workers District No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004); *State v. Golladay*, 78 W.2d 121, 138, 470 P.2d 191 (1970).

50; (2002); *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977). The presumption of prejudice can only be overcome if the instructional error can be declared harmless beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 478-79, 932 P.2d 1237 (1997) citing *State v. Caldwell*, 94 Wn.2d 614, 618, 618 P.2d 508 (1980). A harmless error is an error which is trivial, or formal, or merely academic, and in no way affected the final outcome of the case. *Britton, Id.*, at 341. Instruction 18 is a clear misstatement of the law, particularly when considered outside the context of the recreational use statute, and because, in the context of this case, giving this instruction cannot reasonably be characterized as an error which is trivial.

Jury instructions are sufficient if they (1) permit each party to argue its theory of the case; (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. *Boeing Company v. Key*, 101 Wn.App. 629, 633, 5 P.3d 16 (2000). The instructions in this case fail all three of the above tests.

Because the revised jury verdict form did not contain a special interrogatory asking the jury whether the evidence established that the Do Not Enter sign was present on the day plaintiff was injured, there is no way of knowing whether the jury attempted to reach any agreement on

this disputed issue or whether, agreement or not, the jurors even considered the issue in deciding that the city was not negligent. For all that is known, some of the jurors may even have believed that the Do Not Enter sign was present on the day the plaintiff was injured and that because the sign contained the phrase “Hazardous Conditions”, the City met its obligation to post a “warning sign” as referred to in Instruction 18 and, *ipso facto*, the City could not be found negligent even if the four qualifiers applied. On the other hand, the jury could logically have concluded, after answering “no” to special interrogatory no. 1, that one or more of the four “qualifiers” did not “apply”. Therefore, the jury would reason, the City had no duty to post a warning sign of any kind, let alone a conspicuous warning sign.

In summary, the fundamental flaw with Instruction 18, unlike instructions 2, 8 and 17, is that it makes no reference to the recreational use statute and fails to alert the jury that, in considering whether the City was negligent, Instruction 18 is not to be considered if the jury first determines that the City did not allow the public to use the Whirlpool Falls area for outdoor recreation. Therefore, in the context of this case, which hinges on the duties owed by a landowner to invitees and/or licensees, Instruction 18 is a clear misstatement of the law and, everything considered, is prejudicial.

As a consequence of the court's error in treating the applicability of the City's immunity defense as an issue of fact, rather than law, and, through Instruction 8 (CP at 61, A11), shifting the burden of proof to the plaintiff with respect to the City's affirmative defense, the plaintiff was forced to produce evidence that the City's intent in posting the Do Not Enter signs around the burn zone was to exclude the public from this area. This evidence had to be presented to ensure that the jury would arrive at the seemingly obvious conclusion that the City did not *allow* outdoor recreation in the whirlpool area. This was largely a blind undertaking in light of the court having signaled, by denying plaintiff's motion for partial summary judgment, that it was inclined to leave it up to the jury to attach whatever definition it saw fit to the word "allow".

Moreover, by leaving the recreational use immunity defense in play at trial, the plaintiff was left with no alternative, as a matter of trial tactics, but to present whatever safety-net evidence, if any, could conceivably be mustered, in light of the possibility that the jury ultimately determined that the recreational use statute did apply. In other words, the plaintiff was forced to engage in an effort designed to persuade the jury, and later argue to the jury, that the injury causing condition of the trail was not only known and dangerous but also artificial and latent. For obvious reasons, attempts by the plaintiff to present evidence and argue

persuasively to the jury that the trail, as well as the slick wet spot caused by natural underground seepage, are artificial conditions was a formidable and probably impossible endeavor and likely diminished, to a significant extent, the credibility of the plaintiff's theory of the case.<sup>21</sup> Presenting convincing evidence and a persuasive argument that the slick spot was not only a dangerous condition but was also a latent condition was perhaps an even more remote possibility in view of the plaintiff's recollection that almost simultaneously with her losing her balance she looked down and actually saw the wet spot. RP at 797-802. It is submitted that by being compelled to present such arguments the plaintiff was prejudiced.

The denial of plaintiff's partial summary judgment motion, insofar as the trial was concerned, substantially diluted the evidence she presented regarding the City's negligence in that the trial, to a large degree, was swallowed up by the recreational use immunity defense. Of course, if it is determined that the court erred in denying plaintiff's motion for partial summary judgment, then the issue as to whether the denial of

<sup>21</sup> A considerable portion of the closing argument of plaintiff's counsel was directed to the evidence indicating that the City did not allow the public into the whirlpool area and that, even if the jury determined that the public was allowed in the area, the City was nevertheless liable for failing to post a conspicuous warning sign. RP 1331-40. In her closing argument, defendant's counsel alluded to instruction 8, pointing out that the plaintiff had to disprove the City's affirmative defense RP at 1368. Predictably, defendant argued profusely in favor of recreational use immunity and that the four qualifiers did not apply. RP at 1373-1388.

the motion for a directed verdict on recreational use immunity becomes moot.

The Court Erred in Refusing to Give Instruction 38. Plaintiff's proposed supplemental instruction no. 38 (A9, CP at 100), using language tailored to this case, is based upon the long established common law principle that an employer is to be considered charged with the knowledge of his employees. As long ago as 1904, the Washington Supreme Court confirmed this rule in holding that a servant's knowledge of the dangerous propensities of a team of horses is imputed to the owner. *Lynch v. Kineth*, 36 Wash. 368, 371, 78 P. 923 (1904).<sup>22</sup> As stated in *Alaska S.S. Co., v. Pacific Coast Gypsum Co.*, 78 Wash. 247, 252 138 P. 875 (1914), "The ordinary rule is that the knowledge of a servant concerning matters the control or supervision of which has been delegated to him by the master is the knowledge of the master." *Id.*, at 47, n. 2. For additional authority for this common law rule, see the Restatement (Second) of Agency § 9 (1) (1958), as well as *Zwink, infra*.

