

NO. 47192-2-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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WENDIE DICKIE,

Appellant,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION,

Respondent.

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**RESPONDENT'S ANSWERING BRIEF**

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## I. INTRODUCTION

This case arises from an incident when Ms. Dickie slipped and fell on a wet wood ramp at Cape Disappointment State Park. Because Ms. Dickie was a recreational user who did not pay a fee, the park is immune from liability under the recreational land use act unless she can establish that she was injured by reason of a known, dangerous, artificial, latent condition for which warning signs had not been conspicuously posted. RCW 4.24.210(4)(a).<sup>1</sup> The policy underlying the statute is to reduce the common law liability in order to encourage landowners to open their lands for recreational purposes.

Ms. Dickie cannot establish the element of latency because the injury-causing condition, a wet wood ramp, was obvious. It is the condition, not the risk it poses, that must be latent. *Jewels v. City of Bellingham*, No. 90319-1, 2015 WL 3643478, at \*14 (Wash. June 11, 2015); *Van Dinter v. Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993). Ms. Dickie has not met her burden of proving the condition—the wet wood ramp—was latent. The trial court properly granted summary judgment and that decision should be affirmed.

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<sup>1</sup> See Appendix (App.) A, RCW 4.24.200, .210.

## **II. COUNTERSTATEMENTS OF ISSUES**

A. Did the trial court properly dismiss Ms. Dickie's negligence claim as a matter of law based upon recreational land use immunity?

1. Is a wet wood ramp a latent condition?
2. Is the park ranger's testimony as to what he did or did not see immaterial and irrelevant?

## **III. RESTATEMENT OF THE CASE**

Wendie Dickie and her husband visited Cape Disappointment State Park to find a covered place for a picnic on November 13, 2010. CP at 5. It was drizzling, overcast and wet. CP at 70-71. The park is located next to the beach in Ilwaco, Washington, and contains trails, campsites, cabins and yurts.<sup>2</sup>

As they drove through the camping area, Ms. Dickie noticed the yurts and out of curiosity, asked her husband to pull over so that she could look into the window of a vacant yurt. CP at 72. The yurt she selected has an access ramp that is approximately ten feet long with a rise of about two feet. The ramp did not have slip resistant material attached to it but had hand rails on both sides. Photographs of the yurt and its ramp were taken the day after the incident and can be found in App. B.

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<sup>2</sup> <http://www.parks.wa.gov/486/Cape-Disappointment> (last visited June 15, 2015).

Ms. Dickie walked up the ramp, peered into the window, and turned around to return to her car. As she descended the ramp, she slipped and injured her knee. CP at 5.

#### IV. SUMMARY OF ARGUMENT

Once it has been determined that Ms. Dickie is a recreational user under the recreational land use statute, the burden is on Ms. Dickie to prove that the condition, not its injury-causing aspect, was latent. Failure to establish this element is fatal to Ms. Dickie's claim. The trial court properly granted summary judgment to the park because the condition—a wet wood ramp—is obvious, even if its slipperiness was not.<sup>3</sup> Ms. Dickie's claim was properly dismissed.

#### V. ARGUMENT AND AUTHORITY

##### A. **The Express Purpose Of The Recreational Land Use Immunity Statute Forecloses Ms. Dickie's Argument**

The recreational land use statute was enacted to encourage landowners to open their land for recreational purposes by limiting their liability for unintentional harm. RCW 4.24.200.<sup>4</sup> *See also Ochampaugh v. City of Seattle*, 91 Wn.2d 514, 523, 588 P.2d 1351 (1979) (“it is

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<sup>3</sup> An order on summary judgment is reviewed *de novo* on appeal. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225-27, 770 P.2d 182 (1989).

<sup>4</sup> “The purpose of RCW 4.24.200 and .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.” RCW 4.24.200.

apparent that this statute was enacted because of a greatly expanding need and demand for outdoor recreational opportunities.”). To achieve this goal, the Legislature expressly modified the duties owed to invitees under the common law: a public or private landowner who makes land available to recreational users free of charge cannot be held liable for unintentional injuries to users unless the injury is the direct result of a known, dangerous, artificial, latent condition for which warning signs have not been conspicuously posted. RCW 4.24.210.<sup>5</sup>

Ms. Dickie has the burden of proving all of these elements, and the failure to establish any one of them is fatal to her claim. *Ertl v. Parks and Recreation*, 76 Wn. App. 110, 115, 882 P.2d 1185 (1994). The only issue in dispute here is the element of latency. Latent is defined as “not readily apparent to the general class of recreational users.” *Van Dinter*, 121 Wn.2d at 45. A condition is obvious as a matter of law if an ordinary recreational user standing near the injury-causing condition could see it by observation, without the need to uncover or manipulate the surrounding area. *Jewels*, 2015 WL 3643478 at \*14.

