

FILED

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DIVISION III
STATE OF WASHINGTON
R. _____

NO. 298043

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JACQUELINE SMITH,
Plaintiff-Appellant

v.

BRYAN STOCKDALE, et al.,
Defendant-Respondent

BRIEF OF APPELLANT JACQUELINE SMITH

Attorney for Plaintiff-Appellant:
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INTRODUCTION

People will continue to be injured and killed as a result of jumping into Wanapum Reservoir from the cliffs near Vantage, Washington, as long as Vantage Riverstone Resorts charges them \$5 to jump, in an area beyond its permit from the Grant County Public Utility District to use property bordering the reservoir. The resort should be encouraged to stop charging people to jump, and to install effective barriers and warnings by means of tort and consumer protection law. *See Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn. 2d 413, 420, 150 P.3d 545 (2007) (stating underlying purpose of tort law is to provide for public safety through deterrence of negligence); RCW 19.86.920 (stating purposes of Washington Consumer Protection Act (CPA) include protection of the public).

ASSIGNMENTS OF ERROR

1. The superior court erred by dismissing Plaintiff's negligence and CPA claims on summary judgment. CP 357-58 (letter decision); CP 359-61 (summary judgment order).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the fact that Defendants did not own or have a permit to use the property on which Plaintiff was injured eliminates their

duty of care, even though they charged her a \$5 fee to use that property for cliff jumping?

2. Whether the fact that Defendants had a permit to charge a \$5 fee for use of the property adjacent to the cliff jumping area precludes a finding, as a matter of law, that it was unfair or deceptive within the meaning of the CPA for Defendants to charge Plaintiff a fee to go cliff jumping in an area for which they did *not* have a permit?

STATEMENT OF THE CASE

A. The Property.

Stockdale, Inc., owns property near Vantage, Washington. Stockdale leases some of its property to Havilah, Inc. Havilah uses the property for the purpose of conducting its business known as Vantage Riverstone Resorts. CP 23.¹

The VRR property borders Wanapum Reservoir on the Columbia River. CP 23. Between the reservoir and the property is a strip of land known as “freeboard” area. CP 263 (S. Dotson Depo., at 11:3-22). The freeboard area is owned by Public Utility District No. 2 of Grant County (PUD). *Id.*

¹ Collectively, Stockdale, Havilah and Vantage Riverstone Resorts shall be referred to in this brief as VRR.

VRR has a permit from the PUD to charge a \$5.00 day use fee for a portion of the freeboard area. CP 23. It does not have authority to charge the fee in the absence of the permit. CP 277-92 (permit).

As a condition of the permit, VRR must maintain its facilities in a safe condition (§ 8); assume liability for injuries suffered by visitors on the property (§ 10); and agree that the use of the property shall not endanger the health of any person (§§ 12 & 33). CP 278-79 & 281.

B. Use Of The Property.

Part of the VRR property and freeboard to the north of the permitted area is used for cliff jumping. CP 294-332 (photos of cliff jumpers); CP 119-20. VRR is well aware of this fact. *E.g.*, CP 228 (B. Stockdale Depo., at 47:13-22); CP 249 (C. Cutlip Depo., at 18:23-19:23); CP 264 (S. Dotson Depo., at 14:19-16:22). VRR charges the same \$5 fee to use the cliff jumping area as it does for the permitted area. CP 119-20.

VRR does not have authority to charge a fee for the cliff jumping area under the terms of its permit from the PUD. CP 267 (S. Dotson Depo., at 26:6-10). According to the PUD, it would be deceptive to tell people who come on their property that they have to pay \$5 in order to jump off the cliff. CP 267 (S. Dotson Depo., at 26:11-17). The reason it would be deceptive is that there is no legal authority to charge the fee for using the cliff jumping area. *Id.*

It is dangerous to jump from cliffs as high as those at Vantage. CP 275. In 2009, a person died jumping from the cliffs. CP 269 (S. Dotson Depo., at 35:18-36:25); CP 334-347 (incident report). The manager of VRR is aware of at least half a dozen injuries, and both the manager and owner acknowledge the danger of cliff jumping. CP 251 (C. Cutlip Depo., at 27:12-25); CP 228 (B. Stockdale Depo., at 46:6-47:1).

