WASHINGTON SUPREME COURT

Court of Appeals No. 46875-1-II
Supreme Court No. 93060-1

JOHN A. HIVELY,

Appellant,

v.

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

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

Bathrooms matter.[1] And paths, even those less traveled, [2] to those bathrooms are equally important.

This case involves the statutory interpretation of Washington's recreational land use immunity statute, RCW 4.24.210. Can a property owner claim immunity under the statute if they charge "a fee of any kind" for the use of their land? Or more succinctly asked, can a property owner, who charges money for patrons to use their property, claim statutory immunity for injuries that occur on a path to the restrooms?

Division II has issued two published decisions[3] on substantially the same facts yet has reached two different legal conclusions. And at least one of those decisions is at odds with the Federal District Court's interpretation of the recreational use immunity statute.[4] This Court's intervention is therefore necessary to resolve the conflict.

The case also raises issues of substantial public interest.

The immunity statute was adopted to encourage landowners to open their land to the public "free of charge" by abolishing the common

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[1] Just ask anyone with children.
[2] Robert Frost, The Road Not Taken.
[3] *Plano v. City of Renton*, 103 Wn. App. 910, 14 P.3d 871 (2000).
[4] *Voss v. United States*, 2006 U.S. Dist. LEXIS 6024 (U.S. District Court for the Western District of Washington).

law duty owed to invitees, licensees, and trespassers.[5] But the Legislature did not intend to provide immunity to those property owners who charge a fee.

Here, the Port of Skamania County ("Port") charged a fee for the use of its park and is therefore not entitled to immunity for injuries that occur within that portion of the property. But the trial court and Division II found either that the bathroom facilities that serve the park were not a "necessary an integral" part of the "fee generating" areas of the park, or because there were two alternative paths leading to the same restroom facility, the Port was not liable for either path. How can a patron, or even a property owner, truly understand this distinction?

The Legislature passed the recreational immunity statute to encourage landowners to open their land for recreational use while encouraging those who charge a fee to use the revenue to provide reasonably safe conditions.[6] Unless this Court accepts review and provides clarity, Division II's published opinion will not only set a dangerous precedent for the public -- and those who pay a fee and expect reasonably safe conditions, it will create confusion to landowners who seek protection under the immunity statute.

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[5] *Jewels v. City of Bellingham*, 183 Wn.2d 388, 394, 353 P.3d 204 (2015).
[6] RCW 4.24.200.

II. IDENTITY OF PETITIONER

Petitioner, John A. Hively ("Hively"), was the plaintiff at the trial court level and the petitioner in Division II.

III. CITATION TO COURT OF APPEALS DECISION

On September 26, 2012, Hively sued the Port of Skamania County ("Port") for negligence. The Port claimed immunity under RCW 4.24.210. Both sides moved for summary judgment.

The trial court granted the Port's Motion and found that because the injury occurred on one of two paths to the restroom, the Port was entitled to immunity. This resulted in the trial court dismissing Hively's lawsuit.

Hively appealed. Division II initially issued an unpublished decision but later ordered the portion of its decision relating to whether the paths were a "necessary and integral" part of the fee generating portion of the park be published. A copy of the Court's decision is attached as **Appendix A.**

IV. ISSUE PRESENTED FOR REVIEW

This case presents the following issue:

A property owner is only immune under the recreational statute (RCW 4.24.210) if they charge no fee "of any kind" to use their property.

The Port charges a fee to those who want exclusive use of its park or for certain events. The Port also charges for the use of a dock. The park and dock are served by a restroom facility. Two paths

lead to the restroom facility; one leads to the women's side and the other leads to the men's side.

While walking on one of the two paths, the Plaintiff tripped over a pothole or wrinkles in the blacktop. The Port admits that the restrooms were an integral part of the park.

Is the Port entitled to statutory immunity under the statute for an injury that occurred on one of the two paths that lead to the restroom facilities?