As to whether the court erred in refusing proposed Instruction 38, it is important to consider that, for her to prove her theory of the case it

<sup>22</sup> See also the dissenting opinion in *Sing v. John L. Scott*, 134 Wn.2d 24, 47, n. 2, 948 P.2d 816 (1997) quoting *Zwink v. Burlington Northern, Inc.* 13 Wn.App. 560, 566, 536, P.2d 13 (1975), cited by plaintiff in support of proposed instruction 38.

was incumbent upon the plaintiff to prove, inter alia, that the City knew, or had reason to know, that the trail from which she fell was frequently utilized by park users, that the City should expect that invitees or licensees, such as the plaintiff, would not discover or realize the danger, that there had been numerous previous injuries in the area and that the trail presented a sufficiently high risk of grave harm so that, at a minimum, the City should have posted a conspicuous warning sign, perhaps one similar to the conspicuous, long standing warning sign located on the south side cliff.

As stated in *Egede-Nissen v. Crystal Mountain Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980, "... a party to a lawsuit is entitled to have the trial court instruct on its theory of the case if there is substantial evidence to support it." *Id.*, at 135. See also *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 616, 707 P.2d 685 (1985).

Also, it must be borne in mind that the defendant in this case was the City of Bellingham, not the Bellingham Parks & Recreation Department. As a matter of logic, and as a practical reality, because the City of Bellingham, as a municipal corporation, is not a sentient being, plaintiff would effectively be precluded from proving her claim unless the City is held to be charged with the knowledge gained by employees through their City employment. This knowledge would include that of

Roger Christiansen regarding prior injuries from falls in the whirlpool area (RP 69-76), Scott Zerba and Wayne Carroll regarding the use by cliff jumpers of the diagonal trail (PRP 105-06; RP at 496) and Richard Rothenbuhler's knowledge that the trail was chronically wet, especially near the top (PRP 11-12, 21), that there was no easy way out of the whirlpool (RP at 547), and that the City had never posted any warning signs about cliff jumping or the dangers of the trail in the vicinity of the north cliff. (RP 559).

When it comes to the standard of review with respect to claimed error based upon a trial court's refusal to give a proposed jury instruction, *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996) provides guidance. In *Lucky* it was held that, "A trial court's refusal to give a requested instruction based on the facts of the case will not be disturbed on appeal except upon a clear showing of abuse of discretion. [citations omitted] Where, as here, a trial court's decision is "predicated upon rulings as to the law," however, it is reviewed de novo for error of law." " [citations omitted]. *Id.*, at 731.

Although the distinction between an instruction based on the facts of the case and one predicated upon rulings of law may not always be readily discernible, it appears that instruction 38 would fit into the second category in that it merely states a common law principle and was well

supported by citation to legal authority.<sup>23</sup> Another factor that might be considered is whether a proposed instruction is redundant and, therefore, potentially prejudicial. In this regard, it is difficult to imagine even the slightest prejudice to the City had this instruction been given or how it might have curtailed the City's ability to argue its theory of the case.

In *Braden v. Rees*, 5 Wn.App. 106, 485 P.2d 995 (1971), a case involving a motor vehicle accident, the court held that the failure to give an instruction proposed by the plaintiff was grounds for a new trial. In reaching this conclusion, the court noted that in the absence of the instruction, the jury *could well have found* from the evidence that plaintiff's excessive speed was a proximate cause of the accident which, in light of the facts of the case would have a legally unjustified result. *Id.*, at 111. See also *De Koning v. Williams*, 47 Wn.2d 139, 143, 286 P.2d 694 (1955).

While it might initially appear to be axiomatic that the knowledge of a municipal corporation's employees, assuming the knowledge is obtained through their employee duties, should be imputed to the corporation itself, it cannot be assumed that a jury will apply this principle in deciding issues of notice and knowledge in a case of this nature. In this

<sup>23</sup> See, e.g. *Kimbro v. Atlantic Richfield*, 889 F.2d 869, 876 (1985). CP at 100.

connection, the lengthy colloquy which occurred between counsel and the trial judge is of interest in that the court appeared very dubious about whether instruction 38 correctly stated the law. RP, November 8, 2011, at 103-14.

It is plaintiff's position that instruction 38 correctly states the law in Washington and it was essential that it be given in order to enable counsel to sensibly argue plaintiff's theory of the case, i.e. review the evidence presented in conjunction with the law given to the jury in the form of the instructions. A de novo review of the court's ruling refusing this instruction leads directly to the conclusion that it was prejudicial error in that the jury was left to guess whether the City could only be liable for the plaintiff's injuries if one of the managers, such as Marvin Harris, knew of the dangerous condition of the path or, on the other hand, whether it was sufficient, with respect to the issue of knowledge of the dangerous nature of the trail, for the plaintiff to prove that at least one employee, manager or not, had such knowledge.

It cannot be assumed that there were no jurors who may philosophically object to the notion that a city should be expected to have notice of facts or circumstances of which its employees gain knowledge during the course and scope of their respective duties. In closing argument, counsel could only speak about what information was known

by various City employees but was unable, due to the lack of an appropriate instruction, to link that knowledge legally to the defendant.

## V. CONCLUSION

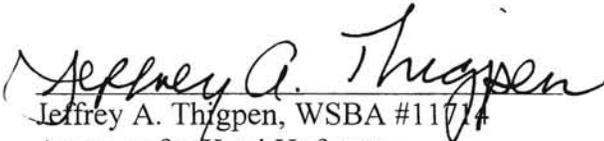
The trial court erred in denying the plaintiff's pretrial motion for partial summary judgment seeking to strike the defendant's affirmative defense that, pursuant to RCW 4.24.210, it is entitled to immunity from liability with respect to the terrible injuries she suffered in the defendant's municipal park. This error deprived her of the opportunity and right to effectively present the evidence establishing her theory of the case.

Moreover, the court's ruling on this motion and the subsequent denial of her motion for a directed verdict pertaining to recreational use immunity led to a virtual farrago of jury instructions which, considered both as a whole and with respect to the misstatement of the law set forth in Instruction 18, were prejudicial, and effectively prevented her from presenting a coherent argument in favor of her theory of the case. Further, she was prejudiced by the court's error in refusing her proposed instruction informing the jury of the firmly established common law rule that the knowledge of an employee should be imputed to the employer. This ruling precluded her from proving essential elements of her claim. It was fundamentally unfair that the plaintiff was put to the task of attempting to persuade the jury of the existence of this common law rule

for which a jury instruction was requested and which would not have inhibited the defendant's opportunity to argue its theory of the case.