The PUD has never prevented VRR from placing a barrier on its property to prevent cliff jumping. CP 266 (S. Dotson Depo., at 23:22-24:2). Likewise, the PUD has never prevented VRR from placing a sign on its own property to warn about the dangers of cliff jumping. CP 266 (S. Dotson Depo., at 23:17-21). Presumably, barriers or signs would discourage cliff jumping and have a corresponding effect on the willingness of customers to pay the \$5 fee.

VRR had as many as 10,000 visitors in the summer of 2006. CP 247 (C. Cutlip Depo., at 9:8-10). One of those visitors was Jaci Smith.

C. Jaci Smith's Injuries.

In July 2006, Jaci Smith and several members of her family traveled from Oregon, where they live, to Washington State, so they could attend the Creation Fest series of concerts at the Gorge Amphitheater near George, Washington. CP 119. At the time, Jaci was 19 years old and she had just graduated from high school. *Id.*

While Jaci and her family were at Creation Fest, they became aware that other attendees were going to Vantage to swim in the Columbia River and cool off from the heat. CP 119. Jaci had never been to Vantage and she was unfamiliar with the area. *Id.*

On July 27, 2006, Jaci went to Vantage to swim along with her brother Beau and two of her sisters, Cyndi and Katie. CP 119. When they arrived at VRR, they saw that people were jumping from the cliffs into the Columbia River. *Id.* After Jaci and her siblings parked their car in an adjacent parking lot, Jaci and her sister Katie split up from her brother and other sister. *Id.* Jaci and Katie started walking toward the cliff jumping area. *Id.*

As Jaci and Katie approached the cliff jumping area, they were stopped by two VRR employees in a golf cart, a man and a woman, who told them that they had to pay \$5 for a wristband. CP 119. Jaci and Katie were previously unaware that there was a charge to use the property. *Id.*

Jaci asked one of the employees whether she still needed to pay if she just wanted to jump off of the cliff, because she did not intend to use any other facilities. CP 119. When she asked this question, the cliff jumping area was visible from where they were standing, and it was possible to see the people who were waiting to jump off the cliff. CP 119-

20. Jaci pointed to the cliff jumping area when she asked the question. CP 120.

In response, the VRR employee answered that Jaci still had to pay the fee, even if she just wanted to jump. CP 120. As a result, Jaci and Katie each paid \$5. *Id.* They received colored wristbands in return.

The VRR employee who answered Jaci's question never said that the cliff jumping area was off limits or that cliff jumping was dangerous. CP 120. Based on Jaci's conversation with the VRR employee, and his charging \$5 for a wristband, Jaci believed that VRR had the authority to charge \$5 for cliff jumping, that she was, in fact, being charged \$5 to jump from the cliff, and that cliff jumping is a normal and safe use of the property. *Id.* She did not appreciate the danger of cliff jumping. CP 121-22.

While they were in the area, neither of the VRR employees in the golf cart tried to stop any of the other people who were jumping, nor did they try to tell them that the cliff jumping area was off limits, nor did they try to warn them that cliff jumping was dangerous, even though the cliff jumping area and the people waiting to jump were visible from where they were standing. CP 120.

After paying the \$5 fee, Jaci walked over to the cliff jumping area along a well-worn path. CP 120. There was no sign along the path, and no

signs were visible from the path. *Id.* Although there was a dilapidated fence that crossed the path, Jaci did not have to step over the fence because it was already on the ground. *Id.* She may have stepped on the fence as it was lying on the ground. *Id.*

Based on Jaci's conversation with the VRR employee about paying \$5 to jump, the fact that other people were jumping, the VRR employees' apparent lack of concern with the other cliff jumpers, the well-worn path, the lack of any signs, and the nature of the fence, Jaci believed that she had permission to use the cliff jumping area. CP 120.

