

66524-3

66524-3

NO. 66524-3-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

JON L. WILKERSON,

Appellant,

v.

CITY OF SEATAC,

Respondent.

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2011 FEB 12 PM 1:01

ORIGINAL

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I. INTRODUCTION

This is a personal injury case brought by the appellant Jon L. Wilkerson arising from his failed mountain bike jump in a secluded area of the Des Moines Creek Park (the “Park”) in SeaTac, Washington. A mountain bike dealer in Kent, Washington, told Wilkerson about an area in the Park that he called the “Softies,” and recommended it as a good place to do “dirt jumps.” Wilkerson visited the site, where he found a series of dirt mounds. He attempted a “gap jump” but missed the landing ramp. He fell to the ground, was paralyzed and lost consciousness, and was not rescued until the following day. He sued the City of SeaTac (“SeaTac”) arguing (a) SeaTac had a duty to protect him from the jump; and (b) even if recreational use immunity applied, it did not apply to secondary medical conditions such as hypothermia because he was no longer recreating at the time.

The Honorable Michael Hayden of the King County Superior Court (the “trial court”) dismissed Wilkerson’s claims on summary judgment. The trial court reasoned recreational use immunity precluded his claims against SeaTac because the dirt mounds were a readily apparent condition. The trial court rejected Wilkerson’s argument that recreational use immunity did not apply to his post-fall secondary injuries. The trial court reasoned that the recreational use immunity statute did not

distinguish between primary and secondary injuries. The trial court also ruled SeaTac did not act intentionally.

The trial court's rulings should be affirmed because the recreational use immunity statute precludes personal injury claims against landowners who open their property to the public when an unintentional injury arises from readily apparent site conditions.

II. STATEMENT OF ISSUES

Whether the trial court properly granted summary judgment because (a) Wilkerson failed to show a latent condition as required under the recreational use immunity statute; (b) recreational use immunity applies to secondary injuries; and (c) there was no evidence SeaTac intentionally injured Wilkerson.

III. STATEMENT OF THE CASE

A. Wilkerson had been mountain biking since age 18.

34 year-old Wilkerson, a certified physical therapist and Arkansas resident, arrived in the Seattle area in mid-June 2006. *See* CP 23. He had been involved with mountain biking since age 18. CP 21-22. He had experience with mountain bike jumps and considered himself an expert. CP 22, 27, 45-46. He testified that speed, and the height and steepness of the jump are important considerations when attempting a bike jump. CP 28-29. He was training for a mountain bike trip to Whistler in Vancouver,

B.C., with his friends. CP 66. A mountain bike dealer in Kent told Wilkerson about an area in the Park that he called the “Softies,” and told him it was a good place to do “dirt jumps.” CP 52; *also*, 25, 26, 51.

B. Wilkerson entered the Park to do bike jumps.

On June 21, 2006, Wilkerson visited the Park for the specific purpose of doing bike jumps. CP 52. “He didn't pay a fee.” VRP 12/10/10 at 11. The Kent bike dealer told him how to find the dirt mounds. CP 52. Wilkerson “was at the park that day training, working on jumps that [he] knew that [he] would need to be able to clear at Whistler.” CP 66. He entered at the Park’s north entrance. CP 74-78. The jumps were approximately a quarter mile from the main trail. CP 60; CP 78. To get there, Wilkerson had to cross a stream. CP 52-53. He “rode down a ravine, crossed a creek, walked [his] bike up, and the Softies were on the right.” CP 54. He went alone. CP 57-58. It was the first time he had done a mountain bike jump since he had his bike overhauled and his front shocks replaced. CP 70. He inspected all the various jumps when he arrived. CP 41-42. He knew they were jumps. CP 55, 64.

