Court of Appeals No. 46875-1-II
Trial Court No. 12-2-00113-0

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

JOHN A. HIVELY,

Appellant,

v.

PORT OF SKAMANIA COUNTY, WASHINGTON, a Washington municipal corporation,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This case involves the statutory interpretation of Washington's recreational land use statute, RCW 4.24.210. The issue presented is whether a property owner may claim immunity if they charge "a fee of any kind" for the use of their land.

The statute was adopted to encourage landowners to open their land to the public "free of charge" by abolishing the common law duty owed to invitees, licensees, and trespassers.[1] However, according to this court's holding in *Plano v. City of Renton*, 103 Wn. App. 910, 14 P.3d 871 (2000), this statutory immunity only applies to those property owners who do not charge "a fee of any kind"[2] to any user of the property. Because the Port charged a fee, at least to some users of its waterfront park, it is not entitled to claim immunity under the statute.

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[1] *Jewels v. City of Bellingham*, 2015 Wash. LEXIS 691 (Wash. June 11, 2015)

[2] RCW 4.24.210 provides in part: (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. (Emphasis added).

At minimum, the question of whether the path where Mr. Hively suffered his injuries was a "necessary and integral" part of the fee generating areas of the Park is a question for the jury.

II. ARGUMENT

A. The Port cannot distinguish this case from *Plano*

The Port tries mightily to distinguish the facts of Mr. Hively's case from the facts in *Plano*. Because the Washington State Legislature has amended the immunity statute at least seven times since this court's 2000 decision without making any changes to the definition of "fee of any kind," it can be presumed that this court properly construed the legislative intent.[3] Further, the Washington Supreme Court and Court of Appeals have decided several other cases involving the interpretation of the statute, but this court's holding in *Plano* remains intact.[4]

1. The Port's Five Reasons for distinguishing Mr. Hively's case from Plano

Recognizing that *Plano* controls the outcome in this case, the Port argues there are five reasons to distinguish *Plano* from Mr. Hively's case:

1. Mr. Hively's accident did not occur in the restroom;

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[3] 2012 c 15 § 1. Prior: 2011 c 320 § 11; 2011 c 171 § 2; 2011 c 53 § 1; 2006 c 212 § 6; prior: 2003 c 39 § 2; 2003 c 16 § 2. Rev. Code Wash. (RCW) § 4.24.210. Also see *Jewels v. City of Bellingham*, 2015 Wash. LEXIS 691, pages 11-12, for the proposition that the Legislature has approved of a court's interpretation where the Legislature has amended the statute but not disturbed a court's decision/interpretation.

[4] *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242 (2001). *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 317 P.3d 987 (2014), and *Jewels v. City of Bellingham*, 2015 Wash. LEXIS 691

2. The Port does not charge to use the restroom;

3. Those that pay to use the waterfront park (Teo Park or the pier) are not required to use the restroom or either of the two paths that access the facility;

4. The restroom facility is not a "necessary and integral" part of Teo Park or the pier (the fee generating areas of the waterfront park); and

5. Mr. Hively was injured in an area outside of the fee generating areas.

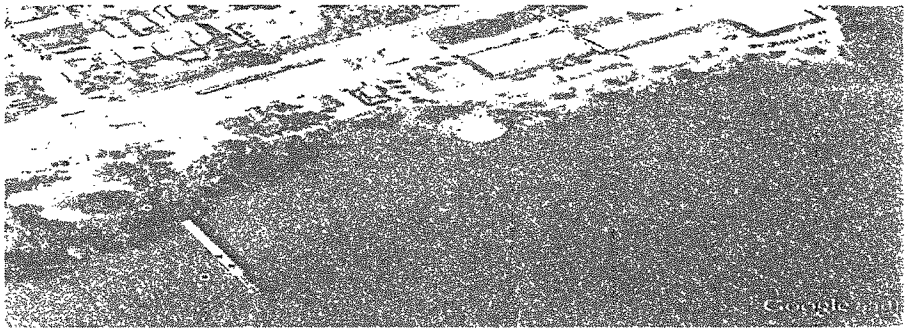
2. Mr. Hively's case is parallel to the Plano case.

Comparing the facts in *Plano* to this case fails to support the Port's position.[5] First, the plaintiff in *Plano* was not injured on the dock where the City charged a fee. Indeed, it was feasible for those boaters charged a fee to dock their boat overnight to not use the ramp where Plano suffered her injury.

