89437-2

Court of Appeals, No. 68156-7-I

SUPREME COURT OF
THE STATE OF WASHINGTON

Katti Hofstetter, Petitioner

v.

City of Bellingham, Respondent

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Katti A. Hofstetter is the petitioner herein.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division One, decision of which the petitioner seeks review was rendered August 12, 2013. This decision affirmed the judgment entered December 2, 2011 in Whatcom County Superior Court following a 10-2 jury verdict in favor of the defendant City of Bellingham ("City") on plaintiff Hofstetter's tort claim. A copy of the decision is attached hereto in the appendix at A-1 through A-7.

On August 28, 2013 Ms. Hofstetter filed a timely motion for reconsideration in the Court of Appeals. This motion was denied by an order entered by the Court of Appeals on September 9, 2013. A copy of the order is attached hereto as A-8.

C. ISSUES PRESENTED FOR REVIEW

1. Should the word "allow", as used in the recreational use statute, RCW 4.24.210, be given a strict or liberal construction? (See the attached appendix at A-9 for the text of the statute.)

2 Is the proper construction of a statute exclusively a question of law that must be addressed by the trial court rather than left for determination by a jury?

3. Does the exception to the general rule that the denial of a summary judgment motion is not reviewable on appeal permit appellate review in this case?

4. Does a jury verdict in favor of a plaintiff with respect to an affirmative defense necessarily preclude review, under the harmless error doctrine, of a trial court's error in permitting the defendant to present evidence and argument in support of the affirmative defense?

5. Given the circumstances of this case was instruction 18, derived from language in RCW 4.24.210, a clear misstatement of the law?

6. To what extent is a party required to present a rationale in support of a proposed jury instruction?

7. Is it an abuse of discretion for a trial court to refuse a proposed instruction which would inform the jury of a well established common rule upon which a party 's theory of the case is based?

D. STATEMENT OF THE CASE

(a) Summary of Facts[1]

On August 3, 2005, when she was 16 years old, petitioner Katti Hofstetter, and her friend, Tonya Brock, entered a largely forested City of

1 Throughout this petition "VRP" refers to the Verbatim Report of Proceedings prepared by reporter Rhonda Jensen. "PRP" refers to the Partial Verbatim Report of Proceedings dated October 24, 2011 and prepared by reporter Margaret Watts. Unless otherwise noted, A1 through A25 refer to documents, photographs, etc. attached to the petitioner's opening brief.

Bellingham municipal park known as Whatcom Falls Park. They eventually entered into a portion of the park known as the whirlpool area to which neither of them had ever previously been. VRP at 423, 740.

While in the whirlpool area, Ms. Hofstetter observed some older boys engaged in an activity known as "cliff jumping" which, in Whatcom Falls Park, consists of jumping off the top of one, or the other, of the two nearly vertical cliffs descending to a large pool located below. VRP at 155, Ex. 6 (A17). After watching for several minutes, the two girls decided to participate. VRP at 430, 750, 774. Ms. Hofstetter removed some outer clothing and her flip-flops and then jumped down from the north cliff into the water. VRP at 752. While waiting for Ms. Brock to jump down and join her, Ms. Hofstetter decided to return to the top and began walking barefoot up a trail she had observed other boys enter upon and which appeared to lead back to the top of the cliff. VRP at 754-56. The trail begins close to the pool, twists diagonally up the bank and culminates at the top of the cliff from which she had jumped.[2]

At a location very close to the top, she stepped upon on a slick, muddy, wet spot located above a large root. Clerk's Papers ("CP") at

2 Various portions of the trail are depicted in photographs admitted as exhibits at trial. The upper portion of the trail can be seen in Ex. 9 (A21) which depicts the very upper portion of the trail with three boys standing at the location at the top of the north cliff from which the petitioner jumped. See also Exs. 6, 4, 8, and 2, at A17, A19, A20, and A22. Throughout this petition "trail" refers to this particular trail.

620, 897-98; VRP at 799-802. When her bare foot contacted this slick spot, she slipped, lost her balance and fell sideways over the edge of the trail, which, at that particular location, was adjacent to the cliff's edge, which was largely obscured by foliage, PRP at 7, 57-62-69-70; VRP at 183-84; Exs. 4 & 8, A19, A20. She landed on her back on the rocks located approximately 25 to 30 feet below with resulting spinal injuries which have rendered her a permanent paraplegic. PRP at 62. This incident occurred in the early evening during dry weather and at time when there was ambient sunlight. PRP at 57-62, 776.

Richard Rothenbuhler worked for the City Parks Department for nearly 40 years from 1967 until his retirement in 2006. VRP at 539-40. During the last 16 years of his employment his primary duty was in trail work. VRP at 541. Through his experiences as a boy growing up in the area and through his employment Rothenbuhler gained an extraordinary knowledge of the whirlpool area. VRP at 542-43. He explained at trial that the chronic wet spots on the trail were produced by water from seepage flowing underground down the sloped terrain above the whirlpool area. PRP at 21. He also testified that there was no easy way out of the pool below because "it's steep all the way around. It's a hole. It's over an edge. There's no route that is easy." VRP at 547.

Some of the other Parks Department employees testified at trial that they were aware at the time of this incident that the trail was used by members of the public, particularly younger people, who engaged in cliff jumping. PRP at 21-22, 68-69, 103-04; RP at 496, 500.

Brandon Stanley, who was a student at Western Washington University from 2001 through 2006, estimated that he had been to the whirlpool area more than 75 times prior to August 3, 2005 to observe cliff jumping. PRP at 49-50, 67-68. He was present at the time Ms. Hofstetter was injured and described seeing her fall over the edge of the north cliff at a location near the top of the trail. PRP at 59-61. He also testified that it was common for cliff jumpers to use the trail to return from the pool to the top of the north cliff. PRP at 69. Stanley characterized the upper portion of the trail as dangerous and narrow with "tons of loose dirt or kind of slippery mud and there's a lot of vegetation there". PRP at 69-70.