V. STATEMENT OF THE CASE

A. Hively trips and falls on a poorly maintained public path leading to the park's public restrooms.

On September 26, 2009, Hively traveled to Stevenson, Washington to scatter his son's ashes[7] along the Columbia River at the Port's Waterfront Park (the park).[8]

Hively walked through the park down a wide paved area that ended at the pier/dock.[9] He then continued east upon a paved path that led to the park's bathroom facilities.[10]

After taking a few steps, Hively tripped and fell to the ground shattering his cheek bone and sustaining other serious injuries.[11] He had

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[7] His son had tragically committed suicide a few weeks before this incident.
[8] CP 152 and 170.
[9] CP 152 and 170.
[10] CP 152, 170, and 171.
[11] CP 152, 153, and 171.

tripped over a pothole or other wrinkle in the blacktop, caused by the roots of the nearby trees.[12]

Hively tripped well before the steps leading to the park's restrooms.[13] Hively never noticed the potholes, or the uneven nature of the path, because he expected no hazards to be on the asphalt pathway.[14]

B. The Port is responsible for the waterfront park and charges a fee for its use.

The Port owns the property where Hively fell.[15] The property is comprised of a park, boat dock and various paths. The park and dock are served by a centrally located public restroom building, which the Port also constructed, manages, operates, and controls.[16] There are two paved paths that lead to the bathrooms; one to the women's side while the other serves the men's side. Hively fell on the path that leads to the men's side.

C. While generally open to the public, the Port charges fees for certain uses of the Waterfront property.

The Port's Park is generally open to the public without fee.[17] However, the Port's Manager, John McSherry, testified the Port charges mooring fees to those that moor their boats or ships[18] at the Stevenson

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[12] CP 153 and 171.
[13] CP 153, 171, and 172.
[14] CP 153, 171, and 172.
[15] CP 149, 150, 179, 183, and 184.
[16] CP 150, 180, and 202.
[17] CP 150 and 179
[18] Various Columbia River cruise ships moor at the dock to allow its guests to debark to enjoy the local amenities.

Pier.[19] Those embarking or disembarking a boat or ship moored at the dock must use one of the two paths—including the path where Hively was injured—to access the restrooms.[20]

The Manager further testified that the Port regularly rents out exclusive use of the Park for events such as wedding parties, reunions, public events, and other activities "for a fee."[21] And while this rent may not include exclusive use of the entire Waterfront property, Mr. McSherry repeatedly testified that the restrooms are considered an "integral part" of the entire property, including those areas that generate fees.[22]

The Manager further admitted there are directional signs to the bathrooms for those using the park or dock—including those paying customers.[23] This includes the path where Hively was injured.

D. Procedural Posture

1. The trial court granted the Port's Motion for Summary Judgment.

The Port claimed immunity under the recreational use statute and successfully moved for summary judgment. In announcing his decision, the trial judge "found" that because the restrooms could be reached by one of two paths, and because the restrooms were "sufficiently attenuated"

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[19] CP 150, 180, and 209.
[20] CP 150 and 180.
[21] CP 150, 151, 180, and 208.
[22] CP 151, 180, 204, and 213.
[23] CP 151, 180, and 204.

from the fee generating areas of the property (i.e., the park), the Port was entitled to absolute immunity.[24] The Court therefore dismissed Hively's lawsuit.[25]

2. Division II affirms trial court's decision.

Division II, in a partially published decision (Hively only seeks review of the published portion of the decision), affirmed the trial court's dismissal of Hively's complaint. Division II found that the pathway where Hively was injured was not a "necessary" component of the fee generating areas of the Port.[26] It reasoned that because a person is "not required to pay" to use the path leading to the bathroom, the Port was entitled to immunity.

Hively seeks discretionary review on the ground that the path to the bathroom facility should be considered an integral part of the fee generating portions of the Port's Property (i.e., the park and the dock).

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[24] Verbatim Report of Proceedings page 9 line 2 and page 10 lines 23-24 ("My finding is that the restroom can be reached by other access routes.")
[25] CP 134-137
[26] Opinion at 5-6.

VI. ARGUMENTS

A. The Supreme Court should accept review because (1) the courts have issued different rulings on substantially similar facts and (2) issues of substantial public interest are at stake.

Hively seeks discretionary review of Division II's published opinion under RAP 13.4(b)(1) and (4).

First, the opinion here conflicts with Division II's decision in *Plano v. City of Renton*, 103 Wash. App. 910, 14 P.3d 871 (2000) and the United States District Court for the Western District of Washington's opinion in *Voss v. United States, 2006 U.S. Dist. LEXIS 6024 (2006).*

Second, left unchecked, the decision in this case will create a dangerous precedent for those citizens who pay to use property and reasonably expect that the conditions of the premises will be reasonably safe. The various and conflicting opinions will also leave property owners guessing at whether they are or are not entitled to immunity under the recreational use statute.