At the time, there were approximately 7-10 people in the cliff jumping area, and Jaci had to wait for at least 3 of them who were ahead of her before she could jump. CP 121. When it was her turn, she jumped. *Id.*

As soon as Jaci hit the water, she knew something was wrong. CP 121. She had trouble getting out. Her brothers and sister helped her get out of the water and to the car. *Id.* They drove immediately to see their mother at Creation Fest. *Id.* When they got there, Jaci's mother took her to the hospital in Quincy, Washington, where it was discovered that Jaci had a broken back and other injuries. *Id.* Jaci's injuries cause difficulty for her on a daily basis. *Id.*

D. Procedural History.

VRR moved for summary judgment. CP 20-21. The superior court granted the motion. CP 359-61. The court reasoned that VRR owed no duty of care to Jaci Smith because it did not own or have a permit to use the freeboard area where she was injured, without regard for the \$5 fee or the other circumstances. CP 357. The court also reasoned that VRR's conduct was not unfair or deceptive within the meaning of the CPA, as a matter of law, because VRR had the right to charge a fee for the property on which Jaci Smith was standing when she paid it, again without regard for the circumstances under which the fee was charged. CP 357-58. From the court's order, Jaci Smith has timely appealed.²

STANDARD OF REVIEW

The superior court's summary judgment order is reviewed de novo. *Veit ex rel. Nelson v. BNSF*, 171 Wn.2d 88, 98-99, 249 P.3d 607 (2011). The facts and all reasonable inferences therefrom must be viewed in the light most favorable to Jaci Smith as the non-moving party. *Id.*

² The summary judgment order was entered on February 28, 2011, and the Notice of Appeal was filed on March 29, 2011. It appears that the Notice of Appeal is not included in the Clerk's Papers. A supplemental designation of Clerk's Papers for the Notice of Appeal is being submitted simultaneously with this brief.

ARGUMENT

A. There is a question of fact whether VRR's conduct is unfair or deceptive within the meaning of the CPA.

The purposes of the CPA are “to protect the public and foster fair and honest competition.” RCW 19.86.920. To accomplish these purposes, the CPA “shall be liberally construed[.]” *Id.* Among other things, the CPA prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce[.]” RCW 19.86.020. This case involves non-per se unfair and deceptive acts by Defendants. A non-per se violation of the CPA is based on proof of five elements: “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 780, 719 P.2d 531, 533 (1986). The basis of the superior court’s summary judgment order is the first element requiring proof of an unfair or deceptive act or practice. CP 359-60.³

Although the terms “unfair or deceptive” are not specially defined by the CPA, *see* RCW 19.86.010 (definitions), the Washington Supreme

³ It should be noted that this was not the focus of VRR’s summary judgment motion. Instead, VRR focused on the fifth element requiring proof of an injury to business or property. The \$5 fee paid by Jaci Smith satisfies this element because it is independent of, and can be separated from, her personal injuries. It therefore satisfies the CPA injury element, consistent with the Washington Supreme Court’s decision in *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009).

Court has adopted a test of unfair or deceptive conduct. “To show a party has engaged in an unfair or deceptive act or practice a ‘plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public.’” *Sing v. John L. Scott, Inc.*, 134 Wn. 2d 24, 30, 948 P.2d 816 (1997) (quoting *Hangman Ridge*, 105 Wn.2d at 784). “The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs.” *Id.*

The conduct of VRR satisfies this test of unfair or deceptive conduct. The capacity to deceive is established in part by the fact that Jaci Smith was, in fact, deceived in several key respects. The words and conduct of VRR’s employees in context led her to believe that she was being charged \$5 to cliff jump, that VRR had the right to charge the fee for cliff jumping, and that cliff jumping is a safe use of the property. The fact that VRR does not have the right to charge a fee for cliff jumping, and the fact that cliff jumping is not a safe use of the property confirms that VRR’s conduct has the capacity to deceive others as well.

The superior court erred by considering only one statement made by VRR’s employees in isolation from the circumstances to conclude as a matter of law that its conduct was not unfair or deceptive. Specifically, the superior court stated “due to the fact that plaintiff was already physically located in an area for which a fee was collectible, even if the defendant’s

employee had stated that plaintiff ‘still had to pay the fee, even just to jump’ as described in plaintiff’s declaration ... this statement was not deceptive or misleading *because it was true* (she was then-present, during that conversation, on property for which defendant’s [sic] had a right to collect the \$5.00).” CP 358 (italics & parens. in original). By viewing this single statement in isolation from the other circumstances, the superior court ignores the words and conduct of VRR’s employees in context that indicated, to the contrary, that Jaci Smith was being charged for cliff jumping. CP 119-20. Just as importantly, the superior court ignores Jaci Smith’s own testimony that she did not want to use the other facilities and presumably would have left the premises rather than pay the fee if cliff jumping were not allowed.⁴ CP 119.