The four consecutive terms used in RCW 4.24.210(4)(a)—“known,” “dangerous,” “artificial,” and “latent”—modify “condition,” and

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<sup>5</sup> “Nothing in this section shall prevent the liability of the landowner or others in lawful possession or control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” RCW 4.24.210(4)(a).

not one another. *Jewels*, 2015 WL 3643478 at \*9. Injuries that result from latent dangers presented by a patent condition are not actionable under the recreational land use statute. *Van Dinter*, 121 Wn.2d at 46; *Tabak v. State*, 73 Wn. App. 691, 695, 870 P.2d 1014 (1994).

The condition in issue here is a wet wood ramp. There can be little doubt that a wet wood ramp located on the coast of Washington is not a “latent condition” for which the landowner has a duty to warn. The statute’s purpose is “to encourage owners . . . to make [their properties] available to the public,” RCW 4.24.200, but that can only be effectuated with predictability. A finding that a wet wood ramp is a latent condition would be contrary to the express legislative intent and seriously undermine the public policy that is the basis for recreational land use immunity. Under Ms. Dickie’s interpretation of the law, landowners would be compelled to close their property to the public in order to avoid liability for obvious conditions that exist across the state.

#### **1. A Wet Wood Ramp Is A Readily Apparent Condition**

Ms. Dickie complains that the trial court erred because it required proof of a “hidden” condition, as opposed to a condition that is “not readily apparent”. Brief of Appellant at 8. This is a distinction without a difference. The words “hidden” and “not readily apparent” are used interchangeably by the courts, and the use of the word “hidden” instead of

“not readily apparent” does not establish that the trial court imposed a more rigorous standard on the plaintiff to prove latency. *See Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 924, 969 P.2d 75, 82 (1998) (using “hidden” and “not readily apparent” interchangeably); *Preston by Preston v. Pierce County*, 48 Wn. App. 887, 892, 741 P.2d 71, 74 (1987), *overruled on other grounds by Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 845 P.2d 522 (1993); *see also Black’s Law Dictionary* 898 (8th ed. 2004) (“latent” means concealed, dormant; “latent defect” refers to “hidden defect” as defined under “defect” ).

In order to avoid the operation of the recreational land use statute, Ms. Dickie must show that the injury-causing condition, not the specific risk it poses, is hidden or not readily apparent to the ordinary recreational user. *Jewels*, 2015 WL 3643478 at \*14; *Van Dinter*, 121 Wn.2d at 46; *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 610, 774 P.2d 1255 (1989); *Swinehart v. City of Spokane*, 145 Wn. App. 836, 853, 187 P.3d 345, 354 (2008). Because RCW 4.24.210 does not hold landowners potentially liable for patent conditions with latent dangers, a party may not recover for an injury caused by latent dangerous aspects of a patent condition. *Van Dinter*, 121 Wn.2d at 46.

The *Van Dinter* case is similar to the present case. Plaintiff in that case sustained injuries when he ran into an antenna of a caterpillar-shaped

piece of playground equipment. The trial court granted summary judgment to the City of Kennewick, the park owner. The court of appeals affirmed that summary judgment as did the Washington Supreme Court. The plaintiff attempted to argue latency from two different standpoints. First, Plaintiff argued that, while the caterpillar itself may have been patent and obvious, its hazardous condition was not. The Supreme Court rejected that argument because in effect, it treats “latent” as modifying “dangerous” rather than “condition”. *Van Dinter*, 121 Wn.2d at 46.

The second argument regarding latency addressed by the Supreme Court in *Van Dinter* was whether the placement of the injury causing condition made it latent for purposes of an exemption from the recreation land use statute. The court rejected that argument as well because RCW 4.24.210 does not hold landowners potentially liable for patent conditions with latent dangers. The condition itself must be latent. *Id.*

The reasoning in *Swinehart* is also analogous to this case. In *Swinehart*, Mr. Swinehart slid down a slide and injured his back after landing on wood chip surfacing at the bottom of the slide. *Swinehart*, 145 Wn. App. at 841. The plaintiffs argued that the insufficient and improperly maintained wood chips at the bottom of the slide were latent not only to Mr. Swinehart, but also to the general class of users. The court found that the displacement and condition of the wood chips at the

playground was patent, or obvious, because park visitors are able to determine whether the wood chips have been displaced, despite the fact that they may not know with absolute certainty how deep the containment pit is. *Id.* at 851. Just like in *Swinehart*, the condition of the wood ramp here was visible and obvious at the time or such a condition could not be captured by a photograph. *Id.* at 852.

The *Van Dinter* and *Swinehart* opinions are controlling here inasmuch as the injury causing condition—the ramp and its wet surface—was obvious, but the specific risk it posed—slipping—may have been hidden or not readily apparent to the ordinary recreational user. Under *Van Dinter* and *Swinehart*, Ms. Dickie may not recover for an injury caused by latent dangerous aspects of a patent condition.