The Court should therefore grant review.

A. Washington's recreational immunity statute only applies to those property owners who don't charge a "fee of any kind."

The Legislature passed the recreational immunity statute to encourage landowners to open their land for recreational use.[27] In so

[27] RCW 4.24.200

doing, the Legislature carved out a limited exception to the common law "public purpose" invitee liability doctrine[28] by exempting outdoor recreation users from those to whom a duty was owed.[29] The Legislature intended for the statute to "encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon."[30]

However, the Legislature also made clear its intent for this immunity to be limited to those landowners that **did not** charge a "fee of any kind" for the use of their property.[31] In creating this *exception to the exception*, the Legislature recognized that landowners charging fees should continue to be held to the common law's duty of care.[32]

It's reasonable to expect those charging a fee will use at least a portion of the revenue to make their property safe for their patrons.

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[28] Under Washington's common law, a landowner's duty of care to persons on the land is governed by the entrant's common law status as an invitee, licensee or trespasser. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994) and *Ertl v. Parks & Recreation Comm'n*, 76 Wn. App. 110, 113, 882 P.2d 1185 (1994). Generally, a landowner owes trespassers and licensees only the duty to refrain from willfully or wantonly injuring them, whereas to invitees the landowner owes an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition. *Ertl*, 76 Wn. App. at 113 and *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41-42, 846 P.2d 522 (1993). In regard to invitees, this includes an affirmative duty to inspect the premises and discover dangerous conditions. *Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001).

[29] *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 695, 317 P.3d 987 (2014).

[30] RCW 4.24.200 (statement of purpose)

[31] RCW 4.24.210

[32] For an in-depth discussion regarding the status (invitee, a licensee, or a trespasser) of a plaintiff, please see CP 156.

Patrons have a reasonable expectation that the premises will be reasonable safe, including the paths to the restrooms.

A landowner who charges a fee to any user must treat all users entering upon the land as invitees.[33] This rule applies whether the particular person that suffered the injury paid or not.[34]

Washington courts have also determined that because **immunity is not favored in the law,** statutes that grant immunity should be narrowly construed.[35] No intent to change the common law will be found unless it appears with clarity.[36] In addition, because recreational use immunity is an affirmative defense, the landowner must carry the burden of proving entitlement under the statute.[37] Any doubt should be construed against immunity.

In summary, the Legislature only intended to relieve those landowners from common law liability who allow free access to their lands for recreational purposes. The Legislature, however, did not intend to grant immunity to those property owners who actually receive some

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[33] An invitee is owed the duty of reasonable care to prepare and make the premises safe, and landowners further owe invitees an affirmative duty to discover dangerous conditions. Thus, the duties owed to an invitee are different than those owed to a licensee. *Mucsi v. Graoch Assocs. P'ship # 12*, 144 Wn.2d 847, 31 P.3d 684 (2001)
[34] *Plano v. City of Renton,* 103 Wash. App. 910, 914, 14 P.3d 871 (2000)
[35] *Tennyson v. Plum Creek Timber Co.*, 73 Wash. App. 550, 557, 872 P.2d 524 (1994)
[36] *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980)
[37] *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014)

economic benefit from those who enter their property ("invitees"). This applies to whether the particular plaintiff paid the fee or not.

B. The Decision here conflicts with other decisions.

Here, the trial court granted summary judgment because it found the path leading to the restroom was "sufficiently attenuated" from the park (i.e., the fee generating area of the property) to entitle the Port to immunity. The trial judge also found that, because there were two paths leading to the restroom facility, neither path was a "necessary or integral part" of the park or dock. The Court of Appeals upheld this decision because people could use the bathrooms without paying a fee.

But these decisions are at odds with what Division II decided in *Plano* or what the Federal District Court concluded in *Voss.*

In *Plano*, the plaintiff suffered injuries when she slipped and fell on a public ramp that led to a moorage dock at a public park owned by the City of Renton. It was undisputed that, when the plaintiff fell, she had not paid, nor was she required to pay, any fee to be on the City's property. It was also undisputed that the City charged no fee to enter the park, to use most of the park's facilities, or to enter or walk on the ramp where the plaintiff was injured. The area where the plaintiff was injured was open to the public and that the plaintiff was simply a non-paying member of the public when she was injured.