The plaintiff seeks a ruling that the recreational use statute, as a matter of law, is inapplicable in this case, as well as a reversal of the judgment so that substantial justice can be achieved through a fair trial.

Respectfully submitted this 18<sup>th</sup> day of October, 2012.

  
Jeffrey A. Thigpen, WSBA #111714  
Attorney for Katti Hofstetter

# APPENDIX

**Washington Statutes**

**Title 4. Civil procedure**

**Chapter 4.24. Special rights of action and special immunities**

*Current through 2012 Second Special Session*

**§ 4.24.200. Liability of owners or others in possession of land and water areas for injuries to recreation users - Purpose**

The purpose of RCW 4.24.200 and 4.24.210 is to 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 and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

**Cite as RCW 4.24.200**

**History.** 1969 ex.s. c 24 § 1; 1967 c 216 § 1.

**Washington Statutes**

**Title 4. Civil procedure**

**Chapter 4.24. Special rights of action and special immunities**

*Current through 2012 Second Special Session*

**§ 4.24.210. Liability of owners or others in possession of land and water areas for injuries to recreation users - Known dangerous artificial latent conditions - Other limitations**

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners, hydroelectric project owners, 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 nonmotorized wheel-based activities, aviation activities including, but not limited to, the operation of airplanes, ultra-light airplanes, hanggliders, parachutes, and paragliders, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, rafting, 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.

(2) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowner or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who offer or allow such land to be used for purposes of a fish or wildlife cooperative project, or allow access to such land for cleanup of litter or other solid waste, shall not be liable for unintentional injuries to any volunteer group or to any other users.

(3) Any public or private landowner, or others in lawful possession and control of the land, may charge an administrative fee of up to twenty-five dollars for the cutting, gathering, and removing of firewood from the land.

(4)(a) Nothing in this section shall prevent the liability of

a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.

(i) A fixed anchor used in rock climbing and put in place by someone other than a landowner is not a known dangerous artificial latent condition and a landowner under subsection (1) of this section shall not be liable for unintentional injuries resulting from the condition or use of such an anchor.

(ii) Releasing water or flows and making waterways or channels available for kayaking, canoeing, or rafting purposes pursuant to and in substantial compliance with a hydroelectric license issued by the federal energy regulatory commission, and making adjacent lands available for purposes of allowing viewing of such activities, does not create a known dangerous artificial latent condition and hydroelectric project owners under subsection (1) of this section shall not be liable for unintentional injuries to the recreational users and observers resulting from such releases and activities.

(b) Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance.

(c) Usage by members of the public, volunteer groups, or other users is permissive and does not support any claim of adverse possession.

(5) For purposes of this section, the following are not fees:

(a) A license or permit issued for statewide use under authority of chapter 79A.05 RCW or Title 77 RCW;

(b) A pass or permit issued under RCW 79A.80.020, 79A.80.030, or 79A.80.040; and

(c) A daily charge not to exceed twenty dollars per person, per day, for access to a publicly owned ORV sports park, as defined in RCW 46.09.310, or other public facility accessed by a highway, street, or nonhighway road for the purposes of off-road vehicle use.

TITLE D. SPECIAL LIABILITY OF POSSESSORS  
OF LAND TO LICENSEES

§ **342. Dangerous Conditions Known to Possessor**

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

SCANNED 4

FILED IN OPEN COURT

11-15 2011  
WHATCOM COUNTY CLERK

By [Signature]  
Deputy

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY**

<p>Katti Hofstetter Petitioner/Plaintiff</p>	<p>No. 07-2-02810-9</p>
<p>vs City of Bellingham Respondent/Defendant</p>	<p>Verdict Form - Revised Verdict Reached 4:30pm</p>

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**VERDICT FORM**

We, the jury, answer the questions submitted by the court as follows:

**QUESTION NO. 1:** At the time of Plaintiff's accident, did the City of Bellingham allow the public to use the Whirlpool Falls area of Whatcom Falls Park for outdoor recreation?

**ANSWER:** No (Write "yes" or "no")

*(INSTRUCTION: If you answered Question No. 1 "yes", answer Question No. 2. If you answered Question No. 1 "no", skip Question No. 2, and answer Question No. 3.)*

**QUESTION NO. 2:** Was the Plaintiff injured by a known, dangerous, artificial, latent condition for which warning signs were not conspicuously posted:

**ANSWER:**    (Write "yes" or "no")

*(INSTRUCTION: If you answered "yes" to Question No. 2, answer Question No. 4. If you answered "no" to Question No. 2, sign and return this verdict.)*

**QUESTION NO. 3:** At the time of her injury what was Plaintiff Katti Hofstetter's status on the land in the Whirlpool Falls area of Whatcom Falls Park?

**ANSWER:** Invitee: \_\_\_\_\_  
Licensee:   ✓  

If you determine that Plaintiff was an invitee, apply Instruction No. 20 and No. 21 to determine the City's duty. If you determine that the Plaintiff was a licensee, apply Instruction No. 22 and No. 23 to determine the City's duty.

**QUESTION NO. 4:** Was the Defendant City of Bellingham negligent?

**ANSWER:** No (Write "yes" or "no")

*(INSTRUCTION: If you answered "yes" to Question No. 4, answer Question No. 5. If you answered "no" to Question No. 4, sign and return this verdict.)*

**QUESTION NO. 5:** Was the negligence of the Defendant a proximate cause of injury or damage to the Plaintiff?

**ANSWER:** \_\_ (Write "yes" or "no")

*(INSTRUCTIONS: If you answered "yes" to Question No. 5, answer Question No. 6. If you answered "no" to Question No. 5, sign and return this verdict.)*

**QUESTION NO. 6:** What do you find to be the Plaintiff's amount of damages?

<b>ANSWER:</b>	Past Medical Expenses:	\$	581,856.19
	Future Medical and Non-Medical Expenses	\$	_____
	Loss of Future Earning Capacity:	\$	_____
	Nature & Extent Of Injury	]	
		]	
	Loss of Enjoyment of Life	]	
		]	
	Pain & Suffering	]	\$ _____
		]	
	Disfigurement	]	
		]	
	Humiliation	]	
		]	
	<b>TOTAL</b>	\$	_____