Even under general principles of premises liability law, there is no duty to warn of wet wood conditions because they are obvious and apparent. *See Ranniger v. Bryce*, 51 Wn.2d 383, 385, 318 P.2d 618, 619 (1957) (holding that there was no duty to warn anyone of the possible hazard from a wet wood dock because it was obvious and apparent); *see also Ochampaugh*, 91 Wn.2d at 527 (the danger of slippery wood debris is open and apparent to everyone, even if in a pond and not visible). The Supreme Court in *Ochampaugh* held that, in cases addressing slipping on wet wood, the probability of injury is not great enough to warrant a

conclusion that the duty of exercising reasonable care demands that the landowner make the condition safe or provide a warning. *See id.*

The condition that injured Ms. Dickie in this case was patent as a matter of law. It was not hidden or otherwise undetectable in the exercise of ordinary care. Just as in *Van Dinter* and *Swinehart*, the mere fact that Ms. Dickie may not have appreciated its dangerous characteristics does not render the condition latent. To hold otherwise would impose upon the park a greater duty than it owes to invitees under the recreational land use statute. *Ranniger*, 51 Wn.2d at 385 (no common law duty to warn that a wet wood surface might be slippery). The park is not required to protect recreational users from patent conditions. RCW 4.24.210. The trial court properly granted summary judgment.

## **2. The Park Ranger's Testimony Is Immaterial And Irrelevant**

Ms. Dickie seeks to bolster her claim with testimony of a park ranger regarding whether the slipperiness of the ramp was apparent. First, as established above, the relevant question is whether the wet wood ramp was apparent, not whether it was slippery. Second, latency is viewed objectively, and what a particular user does or does not see is immaterial and has no bearing on whether a condition is latent. *Jewels*, 2015 WL 3643478 at \*11, 14; *Tennyson v. Plum Creek Timber Co.*, 73 Wn.

App. 550, 555, 872 P.2d 524 (1994). The question is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it. *Chamberlain v. Dep't of Trans.*, 79 Wn. App. 212, 219, 901 P.2d 344 (1995); *Tennyson*, 73 Wn. App. at 555.

The park ranger's testimony as to what he did or did not see is immaterial and irrelevant. At best, the testimony goes to the park's knowledge of a condition, not its latency. Because latency is the only element in issue and Ms. Dickie failed to meet her burden of producing competent evidence to establish this essential element of her claim, the trial court properly granted the defendant's motion for summary judgment.

## VI. CONCLUSION

Ms. Dickie is a recreational user who cannot prove that the wet wood ramp on which she fell was a latent condition. Failure to establish this element is fatal to Ms. Dickie's claim. The judgment of the trial court

should be affirmed because the condition—a wet wood ramp—is obvious,  
even if its slipperiness was not.

RESPECTFULLY SUBMITTED this 17th day of June, 2015.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that the Respondent's Answering Brief was electronically filed with the Court of Appeals as follows:

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DATED this 17th day of June, 2015, at Tumwater, Washington.

s/Laurel B. DeForest, Legal Assistant

# Appendix A

## **RCW 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.

[1969 ex.s. c 24 § 1; 1967 c 216 § 1.]

## **RCW 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.

[2012 c 15 § 1. Prior: 2011 c 320 § 11; 2011 c 171 § 2; 2011 c 53 § 1; 2006 c 212 § 6; prior: 2003 c 39 § 2; 2003 c 16 § 2; 1997 c 26 § 1; 1992 c 52 § 1; prior: 1991 c 69 § 1; 1991 c 50 § 1; 1980 c 111 § 1; 1979 c 53 § 1; 1972 ex.s. c 153 § 17; 1969 ex.s. c 24 § 2; 1967 c 216 § 2.]

## **Notes:**

**Findings -- Intent -- 2011 c 320:** See RCW 79A.80.005.

**Effective date -- 2011 c 320:** See note following RCW 79A.80.005.

**Intent -- 2011 c 171:** "This act is intended to reconcile and conform amendments made in

chapter 161, Laws of 2010 with other legislation passed during the 2010 legislative sessions, as well as provide technical amendments to codified sections affected by chapter 161, Laws of 2010. Any statutory changes made by this act should be interpreted as technical in nature and not be interpreted to have any substantive policy or legal implications." [2011 c 171 § 1.]

**Effective date -- 2011 c 171:** "Except for section 129 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2011." [2011 c 171 § 142.]