C. Wilkerson selected and inspected the specific jump.

After inspecting all the jumps, he decided there were some jumps he would not attempt as they were too dangerous, specifically the “roller” type jumps, *i.e.*, a series of ramps placed closely together in a line. CP 41-

42. Instead, he selected a “gap” or “table top” jump as one he was capable of completing precisely because it was not dangerous. CP 31. A “gap jump” consists of launch and landing ramp with a space in between. *Id.* He had experience doing gap jumps. CP 45-46, 60. He learned to do them in Arkansas but he was out of practice: “it had been a while since [he had] done a gap jump.” CP 45-46; *also*, 60-61. He examined the dirt jump before he attempted it. CP 35-36, 69. He checked its pitch, surface composition, and safety. CP 36-37. He rode up and down the jump approach before attempting the jump. CP 37, 50. He had past experience with jumps of similar height. CP 32. He concluded it was safe. CP 36-37. He had no concerns about his ability to accomplish the jump. CP 38. It was “within [his] skill set.” *Id.* He did not watch anyone do the jump before he attempted it. CP 58.

D. Wilkerson evaluated the gap jump and his speed.

Having selected the gap jump, Wilkerson rode up a slope adjacent to the jump in order to ride back down the slope to gain enough momentum to perform the jump. CP 37, 50. He “felt confident.” CP 61-62, 67. “[He] had done the assessment, [he] had the experience.” CP 69. He started pedaling but not “hard” back down the slope toward the launch ramp. CP 50. The approach “was flat for a ways and then went up in elevation.” CP 36-37. He approached the jump “straight,” not at an angle.

CP 49-50. His “trajectory” was “parallel” to the jump. CP 49; *also, id.* (“Q. You were going straight as far as you recall with the jump and onto the landing then? A. Yes”). He thought he had sufficient speed to clear the crest of the landing ramp to land safely. CP 62. He “gauged the speed to be appropriate for the gap.” CP 49. He estimated he “got air” between five and six feet as he left the launch ramp. CP 43, 62.

E. Wilkerson crashed his mountain bike.

“On the back side of the jump for some reason [his] back wheel didn’t make it all the way over the berm of the back side of the jump. So, [his back wheel] impacted the top of the berm, rebounded and knocked [him] over the front of the bicycle.” CP 30. He lost control and “tumbled forward.” CP 47. He flipped head-first over his bike’s handle bars. *Id.* He landed head-first, “on the top of his head.” CP 47-48. He landed on his back and knew immediately he was paralyzed. CP 46-48. He testified he fell because his rear tire caught the crest of the landing ramp, causing him to flip over. CP 43-44, 47-48. He failed to gain sufficient speed at launch. CP 34-35. He said clipping the crest of the landing ramp with the bike’s rear tire was called “casing” the jump. CP 63-64. “Casing a jump ... is something that everyone will do ... occasionally on a jump like that.” *Id.*

F. SeaTac firefighters rescued Wilkerson.

Wilkerson arrived at the Park “probably [between] five [and] six p.m.” CP 56. There was “still yet a bit of light out at that time.” *Id.* He rode around the Park for between 30 and 45 minutes. CP 57. He did not meet or talk with anyone. *Id.* Wilkerson was found in the Park the following morning by Park visitor Ariel Kinsey. CP 78. Kinsey called 911 at 11:03 a.m. CP 74. SeaTac Firefighters arrived at 11:07 a.m. *Id.* Multiple firefighters were needed to rescue Wilkerson because of “low angle rescue concerns.” CP 78. They carried Wilkerson out of the woods and back across the ravine to the main trail. *See id.* King County Medics arrived to provide advanced life support. CP 75; 622. He was taken via ambulance “to Harborview via Medic 13 with two Fire Fighters.” CP 75.