**QUESTION NO. 7:** Was the Plaintiff also negligent?

**ANSWER:** \_\_ (Write "yes" or "no")

*(INSTRUCTION: If you answered "yes" to Question No. 7, answer Question No. 8. If you answered "no" to Question No. 7, skip Question Nos. 8 & 9. The presiding juror should sign this verdict form, and you should return the verdict.)*

**QUESTION NO. 8:** Was the Plaintiff's negligence a proximate cause of the injury or damage to the Plaintiff?

**ANSWER:** \_\_ (Write "yes" or "no")

*(INSTRUCTION: If you answered "no" to Question No. 8, the presiding juror should sign this verdict form, and you should return the verdict. If you answered "yes" to Question No. 8, answer Question No. 9.)*

**QUESTION NO. 9** Assume that 100% represents the total combined fault that proximately caused the Plaintiff's injury. What percentage of this 100% is attributable to the Plaintiff's negligence and what percentage of this 100% is attributable to the negligence of the Defendant? Your total must equal 100%.

**ANSWER:**

To Plaintiff Hofstetter : \_\_\_\_\_ %

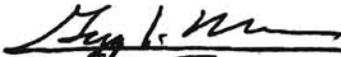
To Defendant City of Bellingham : \_\_\_\_\_ %

TOTAL : 100 %

*(INSTRUCTION: The presiding juror should sign this verdict form and notify the Bailiff*

Date: 11/10/2011

Signed by Presiding Juror # 6

  
\_\_\_\_\_  
Presiding Juror

PLAINTIFF'S PROPOSED INSTRUCTION NO. 38

An agent is a person employed to perform services for another called the principal. In this case the employees of the City of Bellingham who testified at trial were agents of the City

The City is charged with, and bound by, the knowledge of or notice to its employees received while they were acting within the scope of their employment.

WPI 50.01 (modified)

*Kimbrow v. Atlantic Richfield*, 889 F.2d 869, 876 (1985)  
*Hulbert v. Gordon*, 64 Wn.App 386, 396, 824 P.2d 1238 (1992)  
*Zwink v. Burlington Northern Railroad*, 13 Wn.App 560, 566, 536 P.2d 13 (1975)

P-38

INSTRUCTION NO. 2

(1) The plaintiff claims:

That by posting the "Do Not Enter" sign near the Whirlpool, the defendant did not allow users to enter the area; and

If the City is found not to have allowed users in the area, plaintiff further claims:

- (a) That plaintiff was either a licensee or invitee on the premises for a purpose for which the premises are held open to the public;
- (b) That the City knew or should have known of a condition on the premises, should have realized the condition represented an unreasonable risk of harm, should have recognized users would not discover the danger, and failed to act with ordinary care.
- (c) That the City was negligent in addressing the conditions that plaintiff has claimed the City knew or should have known.

Plaintiff claims that this conduct was a proximate cause of injuries and damage to Plaintiff.

The defendant denies these claims.

(2) Defendant claims:

That because this accident occurred in a City park available to the public for recreational purposes, defendant is entitled to recreational use immunity; and That plaintiff was contributorily at fault and her conduct was the proximate cause of her own injuries and damages.

Defendant denies the nature and extent of plaintiff's claimed injuries and damages.

Plaintiff denies these claims.

**INSTRUCTION NO. 8**

The plaintiff has the burden of proving each of the following propositions:

First, that the plaintiff had the status of an invitee or licensee as defined in these instructions and that the recreational use statute does not apply to this case;

Second, that the defendant acted in a manner inconsistent with its duty to users with the applicable status, and in so doing was negligent;

Third, that the plaintiff was injured;

Fourth, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendant, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

INSTRUCTION NO. 17

The Washington recreational use statute states its purpose is to encourage owners in lawful possession and control of land and water areas or channels to make these land or water areas available to the public for recreational purposes by limiting the owners or possessors' liability to persons entering thereon and to persons who may be injured or otherwise damaged on the land or water areas.

The statute provides:

Any public or private landowners or others in lawful possession and control of any lands whether 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 hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, hang gliding, paragliding, rock climbing, 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.

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

INSTRUCTION NO. 18

The injury-causing condition was the condition that caused plaintiff's injury. Each of the four qualifiers, known, dangerous, artificial, and latent must apply to the injury-causing condition before there is a duty to post a warning sign.

"Known" means that defendant must be shown to have had actual knowledge of the particular injury-causing condition.

"Dangerous" should be given the usual and customary meaning.

"Latent" means not readily apparent to the general class of recreational users.

"Artificial" means contrived through human act or effort and not by natural causes detached from human agency.

P.23

Marvin L Harris/parks/cob  
07/26/2005 01:50 PM

To Richard Rothenbuhler/parks/cob@cob  
cc Paul A Leuthold/parks/cob@cob, Steven M  
Nordeen/parks/cob@cob, James A Luce/parks/cob@cob  
bcc

Subject Re: WHATCOMFALLS

Good Day Dick.... The Public Safety side of me says, we need try to restrict park users from going into the burn zone because of the dead yet standing trees.... my piratical side says, the fence and sign have not stopped those who are going to go in any way....

I believe that the area is a park and at this point the area has had a chance to rehab... by removing the cable... I do not believe that there will a marked increase in environmental damage...

I would want still warn the people based on the dead trees.... I think we need to keep up signs indicating this is a burn area and people should stay out because of the dead trees....

