

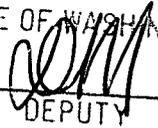
No. 47192-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

BY  DEPUTY

WENDIE DICKIE, Appellant,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION, Respondent.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant Dickie replies to the Washington State Parks and Recreation Commission's Answering Brief.

ARGUMENT

1. **The Injury Causing Condition Is The Wet And Slippery Deck.**

The Washington State Parks and Recreation Commission (hereinafter "State Parks") mischaracterizes the relevant inquiry on appeal. The issue is not whether a "wet deck" is a latent condition under RCW 4.24.210 as a matter of law. Instead, the issue on appeal is whether the evidence viewed in Plaintiff's favor establishes that a wet and slippery deck that provided access to a lodging accommodation in a state park was an objectively latent condition. *Van Dinter v. Kennewick*, 121 Wash.2d 38, 44, 846 P.2d 522 (1993).

In *Jewels v. City of Bellingham*, Number 90319-1 (June 11, 2015), the Supreme Court surveyed prior court decisions addressing the latency component of RCW 4.2 4.210. Essentially, the Court emphasized that determining a factual issue of latency depends on what the general class of recreational users could observe, or not. *Id.* at 5.

The Supreme Court offered basic principles in determining
latency:

“. . . If an ordinary recreational user standing near the injury-causing condition could see by observation, without the need to uncover or manipulate the surrounding area, the condition is obvious (not latent) as a matter of law. The latency of the condition is not based on the particular activity the recreational user is engaged in or the particular user’s experience with the area from earlier visits or expertise in the specific recreational activity.) *Jewels at 5*.

Applying those principals to this case, the inquiry here is whether a recreational user could observe, without any testing or manipulation, that the deck was wet and slippery. If this injury causing condition, a wet and slippery deck, is readily apparent, then the condition is patent, and not latent. However, if by mere observation, a recreational user could not observe that the deck was in fact slippery, then the injury causing condition was latent.

Certainly, finding that a wet wooden ramp alone constitutes a latent injury causing condition would run afoul the legislative intent of encouraging landowners to make their properties available to the public, but that is not the issue here. The correct inquiry is whether this statute encourages a State Park to provide accommodations for a fee that includes latently slippery walking surface that its own employee, short of physical inspection, could not appreciate or observe.

State Parks goes to great lengths to dismiss this employee's testimony that he could not observe slippery nature of the deck upon mere observation. Although this may be only one person's observation, it creates a factual issue as to whether the general class of recreational users could have appreciated the slippery nature of the deck when an employee of the agency charged with maintaining the structure could not.

2. A Wet and Slippery Deck Is Not A Patent Condition As a Matter of Law.

The State of Washington argues that as a matter of law, there is no duty to warn of wet wood conditions because they are obvious and apparent. In support, State Parks cites *Ranniniger v. Bryce*, 51 Wn.2d 383, 318 P.2d 618, 619 (1957). In this case, the injured Plaintiff alleged that a store keeper failed to warn Plaintiff about the wet conditions of a wooden dock, and that the "possible" hazards associated with the wet dock. The Court found, on that record, there was no evidence of a latent condition, and that the condition Plaintiff alleged was open and obvious. This record establishes a latent injury causing condition.

State Park's reliance on *Ochampaugh v. City of Seattle*, 91 Wn.2d 514, 588 P.2d 1351 (1979) is more tenuous. In that case, two children drowned in a pond owned by the City of Seattle. The Supreme Court

addressed the application of the attractive nuisance doctrine to a body of water. *Id.* at 518. Plaintiff urged the Court to carve out an exception to the general rule that bodies of water are not considered an attractive nuisance, arguing that this particular pond was exceedingly dangerous, relying in part on slippery submerged wood. *Id.* at 524. The Court rejected this argument, holding that the pond, with its attributes, was a natural body of water, and as such, fell outside the scope of the attractive nuisance doctrine. Nowhere did the Supreme Court determine that “wet wood,” as a matter of law, is an open and obvious danger as the State Parks contends.

CONCLUSION

Plaintiff established that the wet and slippery deck she fell on was a latent, injury causing condition.

July 15, 2015

Respectfully submitted,



Joe Di Bartolomeo, WSBA 32273
Of Attorneys for Wendy Dickie

1 **CERTIFICATE OF TRUE COPY**

2 I hereby certify that the foregoing Appellant's Reply Brief is a true and correct copy of the
3 original.

4 DATED: July 15, 2015

5 DI BARTOLOMEO LAW OFFICE, P.C.

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10 Of Attorneys for Appellant Wendy Dickie

11 **CERTIFICATE OF SERVICE AND MAILING**

12 I hereby certify that I served the foregoing Appellant's Reply Brief to Defendant upon the
13 following:
14

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21 on July 15, 2015 by a true copy, certified by me as such and contained in a sealed envelope
22 with postage prepaid to said person at their last known address.

23 DI BARTOLOMEO LAW OFFICE, P.C.

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