G. The incident was caused by a failure of technique.

Wilkerson testified there was nothing about the composition or pitch of the jump that caused him to fall. CP 38-39. He could not recall the jump giving way. CP 39. He could not recall any unknown condition. CP 69-70. He could not say there was anything wrong with the launch and landing ramps, or with the jump as a whole. CP 38-39; 56; 69-71. Wilkerson explained he “was a bit out of practice” and “a little too bold.” CP 40-41; also, CP 80. “He reported feeling down at times and guilty as he believes he was the cause of the incident by doing a stunt on the

mountain bike that he was not prepared for.” CP 67-68; *also*, CP 82. He “verbalized self-blame regarding the accident as he reports he was doing a ‘trick’ on the mountain bike that he was not prepared to do.” CP 84.

H. Wilkerson alleged SeaTac was negligent.

Wilkerson alleged three separate counts of negligent conduct by SeaTac, designated as Counts I, II, and III. CP 89-90. In Count I, he alleged SeaTac had a duty to protect him from his failed mountain bike jump. CP 89. In Counts II and III, he alleged SeaTac should have found him sooner than it did, and that he suffered secondary injuries such as pneumonia and respiratory failure as a result. CP 90.

I. The Superior Court dismissed Wilkerson’s claim.

1. Wilkerson argued an “S-curved, angled lead-in.”

SeaTac moved for summary judgment arguing recreational use immunity applied because Wilkerson testified he saw and inspected the gap jump and its approach, and therefore the site conditions were readily apparent. CP 102-117. In response, Wilkerson argued for the first time in a summary judgment declaration that the gap jump had an “S-curved, angled lead-in” which caused him to approach the jump at an angle. CP 394-96. He testified the S-curve was there but he did not notice it at the time. CP 526 at ¶ 25. He testified he noticed it shortly before the

summary judgment hearing based on photographs given to him by his lawyer. CP 526 at ¶ 18; CP 530-542.

2. Wilkerson’s experts could see the site conditions.

Wilkerson’s alleged experts submitted summary judgment declarations adding to Wilkerson’s description of site conditions. CP 526-527 at ¶¶ 25, 31; CP 513 at ¶ 7; CP 521; CP 550-551 at ¶¶ 13-14, 18; CP 416 at ¶ 14. They testified to the presence of logs, trees stumps, a z-curve or an s-curve, and an approach that required Wilkerson him “to turn sharply three times as [he] came down the approach.” *Id.*

3. No one testified to any latent site condition.

In his summary judgment declaration, Wilkerson stated only that he did not notice the S-curve. CP 526 at ¶ 25. Notably, he did not say the S-curve could not be seen. *Id.* Nor could he, because he had previously testified at his deposition that he rode up and down the jump approach before attempting the jump. CP 37, 50 Also, none of Wilkerson’s experts stated the jump approach could not be seen. Rather, their testimony focused exclusively on an alleged latent danger. CP 395; *also*, CP 416-417 at ¶15 (“it is hard to notice, much less fully appreciate, the effect that the curved lead in will have”); CP 552 at ¶ 19 (“it is hard to notice the adjustments that that must be made to avoid the log, much less fully appreciate the effect that the curvy lead-in will have”); CP 553 at ¶ 23

(“the S-curve ... affects the direction, physics, and speed of the rider ... This is something that [Wilkerson] obviously did not notice or appreciate”); *id.* at ¶ 25 (“it is my opinion that the dangers ... were not obvious for [Wilkerson]”).

4. The trial court granted summary judgment.

The trial court dismissed Wilkerson’s claims on summary judgment. It held recreational use immunity precluded Wilkerson’s claim because the jump and associated site conditions could be seen and there was no evidence to the contrary: “there is no testimony that you couldn’t see the path. The path was there. The path was not submerged; it was not invisible. Whether it was straight or curved, it was the path that one could see.” VRP 10/19/10 at 30-31. The trial court ruled whether Wilkerson could appreciate the danger presented by obvious site conditions was irrelevant: “there are no cases where the courts have said you can look directly at it, you can see what is there to be seen, and the inability to appreciate the risk posed constitutes latency.” *Id.* at 32.