Richard Rothenbuhler/parks/cob



Richard  
Rothenbuhler/parks/cob  
07/26/2005 12:16 PM

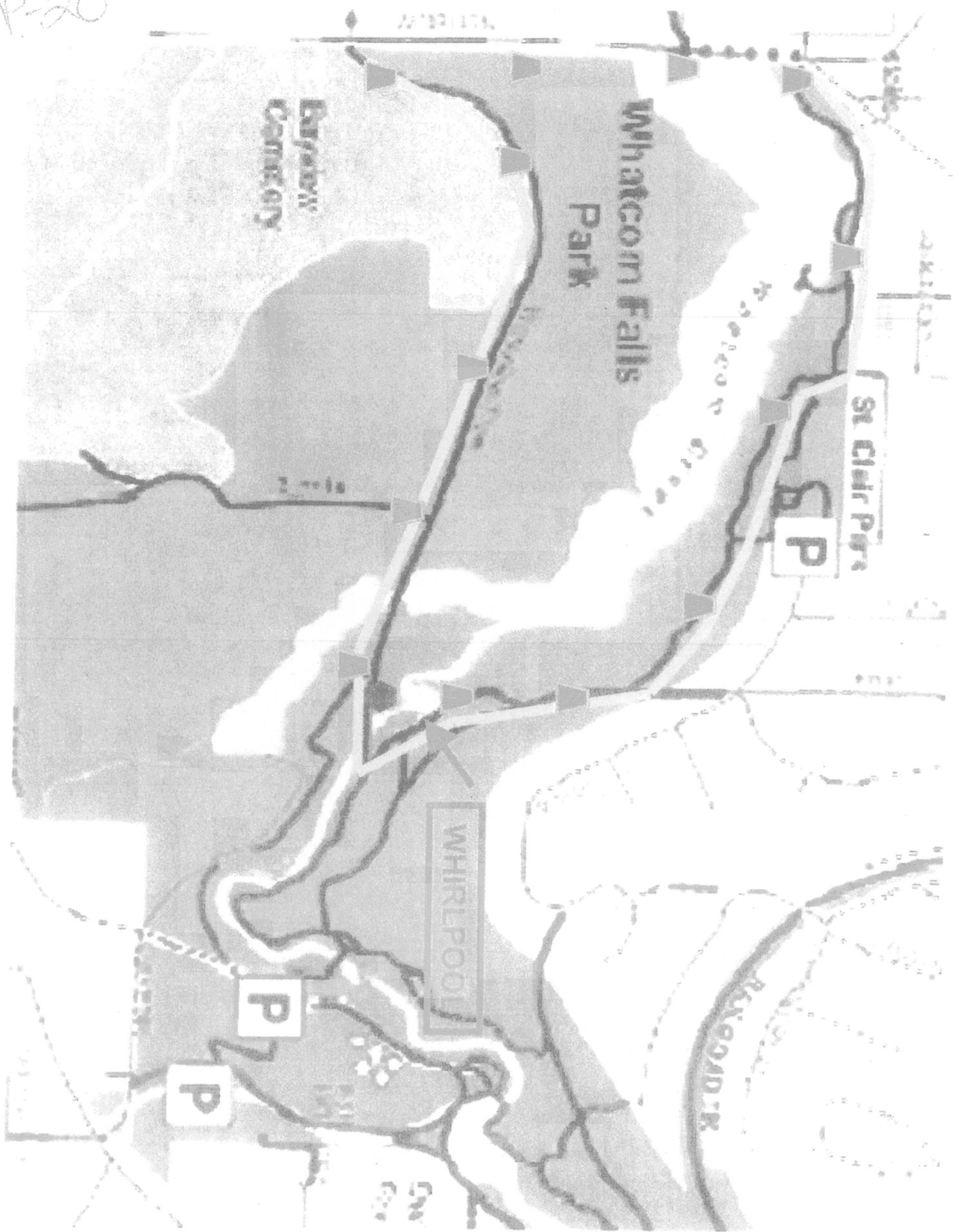
To Marvin L Harris/parks/cob@cob, Clare G  
Fogelsong/pw/cob@cob  
cc

Subject WHATCOMFALLS

WE HAVE HAD SOME LARGE PIECES OF CABLE DAMAGED AS WELL AS SOME STOLEN , i AM NOT IN FAVOR OF MAKING THE NESSASARY REPAIRS ON OUR BUDGET AND BELIEVE THAT MAYBE IT IS TIME TO JUST REMOVE THEM RATHER THEN TRYING TO KEEP IT CLOSED AND CABLED .  
ANY DIRECTION HERE ? WHAT WOULD YOU LIKE DONE HERE ?