B. VRR owed a duty of reasonable care to Jaci Smith as an invitee on the cliff jumping area.

The operator of a business owes a duty of reasonable care for the safety of members of the public who are invited as customers to his business premises. *See Tincani v. Inland Empire Zoological Soc’y*, 124 Wn. 2d 121, 138-39, 875 P.2d 621 (1994) (following Restatement (Second) of Torts § 343 (1965)). A customer is entitled to expect that the business owner will exercise reasonable care to make the premises safe for

⁴ In this sense, the fee is akin to charging for unsolicited goods and services, which would be a per se violation of the CPA. *Cf.* RCW 19.56.020-.030.

his or her entry. *Id.* This duty requires the business owner to inspect for dangerous conditions, followed by such repair, safeguards, or warning as may be reasonably necessary for the customer's protection under the circumstances. *Id.* This duty extends throughout the area that the customer reasonably believes is open to him or her. *Id.* at 140.

There can be no question that Jaci Smith was a business invitee. A business invitee "is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant is then engaged." *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wn. 2d 644, 649, 414 P.2d 773 (1966). The duty follows from the business owner's expectation of some measure of economic benefit from the invitee's presence. *Id.* In this case, Jaci Smith entered Defendants' land precisely because Defendants conduct business there, and she conferred an economic benefit on them when she paid the \$5 fee. She can only be considered an invitee under these circumstances.

Normally, it is true, a business has no duty to prevent harm to customers when they are located on adjacent premises. However, in this case, VRR treated the adjacent premises – i.e., the freeboard area where cliff jumping occurred – as its own by charging \$5 to jump from that location into Wanapum Reservoir. As a result, there is no reason why liability should be any different than if it actually owned or occupied the

adjacent premises. After all, a business owner's duty of care extends throughout the area onto which it invites customers. *Cf. Tincani*, 124 Wn.2d at 140 (stating "[t]he negligent failure to prevent an invitee from straying into prohibited areas *extends the area of invitation* ... If the Zoo were negligent in creating boundaries, the area of invitation would have extended to all places a zoo patron reasonably believed were held open to her"; italics in original). The words and conduct of VRR's employees in context invited Jaci Smith's to cliff jump on the adjacent premises, and its duty of care should match the extent of its invitation.

In any event, even with respect to natural conditions, an owner or occupier of land has a duty to prevent harm on adjacent premises when s/he has knowledge of the danger. *See Albin v. Nat'l Bank of Commerce of Seattle*, 60 Wn. 2d 745, 752, 375 P.2d 487 (1962). *Albin* involved a claim of premises liability for a tree that fell onto an adjacent public highway. The Washington Supreme Court approved the superior court's determination that there was no duty to prevent harm, but only "absent knowledge of a hazardous condition" created by the tree. *Id.* at 752; *see also Rosengren v. City of Seattle*, 149 Wn. App. 565, 571, 205 P.3d 909 (2009) (discussing *Albin*). In this case, VRR knew about, and even encouraged, cliff jumping. CP 119-20, 228, 249 & 264. At the same time, VRR admits knowing the danger of cliff jumping. CP 228 & 251. These

admissions give rise to a duty of care toward the cliff jumpers who paid VRR for the privilege.

CONCLUSION

Based on the foregoing argument and authorities, Jaci Smith respectfully asks the Court to reverse the decision of the superior court, vacate the summary judgment of dismissal against her, and remand her CPA and negligence claims for trial.

Submitted this 11th day of July, 2011.

AHREND LAW FIRM PLLC

By: 
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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On July 11, 2011, I served the Respondent with the document to which this is annexed as follows:

By facsimile transmission to (206) 462-6701, email to seh@pattersonbuchanan.com and map@pattersonbuchanan.com, First Class Mail, and/or hand delivery, to:

Michael Patterson & Sarah Heineman
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Signed at Moses Lake, Washington this 11th day of July, 2011.



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