The trial court also rejected Wilkerson’s argument that recreational use immunity did not extend to his post-fall secondary injuries such as pneumonia: “[I]n the circumstances of having failed to detect him injured on site [earlier] and [alleged] fail[ure] to [bring] medical services to him

fast enough, the [C]ity is still acting in its capacity as landowner.” VRP 12/10/10 at 25.

5. The court also rejected an intentional act theory.

Wilkerson also argued recreational use immunity did not apply because the City acted intentionally. The trial court rejected that argument: “[W]hether you say intentional, willful or wanton, the first admitted fact is that the [C]ity did not build the jump. I would point out in *Van Dinter*¹ that the defendant did build the item, but having built it, presumably know[ing] it was dangerous, [it] still w[as]n’t found to have committed an intentional act ... The intent element goes to intentionally causing harm, not just acting in a volitional manner, and there is no evidence ... that the City intended to harm anyone.” VRP 10/19/10 at 32.

IV. STANDARD OF REVIEW

Summary judgment rulings are reviewed de novo. *Swinehart v. City of Spokane*, 145 Wn. App. 836, 843, 187 P.3d 345 (2008).

V. ARGUMENT

A. The recreational use statute confers broad immunity.

Landowners such as SeaTac who make land available for recreational use by citizens are given broad immunity under RCW 4.24.210. The relevant portions of the statute read as follows:

¹ *Van Dinter v. Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993).

Liability of owners or others in possession of land and water areas for injuries to recreation users — Limitation.

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes ... bicycling ... without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users ...

...

(4) 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 ...

RCW 4.24.210.

“The recreational use statute encourages landowners to open recreation areas to the public without fear of liability for unintentional injuries.” *Nauroth v. Spokane County*, 121 Wn. App. 389, 392, 88 P.3d 996 (2004). As such, landowner liability for injuries on public lands is completely precluded unless the entrant (1) is charged a “fee of any kind,” or (2) is injured by an intentional act, or (3) sustains injuries “by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” *Van Dinter v. Kennewick*, 121 Wn.2d 38, 42-43, 846 P.2d 522 (1993); RCW 4.24.210. These narrow exceptions are

the only means of piercing the immunity granted by the statute to qualifying landowners.

B. The Superior Court’s rulings should be affirmed.

There was no dispute on summary judgment that SeaTac owned the Park and allowed its use by the public for recreational purposes free of charge. *See* CP 119. Wilkerson challenged recreational immunity arguing (1) the danger was latent; (2) immunity did not apply to his post-fall secondary injuries; and (3) the City acted intentionally. CP 404-10; 640-49. The trial court correctly granted SeaTac’s motion for summary judgment on the basis that SeaTac was entitled to immunity from suit under the recreational use statute. In granting SeaTac’s motion, the trial court concluded that there was no genuine issue of material fact as to the latency of the bike jump and its approach. The trial court also properly rejected Wilkerson’s arguments that immunity did not apply to his post-fall secondary injuries, and that SeaTac intentionally injured him.

1. Latency relates to the condition, not the danger.

“In order to establish a recreational use landowner’s liability, each of the four elements (known, dangerous, artificial, latent) must be present in the injury-causing condition.” *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001). “The elements modify the term ‘condition,’ rather than modifying one another.” *Id.* “If one of the four elements is not present, a

claim cannot survive summary judgment.” *Id.* The test for latency is objective: “A condition is ‘latent’ if not readily apparent to the general class of recreational users.” *Widman v. Johnson*, 81 Wn. App. 110, 114, 912 P.2d 1095 (1996). Also, “under the statute, a landowner is not required to anticipate the various ways that people might use its property, nor is a landowner required to predict possible scenarios in which a user might fail to see a patent condition.” *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 556, 872 P.2d 524 (1994). In short, latency relates to the condition, not the danger. *Van Dinter*, 121 Wn.2d at 46 (“RCW 4.24.210 does not hold landowners potentially liable for patent conditions with latent dangers. The condition itself must be latent”). This principle is well established in the Washington cases. *Id.* at 40, 46 (metal rods protruding from caterpillar-shaped piece of playground equipment were “obvious,” even considering their proximity to surrounding grassy play area); *Swinehart*, 145 Wn. App. at 849-50 (displacement and condition of the wood chips at the playground was patent, or obvious,” even if visitors could not tell by looking at the wood chips how deep they were); *Tennyson*, 73 Wn. App. at 555-556 (“what a particular recreational user reasonably did or did not see has no bearing on whether a condition is latent” when “ the excavation was in plain view and readily apparent to anyone who examined the gravel mound as a whole”); *Widman*, 81 Wn.