Despite the knowledge of City employees that the trail was used by cliff jumpers and Rothenbuhler's knowledge about the dangers it presented, no warning signs regarding the trail had ever been posted by the City above the north cliff nor had there ever been any signs placed at the pool below to direct users to another route for exiting the area. VRP at 559. At trial Rothenbuhler explained the reasons why the City took no action, with respect to the trail, to post warning signs, mark an exit route

or construct a safe exit route: "[W]e 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." VRP at 547. (Quoted in Appellant's Opening Brief at 15.)

Prior to trial and during trial, Hofstetter presented undisputed evidence that from 1999 through 2009, the City had constantly maintained on the bank above the north cliff a large sign[3] stating "Do Not Enter" and "Park Area Closed" [to the public] in large capital letters, by "Order of the Director of Park's & Recreation" and further stating: "Violation of this order is punishable by a fine not to exceed $1,000 and or 90 days in jail." VRP at 166-67, 658. This sign and several identical signs were placed around the perimeter of a large area referred to as the "burn zone" following a fire in the park in 1999 which was caused by an explosion due to a ruptured gas line. As shown by the map admitted at trial as Exhibit 20 (A15), the whirlpool area is located within the burn zone which remained closed to the public after some areas of the park were eventually re-opened after the fire. PRP at 26; 29-30; CP at 505-07.

Both Ms. Hofstetter and Ms. Brock testified that they did not see the Do Not Enter sign above the north cliff when they entered the area on

[3] Exhibit 1 (A16) is a photograph of a sign identical to the one the City attempted to continuously maintain above the north cliff. See A-11 attached hereto.

August 3, 2005 and believe it was not there because if it had been present they would have noticed it. VRP at 477, 751. This is not surprising in view of the fact that, due to frequent vandalism, the sign was often missing. Rothenbuhler testified that this particular sign had a "habit of disappearing" and had to be replaced on "dozens of occasions". VRP at 569. The City produced no evidence that it conducted an inspection of the area immediately following the incident to ascertain if the sign was present at the time the incident occurred.

However, as noted above, the City continuously attempted to maintain the Do Not Enter sign depicted in Exhibit 1 for ten years beginning in 1999. In an e-mail communication just eight days before Ms. Hofstetter was injured, one of the Parks and Recreation Department managers, Marvin Harris, directed Rothenbuhler to keep the Do Not Enter signs surrounding the burn zone in place. PRP at 34; Ex. 23 (A14).

(b) *Summary of Relevant Procedure, Pleadings & Arguments*

Motions for Partial Summary Judgment and Directed Verdict

In its answer to Hofstetter's complaint the City pled multiple affirmative defenses, including recreational use immunity under RCW 4.24.200-210 and subsequently presented motions for summary judgment seeking a dismissal of the complaint on these grounds. CP 919-21, 837-39, 814-26, 755-66. In its order denying the City's initial motion, the trial

court included a finding that "a genuine issue of material fact exists concerning whether defendant intended to hold the area where plaintiff was injured open to the public for recreational use." CP at 768.

After Hofstetter then conducted additional discovery, she filed a motion for partial summary judgment and presented supporting memoranda seeking to strike the recreational use immunity defense on the grounds that the evidence established unequivocally that the whirlpool area was closed to the public at the time her injuries occurred. CP at 600-01, 590-99, 590-599, 465-76. In support of the motion she quoted the language on the Do Not Enter sign (CP at 592) and cited Washington case law[4] holding that the recreational use statute, being in derogation of common law, must be strictly construed. CP at 596.

Significantly, in its response, the City admitted that "physical entry [into the burn zone] was prohibited at the time Plaintiff was injured." CP at 542. The City also later admitted this fact in its trial memorandum. CP at 994. It has never been disputed that the location where the plaintiff was injured is within the burn zone. Hence, the public was not permitted to physically enter the whirlpool area and any park visitor who did enter was subject to criminal penalties.

[4] *Matthews v. Elk Pioneer Days*, 64 Wn.App. 433, 437, 824 P.2d 471 (1988); *Van Scoik v. State of Washington*, 149 Wn.App. 328, 334, 203 P.3d 389 (2009).

The City responded by arguing, *inter alia,* that the public was excluded from the whirlpool area due to environmental concerns and that the closure was never intended to keep park users from swimming in the Whirlpool area on a "long term basis." CP at 542. However, this argument obviously fails to refute the undisputed fact that for several years prior to the injury date and on the injury date itself, the whirlpool area was closed to the public irrespective of the City's intent in issuing the closure order which provided no exception for outdoor recreation.

It is especially noteworthy that, although it failed to cite any case law to support the conclusion that RCW 4.24.210 should be subject to a liberal construction, the City recognized, as stated in its reply memorandum that the "*key is whether recreational use was 'allowed' at the time of the accident being litigated*". [emphasis added.] CP at 546. By then proceeding to argue that the court should adopt a "plain meaning" for the word "allow", the City conceded that analysis of Hofstetter's motion required the application of principles of statutory construction with respect to the word "allow" as used in RCW 4.24.210. The City offered various definitions of "allow", including what would amount to lack of enforcement of the closure order which it had enacted and which appeared on the sign with specific reference to the applicable

section of the Bellingham Municipal Code.[5] CP at 546. However, the City's argument for an expansive definition of the word "allow" is untenable because the recreational use statute, being in derogation of common law, must be strictly construed. *Matthews v. Elk Pioneer Days*, 64 W.App. 433, 437, 824 P.2d 471 (1988).