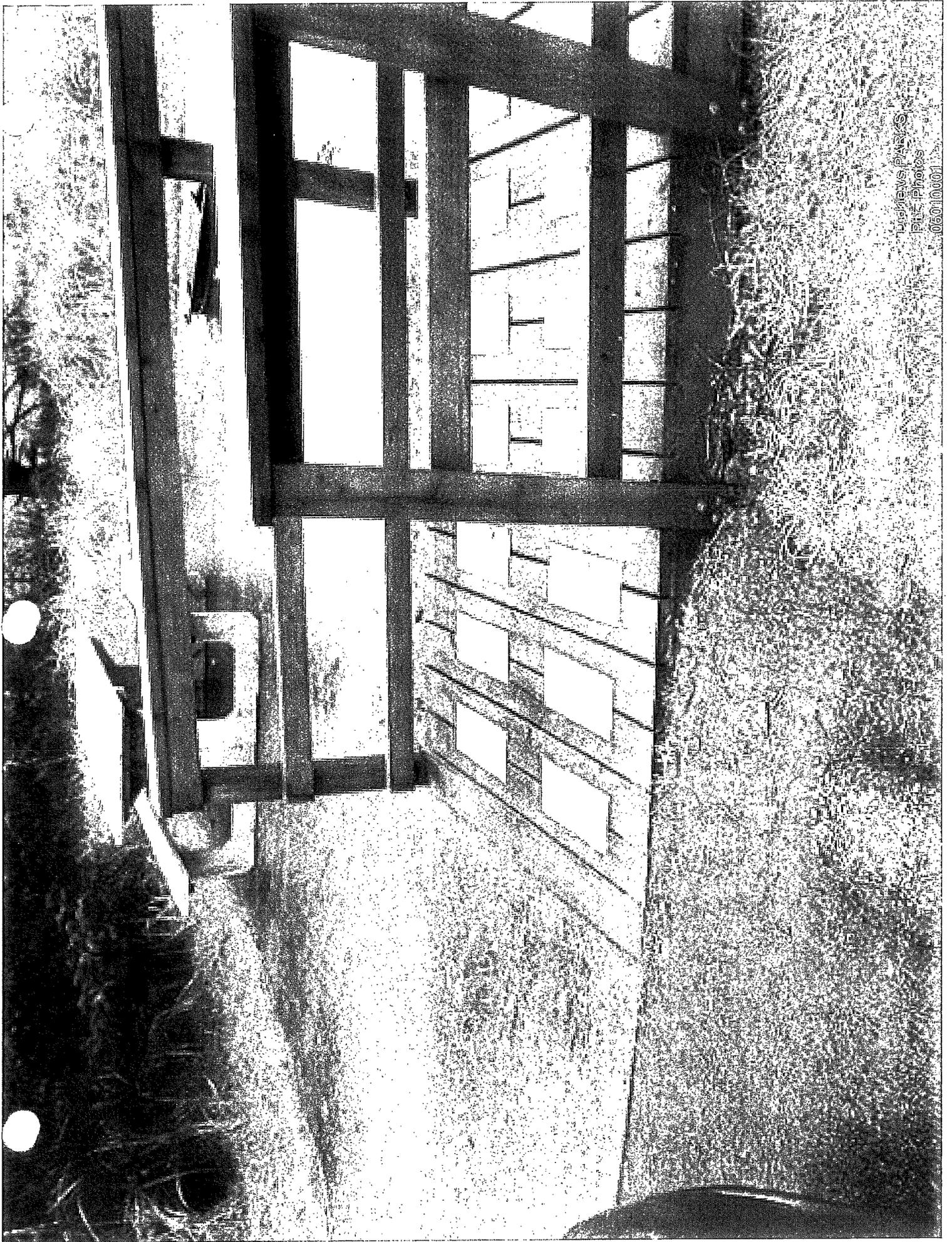
**Finding -- 2003 c 16:** "The legislature finds that some property owners in Washington are concerned about the possibility of liability arising when individuals are permitted to engage in potentially dangerous outdoor recreational activities, such as rock climbing. Although RCW 4.24.210 provides property owners with immunity from legal claims for any unintentional injuries suffered by certain individuals recreating on their land, the legislature finds that it is important to the promotion of rock climbing opportunities to specifically include rock climbing as one of the recreational activities that are included in RCW 4.24.210. By including rock climbing in RCW 4.24.210, the legislature intends merely to provide assurance to the owners of property suitable for this type of recreation, and does not intend to limit the application of RCW 4.24.210 to other types of recreation. By providing that a landowner shall not be liable for any unintentional injuries resulting from the condition or use of a fixed anchor used in rock climbing, the legislature recognizes that such fixed anchors are recreational equipment used by climbers for which a landowner has no duty of care." [2003 c 16 § 1.]

**Purpose -- 1972 ex.s. c 153:** See RCW 79A.35.070.

Off-road and nonhighway vehicles: Chapter 46.09 RCW.

Snowmobiles: Chapter 46.10 RCW.

# Appendix B



MURKOV'S PICTURES  
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# WASHINGTON STATE ATTORNEY GENERAL

**June 17, 2015 - 11:17 AM**

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