App. at 115 (intersection of logging road and state highway is readily apparent); *Chamberlain v. Department of Transp.*, 79 Wn. App. 212, 219-20, 901 P.2d 344 (1995) (proximity of walkway to vehicular traffic an obvious condition); *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 610, 774 P.2d 1255 (1989) (tracks across the top of the dam “were obvious”); *Riksem v. Seattle*, 47 Wn. App. 506, 511, 736 P.2d 275 (1987) (mixed-use condition of trail was apparent).

2. There was no evidence of a latent condition.

Here, there was nothing obscuring Wilkerson’s plain view of the conditions of the jump and ramps. CP 31, 35-37, 41-42; 50, 55, 64. He inspected the various jumps at the site, selected one as within his skill level, and examined it. *Id.* He checked its pitch, surface composition, and its safety. *Id.* He rode up and down the jump approach. CP 37, 50. He testified there was no unknown condition. CP 69-70.

By arguing the “S-curved angled lead in,” the presence of logs and trees stumps, and an approach that required Wilkerson “to turn sharply three times as [he] came down the approach,” Wilkerson and his experts argued the same theory rejected in *Van Dinter, i.e.*, that the interplay of visible elements created a latent danger. He and his experts expressly stated the site conditions were visible but Wilkerson failed to “appreciate” the danger. CP 526 at ¶ 25; CP 395 (“bike jumpers would not see or

appreciate the effect of the S-curve”); *also*, CP 416-417 at ¶15 (“it is hard to notice, much less fully appreciate, the effect that the curved lead in will have”); CP 552 at ¶ 19 (“it is hard to notice the adjustments that that must be made to avoid the log, much less fully appreciate the effect that the curvy lead-in will have”); *id.* at ¶ 23 (“the S-curve ... affects the direction, physics, and speed of the rider ... This is something that [Wilkerson] obviously did not notice or appreciate”); *id.* at ¶ 25 (“it is my opinion that the dangers ... were not obvious for [Wilkerson]”). Moreover, Wilkerson’s only authorities on latency each involved conditions that could not be seen. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 914, 969 P.2d 75 (1998) (tree stumps obscured by water); *Cultee v. City of Tacoma*, 95 Wn. App. 505, 509-10 977 P.2d 15 (1999) (road edge obscured by water). In sum, the trial court correctly ruled that the visibility of the site conditions required dismissal.

3. Wilkerson does not establish latency on appeal.

Wilkerson’s arguments on appeal are the same as those made before the trial court. App. Br. at 22 (“John [*sic*] testified that he did not see the S-curved approach to the jump”); *id.* at 22-23 (“experts also testified ... what [Jon] did not consider ... because of the subtleness is the curved approach leading into the jump and the effect that the approach would have on the ability of the rider to complete the jump”); *id.* (“the “S-

curve ... affects the direction, physics and speed of the rider This is something that Jon obviously did not notice or appreciate”); *id.* (“the dangers posed by the S-curved led-in to the jump were not obvious”). Also, as before the trial court, Wilkerson argues *Cultee* and *Ravenscroft* as sole support for his position, even though both cases involved site conditions submerged by water. *Id.* at 20-22.