Notwithstanding the City's admission that physical entry into the whirlpool area was prohibited on the injury date and the recognition by the parties that resolution of the issue before the court was a matter of statutory construction with respect to the word "allow", the trial court, without making any written findings and without addressing the legal issue presented, denied the petitioner's summary judgment motion. CP at CP 445-47; VRP (January 14, 2010) at 22.

Likewise, the Court of Appeals did not discuss Ms. Hofstetter's argument based on statutory construction. Instead the Court of Appeals concluded that the trial court was correct in deciding that the issue of recreational use immunity was a jury question and stated, by way of a footnote in its opinion that "the record shows material fact issues on the

[5] There was evidence presented at trial that citations had been issued by a Bellingham police officer to persons he observed in the whirlpool area at a location below or past the Do Not Enter sign. VRP at 93-94.

question of whether the whirlpool area was open to the public for recreation on the injury date."[6] Court of Appeals decision at 4, fn. 5.

The Court of Appeals also cited *Brothers v. Pub. Sch. Emps. of Wash.*, 88 Wn.App. 398, 409, 945 P.2d 208 (1997) for the proposition that its well settled that "[a] summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the fact finder." Court of Appeals decision at 4. However, as held in *Kaplan v. Northwestern Mutual Life Insurance Co.*, 115 Wn.App. 791, 65 P.3d, 16 (2003), there is an exception to this rule when a summary judgment denial turns on a substantive legal issue.

Just as in *Kaplan, Ibid.*, the trial court in the instant case sent a legal issue to the jury in the erroneous belief that there was a material factual issue for the jury to decide.[7] The legal issue erroneously relegated to the jury here was one involving interpretation of the word "allow" as used in RCW 4.24.010 and, accordingly, requires the application of

[6] It is unclear to the petitioner why the Court of Appeals commented on the City's judicial estoppel argument inasmuch as this argument has not been advanced by the City on appeal and the trial court appropriately exercised its discretion by providing the City a fair opportunity to respond to the motion. VRP (December 17, 2010) at 6-12.

[7] See the Appellant's Reply Brief at 2-5 for a full discussion of *Kaplan, Id.* and petitioner's analysis supporting de novo review of the denial of her motion for partial summary judgment. She also discussed this issue at length in her opening brief at 23-26.

principles of statutory construction.[8] Pursuant to *Kaplan, Id.*, merely because the trial court stated that there were material issues of fact in dispute, e.g. whether the City intended to hold the whirlpool area open for recreational use, should not preclude appellate review of the court's summary judgment denial if the court's belief that the City's intent and reasons for prohibiting physical entry into the burn zone were material facts was clearly an erroneous belief. As noted above, the City admitted that entry into the whirlpool area was prohibited. Hence, the petitioner's summary judgment motion turned on a substantive legal issue, i.e. construction of RCW 4.24.210 with respect to the word "allow". Therefore, based on *Kaplan, Id.*, the denial of the motion is subject to de novo review. The Court of Appeals failed to address this argument.

When the presentation of evidence was concluded at trial, Hofstetter filed a motion seeking a judgment as a matter of law that the recreational use defense did not apply. CP at 122-35. This motion, which was well supported by citation to legal authority, summarized the evidence which demonstrated that no rational trier of fact could conclude that the City allowed the public to enter the whirlpool area on the injury

[8] In this connection, it is noteworthy that the trial court rejected Hofstetter's proposed instruction 35 (CP at 97) which defined "allow" for purposes of RCW 4.24.210. Instead, the court gave instruction 17 (CP at 70) which sets forth the text of portions of RCW 4.24.200 and RCW 4.24.210. Not surprisingly, the jury expressed confusion during deliberations by sending a note to the court inquiring whether "allow" [as used in Question 1 of the revised verdict form, CP at 43] means "legally allow". CP at 5

date as long as the word "allow" is given a strict construction. Although this motion was denied, it constituted, by implication, an exception to all of the jury instructions relating to the recreational use statute.[9]

In sum, the trial court's respective rulings denying her pretrial motion to strike the City's affirmative defense of recreational use immunity and denying her motion for judgment as matter of law are clearly erroneous. Essentially, the trial court held, and the Court of Appeals has affirmed, that a municipal government can prohibit the public from entering on to property it owns and impose criminal penalties for doing so and yet, at the same time, be entitled to recreational use immunity for injuries occurring on such closed property. As a matter of logic, such an anomaly only makes sense if the word "allow", as used in RCW 4.24.210 is liberally construed.

Prejudicial Error

The denial of plaintiff's motion for partial summary judgment opened the door for the City to present considerable, otherwise irrelevant, evidence about the reasons for the closure, the 1999 pipeline explosion, including its resulting impact upon the ecology of the park, and the City's "intentions" in closing the area with respect to the whirlpool area in its

[9] See instructions 2, 8, 17 and 18 at CP 55, 61, 70 and 71 and attached hereto respectively as A-12, A-13, A-14 and A-15. Plaintiff also filed a motion for an order vacating or setting aside the jury verdict and granting her a new trial. CP at 32-41.

attempt to persuade the jury that despite the Do Not Enter sign maintained by the City above the injury site, the City nevertheless "allowed" outdoor recreation in this area. A thorough review of the report of proceedings demonstrates that, due to the court's error, Hofstetter was compelled to engage in lengthy and painstaking examinations of City employees aimed at extracting even the most basic admission that the public was prohibited from entering the whirlpool area. This was necessary to enable her to prove that the "recreational use statute does not apply to this case" as the court improperly required her to do to prevail on her claim.[10]