Similarly, Mr. Hively was not injured in Teo Park, on the pier, or in the restroom facility that serves the waterfront park. He was, like the plaintiff in *Plano*, injured on one of two paths that provided access from

[5] Immunity is not favored and statutes granting immunity must be narrowly construed (*Tennyson v. Plum Creek Co.*, 73 Wash. App. 550, 557, 872 P.2d 524 (1994) and the Port must prove that it is entitled to immunity under the statute. *Camica*.179 Wn.2d 684, 317 P3d 987 (2014). Except when it is abundantly clear that immunity should apply, courts should not change the common law. *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980)

(or to) Teo Park or the pier to (or from) the restroom facility. Also, the waterfront path where Mr. Hively was injured provides pedestrian access to (or from) these areas to the Port's east parking lot. And contrary to the Port's assertions, the pathway where Mr. Hively was injured is not distant from the Port's fee generating areas.[6]



Second, the plaintiff in *Plano* was not required to pay a fee to walk down the ramp where she suffered her injuries; the dock and the two ramps leading to the dock were open to the general public without a fee. Only those who moored their boats overnight had to pay any fee.

In this case, neither Mr. Hively nor any member of the public had to pay a fee to access Teo Park, the pier, or the pathway where Mr. Hively

[6] The image above, which was attached to Mr. Hively's declaration, depicts the Port's Property. If a person were to walk from the Pier directly up toward the street, Teo Park would be directly to the left and the restrooms would be directly to the right on the same pathway that leads from the Pier directly up to the street. The pathway leading toward the eastern portions of the Port's Property where Mr. Hively was injured is on the right just before a person reaches the bathrooms if walking from the Pier. A person walking from the Pier would have to use the pathway where Mr. Hively was injured to access the eastern portions of the Port's Property and the restrooms.

was injured. Like in *Plano*, only those who wanted to rent the Park or moor their boats at the pier had to pay a fee.

Third, the plaintiff in *Plano* was injured on one of two ramps that led from the City Park to the boat dock. No one had to walk on the particular ramp where Ms. Plano was injured—they could have taken either one of the two paths.

Here, Mr. Hively was injured on one of two paths that led to the single restroom facility that served the Port's waterfront park. As in *Plano*, visitors of the fee generating portions of the Port's land could access the restrooms by one of two paths, including the path where Mr. Hively was injured. While it was foreseeable the Port's payees (those who rented Teo Park or moored their ships at the pier) would likely use the restrooms, or one of the two paths leading to the restrooms, it certainly was not the only path. It was also foreseeable that those who paid to use the Port's Teo Park or the pier would have used the riverfront path where Mr. Hively was injured to access the Port's east parking lot.

Fourth, the court in *Plano* held that the two ramps leading to the City dock were a "necessary and integral" part of the dock, even though the paid users of the dock would not have necessarily used either of the two ramps where Ms. Plano was injured.

Similarly here, those that rent Teo Park would not, at least conceptually, be required to use the restroom facility in conjunction with their use of the Port. And those that disembark from the boats moored at the Port's pier may, at least conceptually, choose to avoid the park's restroom facility. It is also conceivable that those who rent Teo Park, or who arrive from the pier, won't necessarily use the path that leads to the Port's east parking lot. Similar to *Plano*, the question is whether it is reasonably foreseeable that those who pay a fee would access those areas where the injury occurred. The law requires property owners who receive a fee to maintain their property in a safe condition to protect the public.

Finally, the plaintiff in *Plano* was injured while walking on one of two ramps providing access to the dock where the City would charge a fee to the occasional boater who would moor their boat overnight. The City did not charge fees to those who moored their boat during the day or to those who accessed the dock for fishing, boating, or other recreational uses. It does not matter how frequently the City charged a fee or whether the person injured was one of those required to pay the fee.

Here, the Port only charged a fee to those who occasionally wanted exclusive use of Teo Park, or to those who moored their boat at the pier. As in *Plano*, the fact that the Port only charged an occasional fee to certain users, and charged no fee to the person (Mr. Hivley) who was actually

injured is of no significance. The Port is only entitled to statutory immunity if it charges no fee "of any kind" to any of its users. If it charges a fee, the Port must assume its common law duty to maintain the property in a reasonable condition to all users.