On latency, Wilkerson’s only argument on appeal is that the effect of the jump approach on “direction, physics and speed” constitutes a latent site condition. *Id.* at 23. As such, he confuses a danger he “had not appreciated or noticed” with the visible dirt mound and approach he inspected to try and create a latent site condition. *See* CP 394. For example, while Wilkerson claims “he did not see the S-curved approach,” Wilkerson did not testify the approach could not be seen or was obscured in some fashion. *Compare* App. Br. at 22 *with* CP 526 at ¶ 25.

Moreover, even in his summary judgment declaration, Wilkerson testified to his failure to appreciate the danger, not an inability to see the physical site conditions. CP 527 at ¶ 29 (he “hadn’t appreciated the problem that those conditions presented to [him]”). Similarly, while Wilkerson claims his alleged “experts also testified that the S-curved, kinked lead into the jump was not obvious,” they gave no such testimony. *See* App. Br. at 22. Rather, they stated a bike rider might not notice or

appreciate effect of site elements on “direction, physics and speed.” *Compare* App. Br. at 22 with CP 395 (“bike jumpers would not see or appreciate the effect of the S-curve”); CP 416-417 at ¶ 15 (“it is hard to notice, much less fully appreciate, the effect that the curved lead in will have”); CP 552 at ¶ 19 (“it is hard to notice the adjustments that that must be made to avoid the log, much less fully appreciate the effect that the curvy lead-in will have”); CP 525 at ¶ 23 (Wilkerson had “no reason to think that there was some danger to [him] from the approach to the jump”). Wilkerson does not and cannot show the site conditions were obscured in his case, because he testified he inspected the site and the dirt mound he tried to jump over, and that he rode the approach up and down before attempting the jump. CP 31; 35-37; 41-42; 50; 69.

In short, Wilkerson’s alleged S-curve was readily apparent, even if he did not understand that negotiating it might reduce his speed below the threshold necessary to complete the jump. Wilkerson’s appellate argument is the same as presented to the trial court: it is limited to his alleged failure to notice the site conditions and appreciate the allegedly hidden effect of site conditions on “direction, physics and speed.” *Compare* App. Br. at 22 with CP 31, 35-37, 41-42; 50, 69. The trial court did not “appl[y] an incorrect legal standard for determining latency.” *See* App. Br. at 25. Rather, the trial court properly dismissed the case because

Wilkerson offered no evidence the site conditions were not readily apparent to him, much less to the “general class of recreational users.” See *Widman*, 81 Wn. App. at 114.

4. Immunity also applies to secondary injuries.

The trial court also correctly rejected Wilkerson’s argument that recreational use immunity did not apply to his secondary injuries. CP 640-47. Wilkerson reasons his post-fall injuries should be treated differently because they occurred when he could no longer recreate. *Id.* His theory is premised on an inapposite line of Wisconsin cases involving claimants whose injuries did not arise from a recreational use. *E.g.*, *Sievert v. American Family Mut. Ins. Co.*, 190 Wis. 2d 623, 528 N.W.2d 413, 416-17 (1995) (rejecting recreational use immunity because walking to greet a neighbor was not an outdoor sport, game, or educational activity); *Linville v. City of Janesville*, 184 Wis. 2d 705, 721, 516 N.W.2d 427 (1994) (rejecting immunity because plaintiff impugned quality of medical treatment by City paramedics); *Mason v. Ace Am. Ins. Co.*, 314 Wis. 2d 507, 758 N.W.2d 224 (2008) (unpublished opinion) (no immunity because the “injury had nothing to do with the maintenance or condition of the [land]”); *Kosky v. International Ass’n of Lions Clubs*, 210 Wis. 2d 463, 475, 565 N.W.2d 260 (1997) (no immunity because plaintiff alleged injury

caused by negligent training was “unrelated to the condition or maintenance of the land”).

These Wisconsin cases state two basic principles: (1) there is no immunity if the claimant is not on the land to recreate; and (2) there is no immunity if the claimant’s injuries are not caused by the condition, maintenance or supervision of the land. Even assuming Wisconsin or some other state law applied, neither rule would change the result here.