Scrutiny of the record also reflects that due to the court's permitting the City at trial to raise recreational use immunity as a defense, several otherwise irrelevant "issues" arose, including the significance of the Do Not Enter sign above the whirlpool, whether, by including the phrase "hazardous area", it should be considered a conspicuous "warning sign" as contemplated by the recreational use statute and whether the sign indicated an intent to prohibit park users from entering the whirlpool area for cliff jumping or swimming. These "issues", in combination, became a red herring which prejudicially distracted the jury and grossly distorted the trial to the extent that Ms. Hofstetter was deprived of a fair

[10] See Instruction 8. CP at 61. Attached hereto as A-13

opportunity to present evidence in a coherent manner to prove that the City breached its common law duties to her as either an invitee or licensee. Characterizing the denial of her summary judgment motion as mere harmless error because the jury ultimately decided the City did not allow outdoor recreation in the whirlpool area is far too simplistic and avoids the statutory construction issue.

Had the court properly granted the plaintiff's motion for a directed verdict regarding the inapplicability of recreational use immunity, jury instructions 2, 8, 17 and 18 would have been omitted. These instructions prevented the petitioner from sensibly arguing her theory of the case in that she was left with no alternative but to spend an inordinate portion of her argument discussing the recreational immunity statute in an attempt to prove it did not apply while at the same time arguing, paradoxically, that the exception to the recreational use statute, i.e. the injury causing condition was known, dangerous, latent and artificial, did apply.[11]

Instruction 18

As the plaintiff pointed out in her opening brief, once the jury determined that the City did not allow outdoor recreation in the whirlpool area, instruction 18 became a clear misstatement of the law in that,

[11] See the excerpts of the closing arguments regarding liability at VRP 1331-96

contrary to what is stated in the instruction, a possessor of land may be subject to liability with respect to injuries suffered by a licensee if the possessor fails to warn the licensee of a known dangerous condition on the land regardless of whether the condition is latent or artificial. Accordingly, because instruction 18 is a clear misstatement of the law in the context of this case, it must be presumed prejudicial.[12]

The jury had no way of knowing that it should disregard instruction 18 if it determined that the City did not allow outdoor recreation in the whirlpool area because the instruction makes no reference to the recreational use statute. Ultimately we are left to guess whether the jury's determination that the City was not negligent was based upon their conclusion that because the condition which caused the petitioner's injuries was not latent or not artificial, the City, according to instruction 18, had no duty to post a warning sign.

Plaintiff's Proposed Instruction 38

Proposed instruction 38 (CP at 100) is based on the long established common rule that the knowledge of an employee is imputed to the employer. It was proposed, *inter alia,* in order to ensure that the jury

[12] 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).

understood that Rothenbuhler's knowledge that the trail was dangerous was the equivalent of such knowledge on the part of the City.[13]

Although it was pointed out by plaintiff Hofstetter's attorney during the lengthy colloquy regarding this instruction that, without the instruction, the jury would have no way of knowing that the knowledge [of the City's employees] is imputed to the City, the court, before rejecting the instruction, expressed doubt whether it correctly stated the law and encourage counsel to simply argue this point to the jury."[14]

The petitioner disagrees with the opinion of the Court of Appeals that she offered a "different rationale for the instruction" to the trial court than she has on appeal. Court of Appeals decision at 6. When the court inquired whether the purpose of the instruction was to the determine whether Mr. Harris is the speaking agent of the City, petitioner's attorney responded, "No . . . knowledge of the Defendant's employees is knowledge of the City with respect to the seepage condition on the trail."[15] A review of the entire colloquy that occurred in regard to this instruction demonstrates that the same rationale in support of the instruction was offered to the trial court as has been urged on appeal, i.e.

[13] Proposed instruction 38 is attached hereto as A-16.

[14] VRP at 110

[15] VRP (Proposed Jury Instructions) at 104.

that the employees' knowledge of the condition of the trail is the equivalent of knowledge on the part of the City.[16] In this regard, it must be noted that in order to prove the City breached a common law duty to the plaintiff as a licensee, it was incumbent upon her to establish that the City, not an employee, had knowledge of the dangerous condition. Likewise, to prove the exception to the recreational use statute she had to prove that the injury causing condition was known to the City.

Due to the court's refusal to give this instruction, there is no way of knowing whether the jury imputed Mr. Rothenbuhler's knowledge that the trail was dangerous to the City itself.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. By upholding the trial court's ruling that the issue whether the City "allowed" outdoor recreation in the portion of the park where the injuries occurred was an issue of fact for the jury, the decision conflicts with several Court of Appeals decisions holding that the recreational use statute, being in derogation of common law, must be strictly construed.[17] As petioner argued to the trial court and has argued on appeal, the

[16] The petitioner considers this issue to be of such paramount importance that she has attached to the appendix hereto at A-17 through A-29 the entire Verbatim Report of Proceedings pertaining to this instruction.

[17] *See e.g. Matthews v. Elk Pioneer Days, Id; Plano v. Renton,* 103 Wn.App. 910, 911-12, 14 P.3d 871 (2000). Both of these opinions were approvingly cited by the Supreme Court in Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 600, 257 P.3d 532 (2011).

summary judgment denial can only be logically justified if the statute is liberally construed with respect to the word "allow".

2. By deciding that the petitioner's assignment of error with respect to the trial court's refusal to give her proposed jury instruction 38 is not reviewable, the decision conflicts with the Supreme Court decision in *Crossen v. Skagit County,* 100 Wn.2d 355, 653 P.2d 1365 (1982) in which held the Supreme Court rejected the view that "failure to give a rationale necessarily precludes appellate review". Petitioner submits that she did furnish a rationale sufficient to meet the requirements of CR 51(f). Furthermore, unlike in *Crossen, Ibid.*, she cited case law to support her position. The record also demonstrates that the trial judge eventually understood petitioner's reasons for proposing the instruction but rejected it because he was uncertain whether it correctly stated the law.