1132

P-20

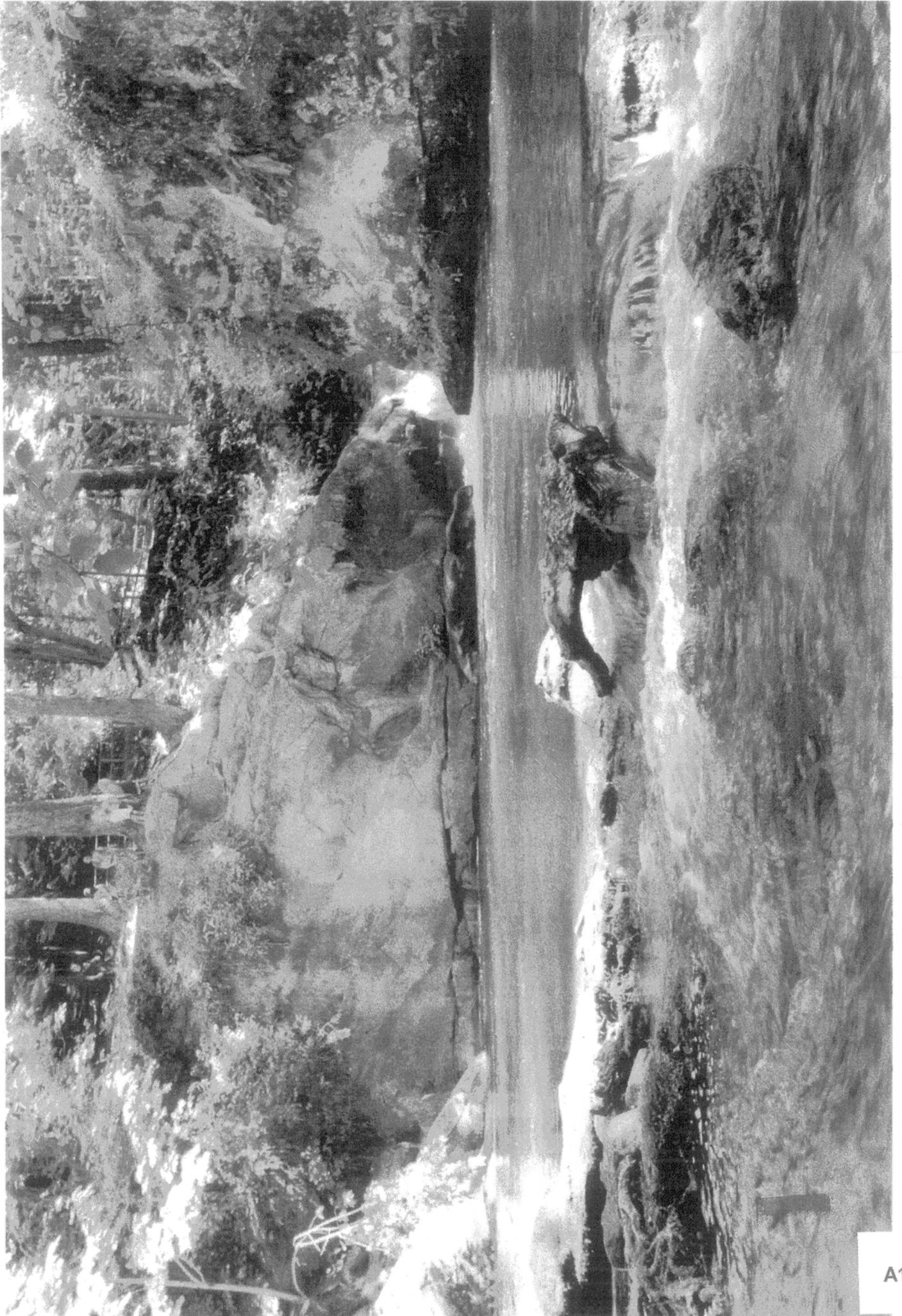


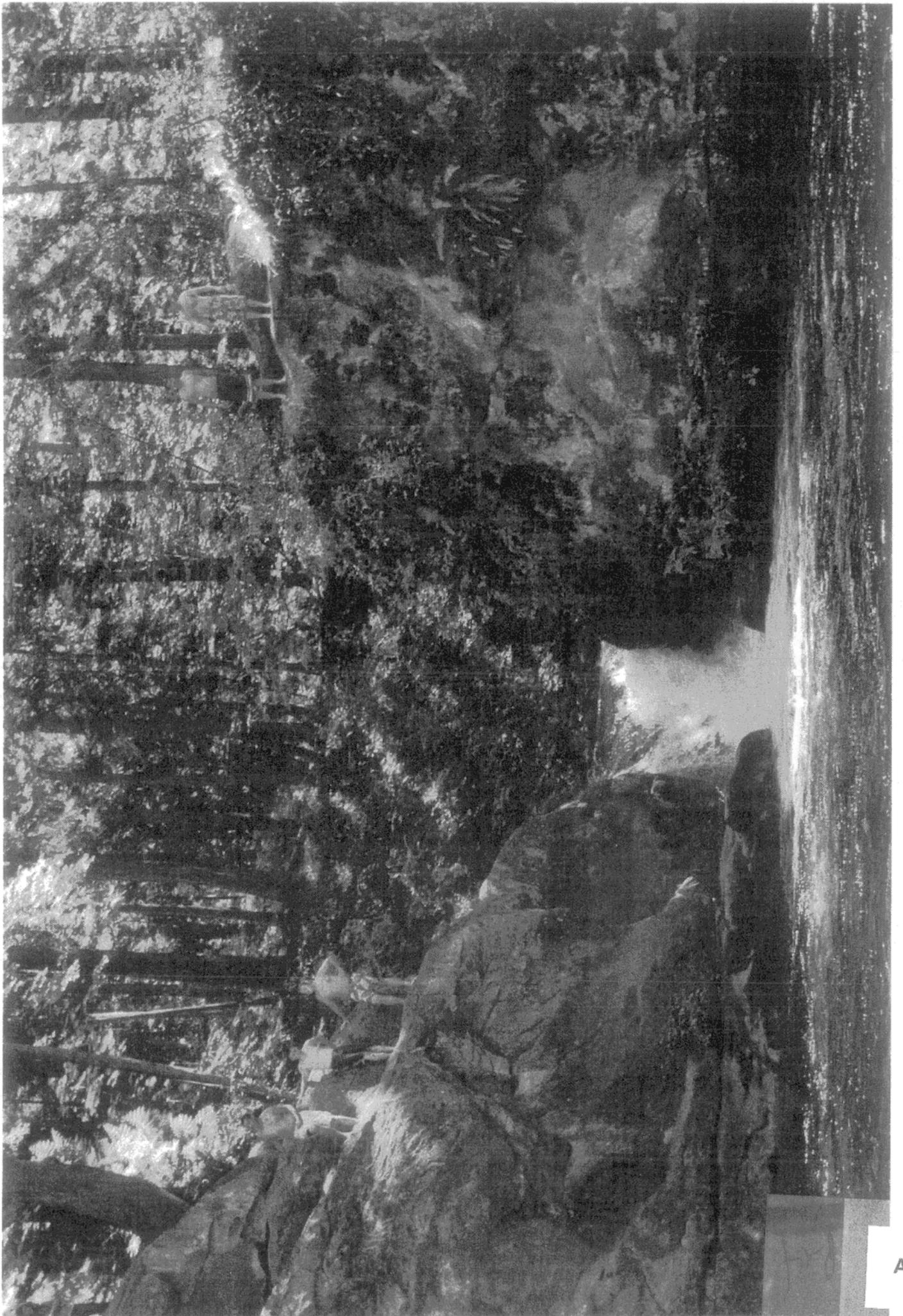


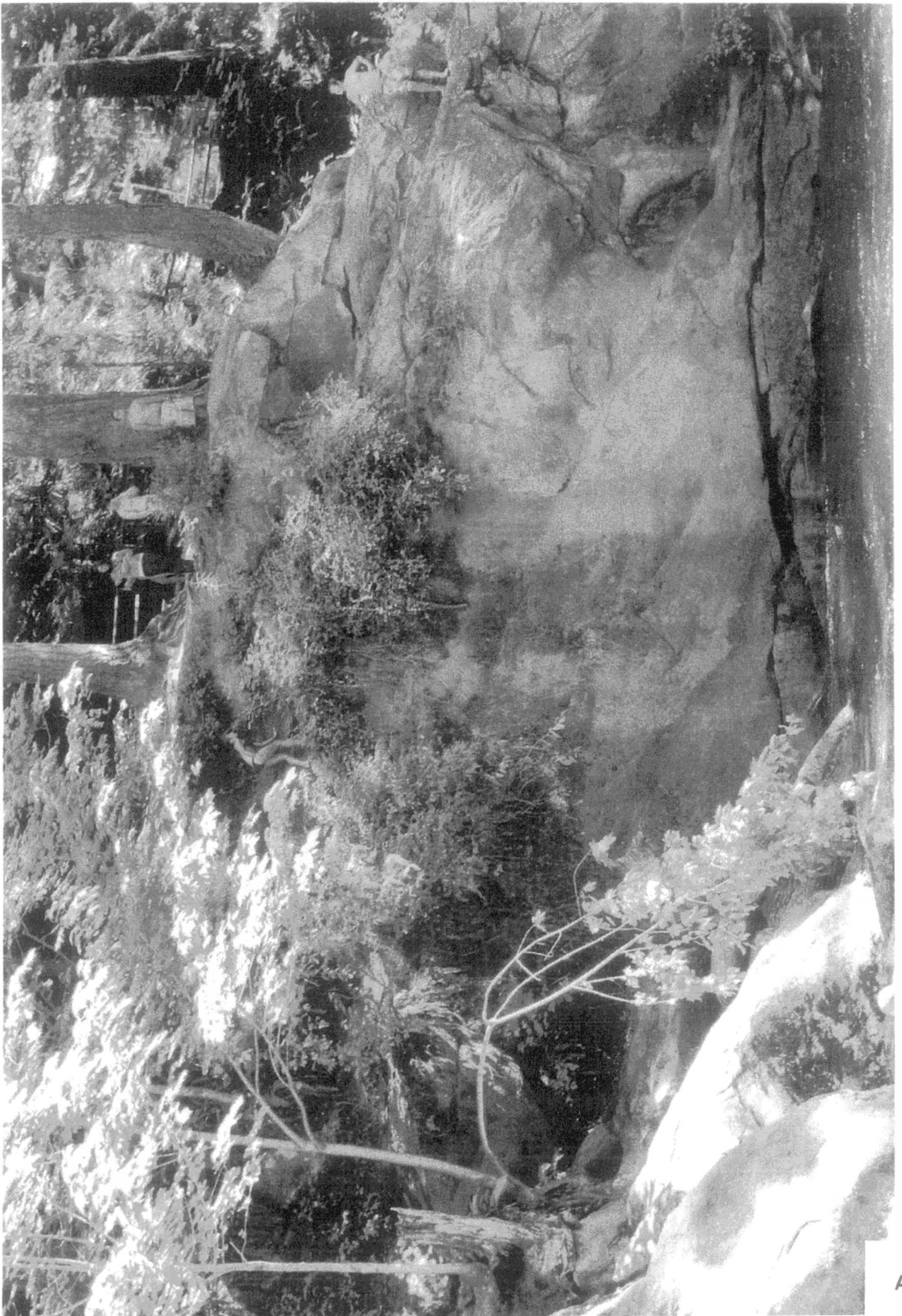
**DO NOT ENTER**  
DUE TO HAZARDOUS CONDITIONS

**PARK AREA CLOSED**

BY ORDER OF THE DIRECTOR OF PARKS  
& RECREATION THIS PARK AREA CLOSED  
TO USE. VIOLATION OF THIS ORDER IS  
PUNISHABLE BY A FINE NOT TO EXCEED  
\$1000 AND OR 90 DAYS IN JAIL.  
PER B.M.C. A.D.A. 130