First, Wilkerson’s Wisconsin cases are based on an entirely different statute, one which—unlike the Washington statute—specifically predicates immunity on a recreational use. Wis. Stats. 895.52(2) (“no owner ... is liable for ... injury to ... a person engaging in a recreational activity on the owner’s property”). In contrast, RCW 4.24.210 provides immunity to public landowners “who allow members of the public to use [the land] for the purposes of outdoor recreation.” In short, Washington’s immunity exists if the land is open for public recreation; the Washington statute does not condition immunity on a recreational use. But the result would be the same here even under Wisconsin law: Wilkerson entered the land to attempt a mountain bike jump, and he alleged injury caused solely by the condition and maintenance of the land.

Second, none of the cases cited by Wilkerson support his proposed rule, *i.e.*, that immunity does not apply to secondary injuries occurring

after the plaintiff has ceased recreating due to a recreational injury. He cited no case in the trial court—and he cites no case on appeal—that makes such a distinction. *See* CP 640-47.

On appeal, Wilkerson offers the same argument rejected at the trial court. *E.g.*, App. Br. at 33 (“Jon was not engaged in recreation as matter of law at the time that Jon’s claim arose – since, once injured, Jon was no longer engaging in recreation”); *also, id.* at 31. Wilkerson tries to shape the facts of his case to match a Wisconsin case fact pattern, *e.g.*, CP 643 (Wilkerson’s secondary injuries “do not stem from his ‘use’ of th[e] land”); *also*, App. Br. at 34. But the duty he alleges relates exclusively to the land and its supervision, not to the quality of his rescue or other independent source of negligence. CP 626-627 at ¶¶ 19-20; CP 629 at ¶¶ 46-47, 50-52. He alleged in his Complaint that SeaTac as part of its Park maintenance operations had a duty to supervise and search the Park and find him sooner. *Id.* But before the trial court and on appeal, Wilkerson insists SeaTac seeks a “grant [of] immunity for negligent actions that are unrelated to the actual use of the land.” App. Br. at 37; CP 647. That contention cannot be reconciled with his Complaint or his own briefing. *See e.g.*, CP 643 (“[Wilkerson] did not have a claim for negligence against the City until he suffered damages as a result of the City’s failure to

supervise and patrol the Park”); App. Br. at 37 (Wilkerson’s “claims relate to the failure to supervise [and] patrol” the Park”).

In sum, Wilkerson’s argument that some of his injuries arose on the land but after he stopped recreating is irrelevant under RCW 4.24.210. Wilkerson entered land open to recreational use to engage in a recreational use. App. Br. at 37 (“Jon had entered the land for the purpose of engaging in recreation”). Further, Wilkerson admits that the duty he alleges—to rescue him sooner—is premised on SeaTac’s alleged “failure to supervise, patrol and rescue.” *Id.* Park supervision, patrol and rescue activities each relate to SeaTac’s operation of the Park, and therefore his claim that he alleges a duty independent of SeaTac’s function as operator of the Park is unsustainable. In short, Wilkerson’s post-fall injuries arise from his use of the land. Therefore, the trial court correctly held they were subject to recreational use immunity.

5. SeaTac did not intentionally injure Wilkerson.

The trial court properly rejected Wilkerson’s intentional act theory. Just as he did at the trial court, Wilkerson relies only on a federal case refusing an intentional act instruction to support his intentional act theory. App. Br. at 26; CP 408-09 (citing *Jones v. United States*, 693 F.3d 1299, 1305 (9th Cir. 1982)). Wilkerson omits key rules that the defendant’s conduct must be “positive rather than negative.” *Jones*, 693 F.3d at 1305;

Adkisson v. City of Seattle, 42 Wn.2d 676, 684, 692, 258 P.2d 461 (1953) (“[w]anton misconduct is positive in nature, while mere negligence is materially negative”). Also, the *Jones* court refused an intentional act instruction because its case did not involve a condition created by the defendant. *Jones*, 693 F.2d at 1305 (citing *Adkisson*, 42 Wn.2d at 688 (City’s agents created the condition by placing a three to six feet high dirt pile in the most “heavily traveled arterial in that area.”); *Greetan v. Solomon*, 47 Wn.2d 354, 355, 287 P.2d 721 (1955) (excavation dug by defendants’ agent).