3. The procedural issue relating to the extent to which litigants must present a rationale in support of an instruction, or in taking exception to an instruction, is a matter of public interest in that it is important to litigants, the bench and bar. In addition, the issue, as raised in this case, whether a court may properly refuse an instruction which correctly states a rule of law on the grounds that the issue was not disputed at trial and/or on the grounds that the proponent could argue the point of law during closing argument, can be fairly characterized as an

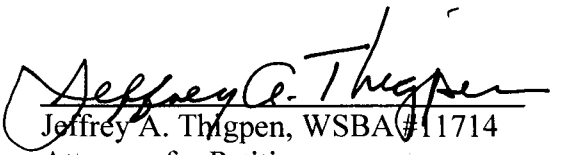
issue of public interest. Granting this petition would provide the Supreme Court the opportunity to further define the contours of CR 51(f) and thereby provide needed guidance to lawyers and judges.

4. The criteria for obtaining review of the denial of a motion for summary judgment following trial is also a matter of public interest in that attorneys and their clients frequently have to decide whether to incur the expense attendant with pursuit of a motion for discretionary review or an appeal after trial. This case provides an opportunity for the Supreme Court to provide further clarification.

F. CONCLUSION

Petitioner requests that the Supreme Court grant this petition for review so that the significant issues which she has raised, and which she contends have been incorrectly ruled upon or avoided by both the trial court and the Court of Appeals, may be fully addressed.

Dated this 7th day of October, 2013.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATTI A. HOFSTETTER, a single woman, Appellant, v. CITY OF BELLINGHAM, a municipal corporation, Respondent.	)	NO. 68156-7-I DIVISION ONE UNPUBLISHED OPINION FILED: August 12, 2013

LAU, J. — Katti Hofstetter sustained catastrophic injuries after falling from a cliff above a popular swimming hole, known as the "whirlpool," in the City of Bellingham's Whatcom Falls Park. Hofstetter sued the City of Bellingham, alleging its negligence proximately caused her injuries and damages. The City claimed immunity from liability under the recreational use statute, RCW 4.24.210. The jury returned a verdict finding no recreational use immunity because it found the whirlpool area was closed when Hofstetter was injured. It also found the City not negligent on Hofstetter's premises liability claim. Hofstetter contends the trial court erroneously denied her partial summary judgment motion, which sought to remove the issue of recreational use immunity from the jury's consideration. Finding no error, we affirm.

The City denied negligence and asserted recreational use immunity as an affirmative defense to Hofstetter's personal injury complaint. The recreational use

statute provides that landowners who "allow" members of the public to use their land for outdoor recreation "shall not be liable for unintentional injuries to such users." RCW 4.24.210(1). Its purpose is "to encourage owners or others in lawful possession and control of land . . . 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.

The City moved for summary judgment, invoking recreational use immunity.[1] It argued immunity from liability as a matter of law because Whatcom Falls Park charged no fee for public outdoor recreational use. Hofstetter opposed the motion, arguing that material fact issues remained as to whether the City "allowed" public recreation in the whirlpool area.[2] She argued, "The evidence in the record supports a finding of fact that the City did not intend to hold the area where plaintiff was injured open to the public for outdoor recreation."

The trial court denied the motion, agreeing with Hofstetter that questions of fact existed over whether the City allowed the public to use the whirlpool area on the day Hofstetter was injured. It signed Hofstetter's proposed form of order, which stated, "The record demonstrates that a genuine issue of material fact exists concerning whether

[1] After conducting additional discovery, the City filed a second summary judgment motion. Neither party raises any issue related to this motion.

[2] Hofstetter filed no cross motion for partial summary judgment on this issue.

defendant intended to hold the area where plaintiff was injured open to the public for recreational use."[3]

Approximately one month before the scheduled trial date, Hofstetter filed a motion for partial summary judgment, asking the court to "strike" the City's recreational use immunity affirmative defense. Contrary to her earlier position opposing the City's summary judgment motion on factual issues, she now argued summary judgment should be granted in her favor because no material fact issues remained because the whirlpool area was undisputedly closed. To support this contention, she submitted the deposition of park operations manager Marvin Harris. She claimed his testimony showed the City closed the whirlpool area due to possible contamination from a 1999 pipeline explosion. She argued that since the area was undisputedly closed as a matter of law, the City was not entitled to present its immunity defense at trial.

The City opposed Hofstetter's motion, observing that Hofstetter's argument conflicted with her previous assertion that the jury should decide the City's entitlement to immunity. The City argued, "For [Hofstetter] to wait until this period of time right before trial to then assert that just the opposite of that, that no material issue of fact exists on that immunity defense, is just, it's not fair, and there should be judicial estoppel in that respect."[4] VRP (Dec. 17, 2010) at 6.

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[3] We have noted, "The summary judgment procedure is designed to avoid useless trials. Where there is a genuine issue as to any material fact, however, a trial is not useless, but is absolutely necessary." Moore v. Pac. Nw. Bell, 34 Wn. App. 448, 456, 662 P.2d 398 (1983).

[4] The City does not argue on appeal that judicial estoppel or invited error applies here.

The City also argued that genuine issues of material fact remained as to whether it allowed public recreation in the whirlpool area on the date of the accident. It acknowledged that "active use" of the whirlpool area had been restricted "for a relatively short period of time immediately following the [1999] pipeline explosion . . . ." VRP (Jan. 14, 2011) at 16. But it claimed that concerns over petroleum contamination had subsided before Hofstetter's accident, prompting city officials to allow the public to resume recreation in the whirlpool area.