But most telling is the fact that the legislature knows how to create exceptions to the "fee of any kind" language. The legislature under subsection (5) of RWC 4.24.210, specifically singled out Discovery Passes and the like as not being "fees of any kind." The legislature had these exceptions in place prior to this court's decision and *Plano* and the legislature has amended the statute since *Plano* but has not disturbed *Plano*'s holding in regard to the interpretation of "fee of any kind." If the Port's interpretation were to stand, then the legislature's intent would be undermined. The legislature could have made an exception for "part-time" use, but it did not, and therefore, the Port's argument is inconsistent with the legislature's intent.

If the Port does not want to be held to the common law standard, it has a simple choice – do not charge fees of any kind to any users. But the Port has consciously made the policy decision to charge fees. It is therefore fair to expect the Port to use those fees to maintain its Waterfront Park in a reasonably safe condition.

As intimated above, the Port has also misstated the facts. On page 9 of its Response, the Port argues that the pathway where Mr. Hively was injured is "distant" from Teo Park to falsely create the perception that the pathway is far from the Port's fee generating areas (Teo Park and the pier).

The truth is that the restroom and the pathways leading to the restroom are in close proximity to Teo Park and the pier. In fact, a blacktopped pathway is the only thing separating these areas from the restroom. The restroom and the two paths leading to it were purposely situated near Teo Park and the pier to provide easy access to those who do and do not pay a fee to use the Port's waterfront park.

B. The Port's Reliance on Florida case law *(Kleer*[7] and *Zuk*[8]) is misplaced.

The Port argues that Mr. Hively's case is more analogous to two Florida cases than with *Plano*. But even if the Florida statute was similar to Washington's version, those cases are easily distinguishable.

First, both cases interpret Florida law. Although it referenced the *Kleer v. United States* case, this court did so in *Plano* for the sole proposition that both states had adopted recreational immunity statutes to

[7] *Kleer v. United States*, 761 F.2d 1492 (11th Cir. Fla. 1985).
[8] *Zuk v. United States*, 698 F. Supp. 1577 (S.D. Fla. 1988).

encourage landowners to open their lands to the public.[9] That's where the similarities between the two cases and statutes end.

Second, the Florida legislature amended its statute after the *Kleer* and *Zuk* decisions. The courts in *Kleer* and *Zuk* ruled that because the government did not charge fees for the specific areas where the plaintiffs were injured, the immunity statute applied. The Florida legislature subsequently amended its statute to broaden the definition to abrogate the courts' holdings in *Kleer* and *Zuk*, at least on those points argued by the Port.[10] More importantly, the facts in both Florida cases are vastly different than those here or in *Plano.*

The plaintiff in *Kleer* was hurt diving from a bridge in an area far from the developed portions of the federal park. The use (diving from a bridge) was certainly beyond that which the property owner could reasonably foresee.

Likewise, in *Zuk,* the plaintiff was injured when he fell from an open arch during a "self-guided tour" of the Fort property. Again, this appears to have been a use beyond what the United States Park Services would have reasonably foreseen from its users.

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[9] *Plano*, 103 Wn. App. 910, 914.

[10] Today, Fla. Stat. § 375.251(5)(a) reads as follows: "Area" includes land, water, and park areas.

Unlike the bridge jumper in *Kleer* or the arch climber in *Zuk,* Mr. Hively was injured within a few feet of the fee generating portion of the Port's waterfront park while simply walking on a path designed to provide access to the restroom facility and east parking lot.

The Port also relies upon *Jones v. United States,* 693 F.2d 1299, 914, 14 P.3d 871 (2000) to argue that a property owner "may charge a fee for something other than use of the land, and still enjoy recreational immunity."[11] In *Jones,* the plaintiff injured herself while snow sledding down Hurricane Ridge on an inner tube she rented from the park. Because the fee was related to renting the inner tube, and not for having access to the land, the court found the government immune.

That is not the situation in this case. The Port does not charge to rent personal property. It instead charges a fee for certain users to use its land. *Jones* is therefore inapposite to the facts of this case.

C. Alternatively, this Court should remand for a jury to decide whether the path leading to the restroom was a "necessary and integral" part of the Port's fee generating areas.

As stated above, Mr. Hively contends the Port is not entitled to statutory immunity as a matter of law. The undisputed facts in this case are eerily similar to the facts and circumstances that existed in this court's decision in *Plano.*

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[11] Respondents Br., p.7.