Here, SeaTac did not create the condition or take some positive act causing Wilkerson to crash. Wilkerson makes only a baseless and inflammatory contention on appeal that the City had “knowledge of an illegal bike park on its property with jumps [and] ... that riders were being hurt” there. App. Br. at 28. First, there is no law prohibiting people riding bicycles over dirt mounds. CP 28-29. Second, SeaTac never held the Park out as containing a mountain bike jump park. *See* CP 392. Third, SeaTac produced 2001 to 2008 Incident Reports for all incidents at the 52-acre-plus Park, and there was no report of prior incidents at the Softies. CP 328-82. In *Jones*, the Government was aware of incidents where the plaintiff was injured, considered warning signs, and decided against them. *Jones*, 693 F.3d at 1305. Even then, the court held that while the facts

supported negligence, they did not support an intentional act instruction. In short, the trial court correctly rejected Wilkerson's intentional act theory.

C. Review is limited to the trial court's rulings.

Wilkerson makes various arguments on appeal which the trial court did not rule on and to which he cannot properly assign error. App. Br. 1-2; 16 (artificial condition); *id.* at 16-18 (known condition); *id.* at 18-19 (dangerous condition); *id.* at 39-47 (duty); *id.* at 40-47 ("focusing tools" for municipal liability). He also asks the Court of Appeals to abolish the "public duty doctrine." App. Br. at 47-50. The trial court did not reach any of these arguments because Wilkerson did not show a latent condition or intentional acts, and the trial court therefore held SeaTac was immune from suit. Wilkerson's counsel asked the trial court to address his "public duty" arguments and the trial court declined to do so. VRP 12/10/10 at 3-4; 26. Because the trial court made no rulings on any of these arguments, their consideration on appeal is improper. *In re Marriage of Meredith*, 148 Wn. App. 887, 891, 201 P.3d 1056 (2009) (scope of appellate review is limited to trial court's orders and not any tangential consequences of those orders); RAP 2.1; 2.2 (scope of appellate review is limited to "decisions"). Here, appellate review is limited to the trial court's rulings to the extent reflected in Wilkerson's assignments of error

and associated issues. App. Br. at 1-2 (issues are whether the condition were “latent”; whether SeaTac acted intentionally; and whether Wilkerson’s post-fall injuries are severable from his initial injuries for purposes of recreational use immunity). There are no other trial court rulings for the Court of Appeals to review.

VI. CONCLUSION

The trial court correctly concluded there was no genuine issue of material fact under the recreational use statute. The site conditions were there to be seen. Wilkerson’s alleged failure to notice them or appreciate their effect does not make them “latent.” The trial court also properly rejected Wilkerson’s assertions that immunity did not apply to his secondary injuries, and that SeaTac acted intentionally. Wilkerson offered no factual or legal basis for these contentions. As such, the trial court correctly dismissed Wilkerson’s claim on summary judgment under Washington’s recreational use immunity statute.

RESPECTFULLY SUBMITTED this 12 day of August, 2011

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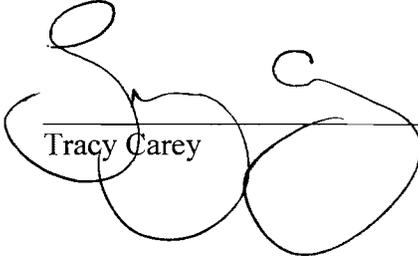
CERTIFICATE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on August 11, 2011, I caused service of the foregoing BRIEF OF RESPONDENT on each and every attorney of record herein:

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