The court denied Hofstetter's motion. It noted the motion presented the "same issues" as those underlying the City's earlier summary judgment motion. VRP (Jan. 14, 2011) at 23. It explained,

> I just went back, and I put up the order that the Court entered the first time on summary judgment, and the Court said, the order says, "The Court finds that the record demonstrates a genuine issue of material fact concerning whether the Defendant intended to hold the area where Plaintiff was injured open to the public for recreational use . . . ."
>
> . . . The issues of who got to go in there and whether it was open or closed were argued to the Court the first time. I really don't think we've progressed, even through your recent discovery, past the point that I think we were at the last time when we had the first summary judgment, which I think that these are still issues of fact on both sides.

VRP (Jan. 14, 2011) at 22. The court properly ruled, as it did the first time, that the issue of recreational use immunity was a jury question.[5] It is well settled that "[a] summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the fact finder." Brothers v. Pub. Sch. Emps. of Wash., 88 Wn. App. 398, 409, 945 P.2d 208 (1997).

[5] Our review of the record shows material fact issues on the question of whether the whirlpool area was open to the public for recreation on the injury date.

The jury answered questions in the special verdict form[6] that addressed the recreational use immunity and common law negligence issues.[7] Hofstetter prevailed on the issue of recreational use immunity:

> 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")

(Formatting and capitalization omitted.) The City prevailed on the issue of negligence:

> 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: [X]
>
> . . . .
>
> Question No. 3: Was the Defendant City of Bellingham negligent?
> Answer: No (Write "yes or "no")

(Formatting and capitalization omitted.)

Under the circumstances here, we find no error.[8]

Hofstetter claims the denial of her partial summary judgment motion "deprived her of the opportunity and right to effectively present the evidence establishing her

---

[6] Hofstetter did not object to any of the questions or the form of the special verdict.

[7] Hofstetter assigns error to the trial court's denial of her motion for judgment as a matter of law, which she brought at the close of all evidence at trial. She acknowledges this challenge "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." Br. of Appellant at 33. The challenge fails for the reasons discussed below. We also note that Hofstetter's opening briefing on this issue purports to argue using incorporation by reference. We do not allow this form of argument. Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 890, 251 P.3d 293, review denied, 172 Wn.2d 1025 (2011).

[8] We do not address the question of whether immunity exists if a member of the public enters land that is open for public recreational use but sustains an injury in a portion of the land that is closed to the public.

theory of the case." Br. of Appellant at 49. She explains, "[I]t 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." Br. of Appellant at 34. We are not persuaded by this speculative and unsupported claim. Hofstetter cites nothing in the record to support jury confusion. This claim fails.

Plaintiff's Proposed Jury Instruction 38

Hofstetter also challenges the trial court's refusal to give proposed instruction 38, which identified an agency relationship between the City and its employees:

> 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.

Without the instruction, she argues, some jurors might refuse to consider the testimony of park employees when deciding whether the City was negligent. This challenge fails because our record shows Hofstetter offered a different rationale for the instruction below. We need not review a rationale presented for the first time on appeal. See Stewart v. State, 92 Wn.2d 285, 298, 597 P.2d 101 (1979) ("objection [to instruction or refusal to give instruction] must apprise the trial judge of the precise points of law involved and when it does not, those points will not be considered on appeal."); Sigurdson v. City of Seattle, 48 Wn.2d 155, 163-64, 292 P.2d 214 (1956) (declining to review instructional challenge on ground that, at the time exception was taken, "the

reason given the trial court was not the reason urged before this court."). In any event, the court properly exercised its discretion in declining to give this instruction. Whether employees were agents of the City was not disputed at trial. Hofstetter fails to establish that the court's failure to instruct the jury on agency deprived her of the opportunity to argue her case to the jury. The trial court had no duty to give an irrelevant or unsupported instruction.[9] Jaeger v. Cleaver Constr., Inc., 148 Wn. App. 698, 716, 201 P.3d 1028 (2009); Ethridge v. Hwang, 105 Wn. App. 447, 456, 20 P.3d 958 (2001).

We affirm.

WE CONCUR:

[9] To the extent Hofstetter raised a challenge regarding instruction 18, the issue is waived. Hofstetter concedes she assigned no error to the court's provision of Instruction 18. Under RAP 10.3(g), "[a] separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. . . ." Further, the record shows Hofstetter took no exception to instruction 18 below. Generally, the failure to take exception waives any challenge on appeal. Estate of Ryder v. Kelly-Springfield Tire Co., 91 Wn.2d 111, 114, 587 P.2d 160 (1978).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATTI A. HOFSTETTER, a single woman, Appellant, v. CITY OF BELLINGHAM, a municipal corporation, Respondent.	)	NO. 68156-7-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Katti Hofstetter moved on August 20, 2013, to reconsider the court's August 12, 2013 opinion. The court has determined that the motion should be denied. Therefore, it is

ORDERED that appellant's motion for reconsideration is denied.

DATED this 9th day of September 2013.

FOR THE PANEL:

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.


DO NOT ENTER
DUE TO HAZARDOUS CONDITIONS
PARK AREA CLOSED

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 of 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.

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)

Kimbro 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)

THE COURT: Thirty-eight.

MR. BURNS: Plaintiff's proposed 38.

MS. McCONAUGHY: Thank you. You know, I think if we were going to give something on this, it should be the WP -- just the WPI, and there's just this continual effort to try to add little curly-cues on what the WPI said.

MR. BURNS: The problem is I don't think that the WPI

is the evidence supports a finding that she was an invitee.