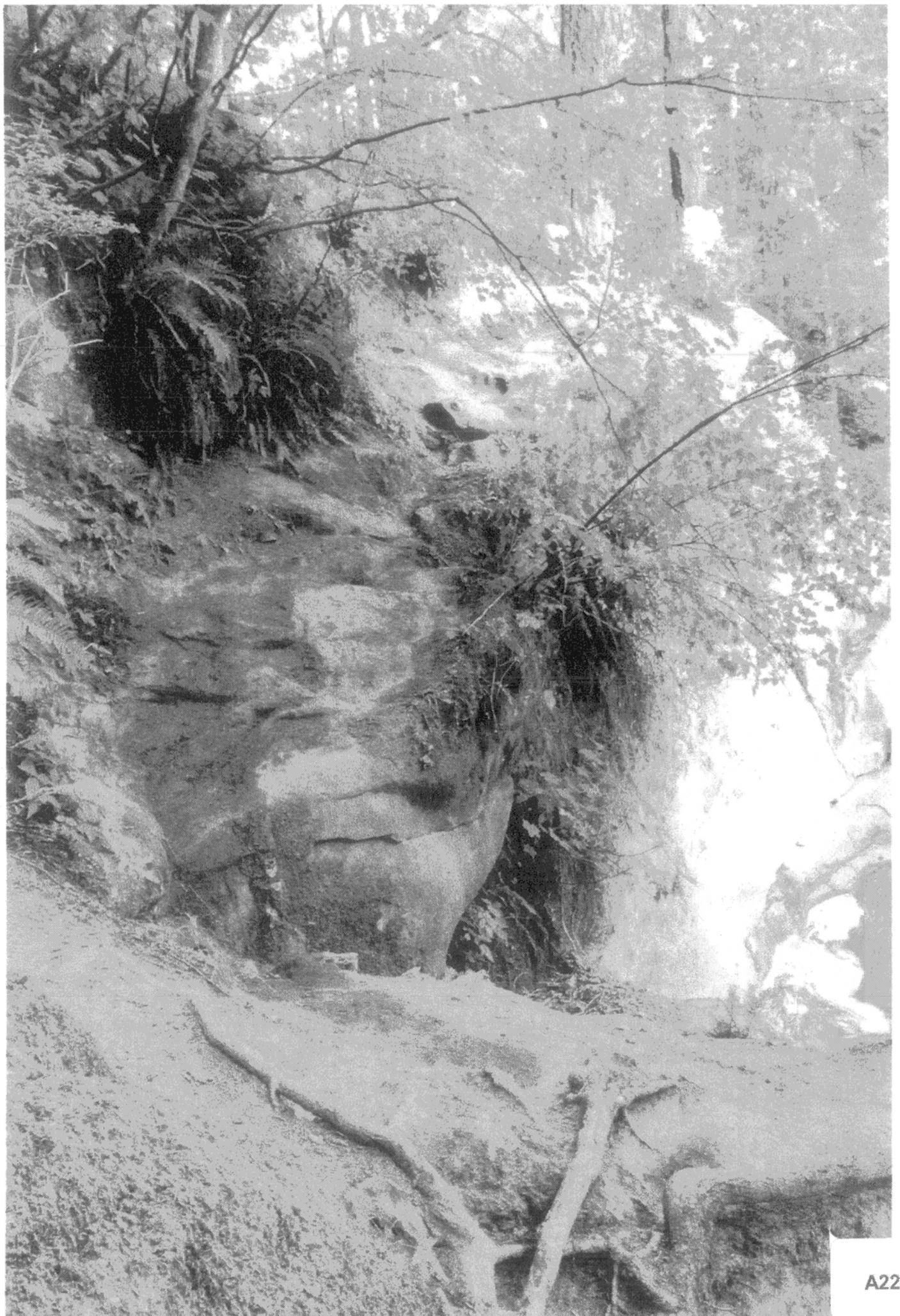














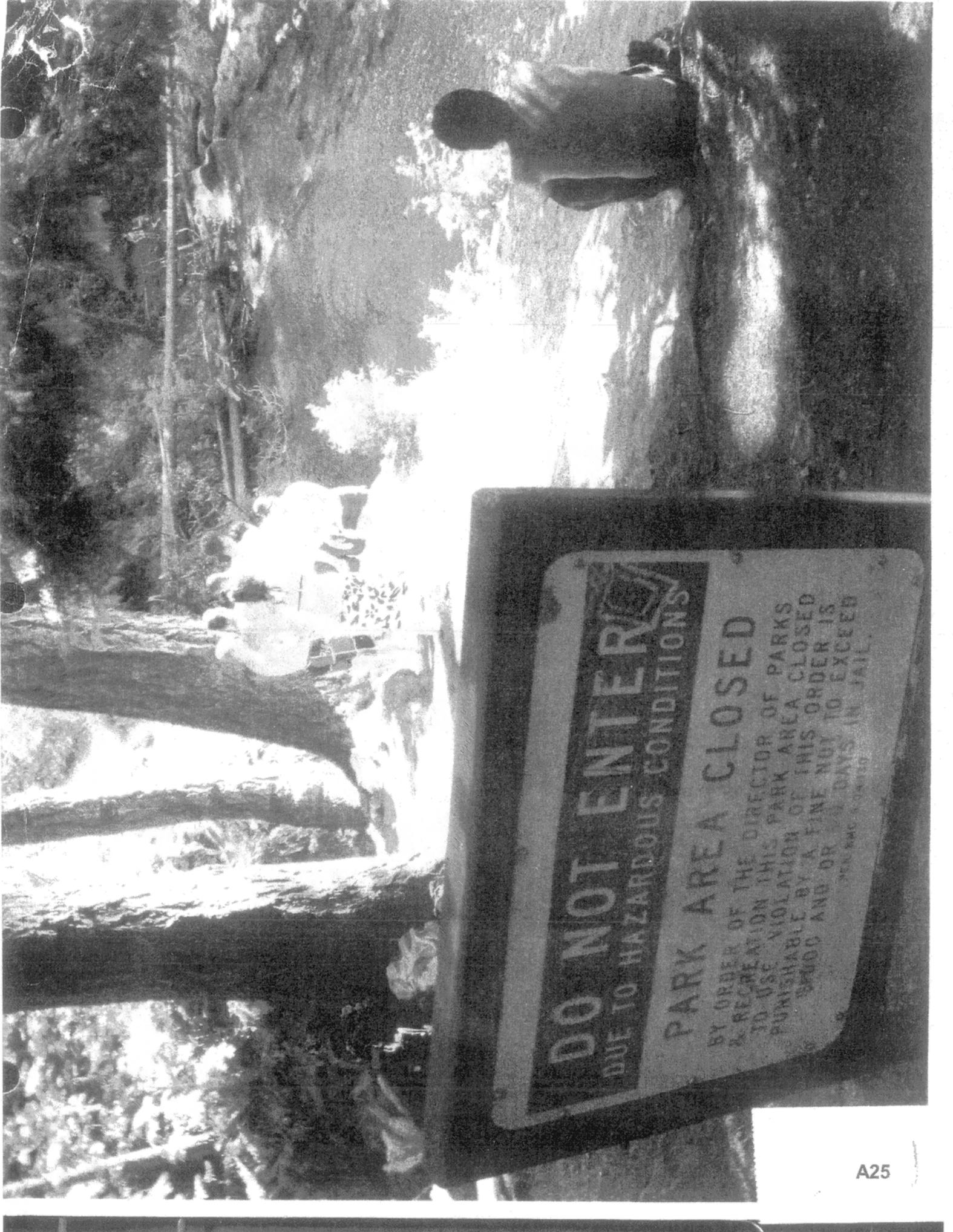
WARNING-HAZARDOUS AREA  
 WATER BELOW IS SHALLOW IN SPOTS  
 AND CONTAINS LARGE ROCKS  
 A FALL OR DIVE MAY RESULT  
 IN SERIOUS INJURY  
 THERE ARE NO  
 SUPERVISED SWIMMING AREAS IN  
 WHITTON FALLS PARK  
 ESTABLISHED BY THE STATE OF TEXAS  
 1935



09/29/2011

A24

918



**DO NOT ENTER**  
DUE TO HAZARDOUS CONDITIONS

**PARK AREA CLOSED**  
BY ORDER OF THE DIRECTOR OF PARKS  
& RECREATION THIS PARK AREA CLOSED  
TO USE VIOLATION OF THIS ORDER IS  
PUNISHABLE BY A FINE NOT TO EXCEED  
\$500 AND OR 90 DAYS IN JAIL.  
PER KMG 5.0010