But at a minimum, *Voss v. United States* supports Mr. Hively's position that a question of fact exists on whether the pathway where Mr. Hively was injured was necessary and integral to the Port's fee generating areas.[12] This is especially true when the trial court made findings of fact in its summary judgment ruling.[13]

D. Applying Immunity to Protect the Port would be against Public Policy.

As this court made clear in *Plano,* the fact that the particular plaintiff paid no fee and was injured in an area outside the "fee generating portions" of the City of Renton's property was irrelevant. The court held that once a property owner charges "a fee of any kind," they must be held to the common law standard for premise liability. A logical reason for this application of the statute is to require the property owner to use at least a portion of the collected fees to make their property reasonably safe to those that use the property, regardless of whether they paid or not. The statute looks at the responsibility of the property owner and not those using the property.

A few examples may aid in revealing the flaw in the Port's argument that it should not be liable for injuries that occur on a path

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[12] *Voss v. United States*, 2006 U.S. Dist. LEXIS 6024 (W.D. Wash. Jan. 30, 2006).

[13] "Findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court." *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991)

leading to the only bathroom that serves the fee generating portions of the Port's property.

Assume a person attends a wedding at Teo Park where the bride and groom have paid a fee to have exclusive use of the Park. During the reception, the attendee, needing to use the restroom, walks down the path and trips over the same pot holes where Mr. Hively tripped and fell. Assume further he suffered the same injuries as Mr. Hively. Would the Port still deny liability?

Or consider someone who pays a fee to attend a Port sponsored concert at Teo Park. Because the west parking lot is full, they must use the east parking lot which then requires that they use the path where Mr. Hively was injured. Would the Port deny liability to this paying customer because they were injured on the path leading to the cordoned-off area?

And finally, assume a family is enjoying Teo Park on a Sunday afternoon. Assume they are not required to pay a fee because the Park is not being rented out. Would the Port be able to escape liability if one of their children was badly injured on their way to or back from the restroom?

While the Port tries to differentiate Mr. Hively's case on the basis that the Port charges no fee to the public for use of the two paths that lead

to the restrooms, the reality is that Mr. Hively's case is too analogous to this court's decision in *Plano*.

E. Under the Supreme Court's decision in *Jewel*, a question of fact exists whether the submerged pothole was latent.

As the Court in *Jewel* explained, it was affirming its decision in *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993) that the adjectives "known," "dangerous," "artificial," and "latent" each modify the term "condition," not one another thereby overruling a line of Court of Appeals cases to the contrary.[14] As more thoroughly described in Appellant's opening brief, the Port new of the potholes, but did nothing to cure the conditions. Therefore, the only issue is whether the condition was latent. Under the facts, Mr. Hively submits to this Court that the condition was not readily visible under the circumstances presented to Mr. Hively and that the general user would not have discovered the condition. Therefore, a question of fact exists as to whether the injury causing condition (sunlight submerged pothole) was latent.

III. CONCLUSION

Mr. Hively was hurt on a regularly traveled path that led from the fee generating portions of the Port's property to the sole restroom facility

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[14] *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999); *Ertl v. Parks & Recreation Comm'n*, 76 Wn. App. 110, 882 P.2d 1185 (1994); *Tabak v. State*, 73 Wn. App. 691, 870 P.2d 1014 (1994); and *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 609, 774 P.2d 1255 (1989)

that serves these areas. This path also provided the main access to and from the Port's east parking lot.

Once the Port charged a "fee of any kind" to any one user for the privilege to use the property, it lost its ability to claim immunity under RCW 4.24.210. This Court should therefore reverse and vacate the trial court's granting of summary judgment to the Port and instead direct the trial court to grant summary judgment to Mr. Hively.

In the alternative, this Court should reverse the summary judgment ruling and allow the trier of fact to decide if the path where Mr. Hively was injured was an integral part of the fee generating portions of the Park.

DATED this 18th day of June, 2015.

Respectfully Submitted,

LANDERHOLM, P.S.

/s/ Bradley Andersen
BRADLEY W. ANDERSEN, WSBA No. 20640
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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Heather dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 18th day of June, 2015, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person:

Christopher J. Kerley
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: June 18, 2015

At: Vancouver, Washington

/s/ Heather Dumont
HEATHER DUMONT

LANDERHOLM PS

June 18, 2015 - 2:15 PM

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