THE COURT: The next thing in your list is a verdict form. I'm going to go past that --

MR. THIGPEN: There was one other one.

THE COURT: I'm getting to some others that we haven't addressed yet.

MR. THIGPEN: All right.

THE COURT: Let's see if it's in there. Principal and agent.

MS. McCONAUGHY: Which set are we in now?

THE COURT: Plaintiff's supplemental, first supplemental, Number 38.

MS. McCONAUGHY: Principal and agent? I'm sorry.

THE COURT: Plaintiff's first supplemental, Number 38.

MR. BURNS: Actually --

MS. McCONAUGHY: Okay. I'm sorry. Is -- what number are we looking at?

THE COURT: Thirty-eight.

MR. BURNS: Plaintiff's proposed 38.

MS. McCONAUGHY: Thank you. You know, I think if we were going to give something on this, it should be the WP -- just the WPI, and there's just this continual effort to try to add little curly-cues on what the WPI said.

MR. BURNS: The problem is I don't think that the WPI

gives the jury enough information.

THE COURT: Let me see what it says.

MR. BURNS: And I think this is an important issue for purposes of recreational use.

THE COURT: What's the purpose here, to determine whether Mr. Harris is the speaking agent of the City?

MR. BURNS: No, knowledge of the, knowledge of the Defendant's employees is knowledge of the City with respect to the seepage condition on the, on a trail. That's, you know, the issue is did -- an issue in the case is whether the Defendant knew of the known artificial latent condition.

THE COURT: You're talking about --

MS. McCONAUGHY: You're just talking about respondeat superior.

THE COURT: Yes.

MS. McCONAUGHY: It should be respondent where a, oh, that's --

THE COURT: That's 50.03, any act or omission of an agent within the scope of authority is the act or omission of the principal, so vicarious --

MS. McCONAUGHY: There's no vicarious liability. It's respondeat superior is what we're talking about.

MR. THORSRUD: They haven't alleged it.

THE COURT: This is isn't whether or not they're

responsible. It's whether or not they know, and I think you question is should the City be imputed knowledge of their agents.

MR. BURNS: Yes, that's exactly the question.

THE COURT: That's not what that instruction addresses.

MS. McCONAUGHY: That's not what that instruction addresses.

MR. BURNS: Not 50.01.

THE COURT: I don't think --

MR. BURNS: Did I misdo it?

THE COURT: I don't think that's what it's intended for.

MR. BURNS: 50.01 defines the agency, and I think they need to know that he, they need to know that the employees are agents of the City and then --

THE COURT: I think agency has to do with if there's a liability requirement under agency is when this should be given.

MR. THIGPEN: We just want one that says the knowledge of an employee is the knowledge of the City. We can draft one.

THE COURT: That's not what this says.

MS. McCONAUGHY: I don't know why it's evading me, but Your Honor, it should just be the typical respondeat superior issue.

MR. BURNS: This is, this is an agency issue. It's a question of whether the, whether the City is charged with knowledge if the employees have knowledge.

THE COURT: I don't think there is an instruction for that. Well, the claim is if the City's employees knew people were jumping --

MR. BURNS: No, the claim -- just to be more accurate, you know, we have to prove that the City knew of the artificial, latent condition that caused the injury, and the evidence is particularly Mr. Rothenbuhler and Mr. Luce, and the name of the other employee escapes me -- Zerba all testified that they were aware, had knowledge of, particularly Rothenbuhler had knowledge of the seepage issue which we claim is certainly part and parcel of the known, artificial --

THE COURT: What prevents you from arguing just that?

MR. BURNS: Pardon me?

THE COURT: What prevents you from arguing just that? The City employees knew about it. They said they knew about it. They knew there was seepage up there. They know people were jumping, and people were climbing up that -- and the City, therefore, knew.

MR. BURNS: Again, the jury needs to be charged that the, or instructed that the knowledge of the employees is the knowledge of the City.

THE COURT: Where is the law that says that that's the case?

MR. BURNS: Right here.

THE COURT: Actually, that's not what that says.

MR. BURNS: Well, and also in the cases that I cited in support of it, these cases all stand for the proposition -- we can get them out. I can tell you about *Kimbro*. It's a federal case I'm very familiar with.

THE COURT: I understand that that's a def -- that that's where the trial court in those cases or the appellate court is saying this is what agency means. It means that the knowledge is imputed, but that's not something that we have an instruction for, because I don't think there's a need for an instruction for that.

MR. BURNS: Then how does the jury know that the knowledge of the employee is the knowledge of the City? How do they know that?

THE COURT: They have to decide that based upon -- you're going to argue them that the City knew, their employees knew, the people in the park knew.

MR. BURNS: That's, that's true, but that's, but the City is the defendant. The employee is not the defendant.

THE COURT: No, but I guess I understand what you're saying, but I don't think it's the sort of thing that there's a provision or instruction on it.

MR. THIGPEN: Your Honor, often instructions are based upon the law. It's a substantive law in these cases cited by Mr. Burns here, and it says under general theories of agency, notice given to and knowledge acquired by an agency is imputed to the principal as a matter of law. That's in the *Hurlbert v. Gordon* case cited.

THE COURT: You've got agent is a person who is employed to perform services for another called a principal. In this case, employees of the City of Bellingham who testified at trial are agents of the City.

MR. BURNS: That's a true statement.

THE COURT: It is a true statement, but I don't know that it's necessary.

What you really want is the second paragraph, 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. That's what you really need.

MR. BURNS: I can live with that.

THE COURT: Because that doesn't, that doesn't require an agency situation.

MR. BURNS: I can take out --

MR. THORSRUD: Where does it say that the City is bound by the knowledge of its employees? I know it says that the instruction -- I'm not sure that it says that in law.

THE COURT: He's citing a case, and I haven't looked at

which case says that. Which case is for that?

MR. THIGPEN: The *Hurlbert* case, headnote four.

The other point, Your Honor --

THE COURT: Just a minute. Let me read it.

MR. THIGPEN: Okay.

THE COURT: I think this is a different context. This case involves the duty of an escrow agent to share information with one of the parties in the transaction.

MR. BURNS: I also cited *Zwink v. Burlington Northern*.

MS. McCONAUGHY: WPI 50.18, the Defendant city is a corporation is a city. It's a municipal corporation. It can act only through its officers and employees. Any act or omission of the agent is an act or omission from the city.

THE COURT: Did you propose that one?

MS. McCONAUGHY: I don't think we did.

THE COURT: You proposed something like that.

MS. McCONAUGHY: This is the typical, this is the classic statement about respondeat superior, and I think that's probably an appropriate thing for the Court --

MR. BURNS: That's not the issue. It's not respondeat superior liability. It's the element of known in the exception to the recreational use immunity. The issue is what knowledge is the City charged with. That's the issue, and it's not --

THE COURT: I think that may be a fact question. The question is was the City aware of this. Did the City respond to this? Did the City fail to do what they were supposed to do? I think that's part of the fact question for the jury.

If we give them this instruction, they have to believe whatever the employees knew, the City knew.

MR. BURNS: But that's true.

THE COURT: I'm not sure that is the law.

This is, this case doesn't talk about that at all. This case talks about the obligation of an escrow agency who has a fiduciary obligation to share information.

MR. BURNS: Okay. All right. Again, I cited *Zwink v. Burlington Northern*, 13 Wn. App. 560.

I can hand that up if you want.

THE COURT: Let me see that one.

MR. BURNS: It's a railroad crossing. It's a personal injury case, and the question is whether the flagman at the crossing knew certain information about the accident, and whether that knowledge was charged to the employer.

THE COURT: This case involves a situation where they say did the railroad have notice of this incident, and at the time of the incident, or that this crossing wasn't working correctly, and they said that the evidence is clear that at the time that happened, there was a railroad

employee there with a lantern, and so the railroad must have known, because they had an employee there actively doing something.

That's not our case at all. We don't have an employee of the City there when Katti goes up the path.

MR. BURNS: I understand, Your Honor. Let me take one more run at this.

I've also cited *Kimbro v. Atlantic Richfield Company*. It's a federal case applying Washington law, and I'll try to be as succinct as I can.

Kimbro was a disability discrimination case which was actually tried by a Bellingham lawyer here, Deborra Garrett. In *Kimbro*, it was a disability failure to accommodate case. The plaintiff had a chronic migraine headache condition, was excessively absent and ultimately terminated.

The case was tried; defense verdict. Case went up on appeal to the 9th Circuit. The defense argued among other things that the decision makers who made the decision to terminate the employee did not have knowledge of the employee's disability, and therefore, could not be held liable under the failure, under 49.60, the disability discrimination statute.

The court of appeals said it's clear that the decision makers who made the decision to terminate did not have

knowledge of the plaintiff's disability, but the plaintiff's manager that was communicating with the plaintiff regarding the absenteeism issue certainly had knowledge, and under Washington agency law, the employer, the corporation was charged with the knowledge of the employee.

It's essentially the same situation here. The issue is does the Defendant City have knowledge of the known, artificial, latent condition which caused the injury? And they're charged with the knowledge of their employees who had the knowledge of that condition.

THE COURT: All the --

MR. BURNS: Same thing.

THE COURT: All the cases you're citing have to do with the act of an agent, the act of the agent, either failure to act or the agent's act. We don't --

MR. BURNS: Kimbro doesn't have anything to do with "act." Kimbro has to do with knowledge of a condition.

THE COURT: No, because it's the failure of the manager to take into account that condition, the manager's failure to follow the law which is to, to allow for this disability.

That isn't what we have here. We don't have a question whether the, some of the park employees didn't go make a report they're supposed to make about people using this.

All we have is evidence is that all the park employees knew that people used this whirlpool for jumping and swimming and climbing up and down. They know that. I don't think there's any evidence -- in fact, I think Mr. Harris in his own testimony said that he was aware that people did that. I don't think there's any question about whether the City has knowledge or not.

MR. BURNS: The issue is not whether the City was aware that people were jumping in the whirlpool area. The issue is whether the City was aware of the condition which is the known, the known, artificial, latent -- the issue is whether they were aware of the artificial, latent condition, whether they had knowledge of that, and we have to prove that they had actual knowledge of it, and our proof of that is the knowledge of the City's employees.

MS. McCONAUGHY: Can I speak on this? This is, I think, a pretty minor point. We don't have a lot of time.

It ought to be 50.01. It -- basically, the City is a corporation. It can only act through its officers and employees. Any act or omission of an officer or employee is an act or omission of the corporation.

You're telling them -- you're insisting that it must say that the City is bound by everything an employee knows. That is basically a directed verdict on the known issue which the Court has already said is an issue of

fact. So --

THE COURT: And I don't think that is necessarily the law. I don't think that everything that an employee knows --

MS. McCONAUGHY: Exactly.

THE COURT: -- the City is charged with.

MS. McCONAUGHY: So can we just give 50.18 and move on?

MR. BURNS: That is taking us into exactly what the Judge is saying is not an issue here.

THE COURT: I just don't think it is. I think the question is the jury has to decide from what Mr. Harris said he was aware of, and what everybody knew that the City, what the City did or didn't know.

I'm going to decline 38, and you can take your exception.

MR. BURNS: Then I -- all right. That's fine. We made