However, the City charged a fee for certain users of the public dock—those that moored their boats overnight. Day users were not charged a fee and it was undisputed that no fee was charged for the public to use the ramp or park. But because it found the ramp was a "necessary and integral part" of the dock, the court concluded that, while the particular plaintiff was merely a non-paying member of the public, the City was not entitled to statutory immunity. Also key, at least for the case at hand, is that the City of Renton has two separate ramps that led to the dock:

> Renton charges a fee for the use of the particular area where *Plano*'s injury occurred--the ramp leading to the dock.... But the metal ramp where *Plano* fell is a necessary and integral part of the moorage. The reason why the two ramps and the connecting gangways exist is to provide access to the floating dock, a fee-generating portion of the park.... These facts establish that the ramp where the injury occurred is in the recreational area for use of which Renton charges a fee.[38]

Initially, it is important to note that the areas in questions are not separated by far distances. The areas are close and separated by mere feet. This is an important fact because the case[39] cited for the proposition that a "landowner may charge a fee to use part of its land and maintain immunity for recreational use of the remainder of the land" involved a portion of the landowner's property that was far and distant from the fee generating area.

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[38] *Plano*, 103 Wash. App. 910, 915

[39] *Kleer v. United States*, 761 F.2d 1492 (11th Cir. 1985).

Like the plaintiff in *Plano,* Hively was injured while walking on one of the two pathways that led from the park and boat dock (fee generating areas of the property) to the restrooms. It is difficult to understand how Division II can reach different legal conclusions on such similar facts. How can a path to the only restroom not be considered an integral part of the park or the dock?

Division II's decision also conflicts with the Western District Court's decision in *Voss.* There, a family traveled to the Gifford Pinchot National Forest on vacation. After parking their car at the parking lot, **and not leaving the required $5.00 fee,** the family walked a half-mile from the picnic area down a trail to the banks of the Muddy River. While there, one of the minor children slipped and fell into the river. His father jumped in to save his son, but both tragically fell to their deaths over a downstream waterfall. The family sued the Forest Service for negligence.

The US government filed for summary judgment claiming immunity under Washington's recreational use statute. The plaintiff argued that because the government charged a fee, the statute did not apply. The Government claimed the waterfall was not part of the fee generating portion of the property.

The court denied the motion because it could not determine whether the $5.00 fee -- which the family did not pay-- was a fee to park

the vehicle or was intended to cover the area where the accident occurred. The court therefore denied the government's motion for summary judgment and ruled that the question of whether the fee was for use of the portion of the land where the father and son died, was a question of fact for the jury to decide.

Similarly, the Port here charges a fee to those who wish to have exclusive use of Teo Park. Using the park includes the use of the bathroom facilities. Moreover, those who embark and debark boats moored at the fee-generating dock also have access to the restroom facilities.

Therefore at minimum, the questions of whether the bathroom facilities or the pathway where Hively was injured are necessary and integral parts of the park or the dock are questions of fact that should not have been resolved by summary judgment.

C. Division II's Opinion creates (1) a dangerous precedent for patrons who reasonably expect facilities to be safe and (2) doubt for those property owners who seek indemnification.

Trying to distinguish the holdings from the three opinions outlined above is daunting and provides less than clear guidelines on when a property owner is entitled to immunity. Division II's ruling will also place at risk those patrons who expect that part of their fee will be used to provide safe conditions.

In *Plano,* Division II wisely ruled that 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. Once a property owner charges "a fee of any kind," they must be held to the common law standard for premise liability, whether the injured party was a paying patron or not.

A logical reason for this interpretation 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 that person paid or not. The statute looks at the responsibility of the property owner and not those using the property.

For example, assume a person attends a wedding at the Port's park where the bride and groom have paid a fee to have exclusive use of the park. During the reception, an attendee, needing to use the restroom, walks down the path and trips over the same pot holes that Mr. Hively tripped and fell over. Assume further he suffered the same injuries as Mr. Hively. Would the immunity statute protect the Port?

Or consider someone who pays a fee to attend a Port-sponsored concert at the park. Would the Port deny liability to this paying customer because they were injured on the path leading to the restroom?

And finally, assume a family is enjoying the 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 just because those particular users paid no fee?

The three opinions outlined could result in different conclusions under the three similar scenarios. Patrons and property owner must guess at whether a property owner, who charges a fee for a portion of their property, is or is not liable for the amenities associated with that property. Left in-tact, Division II's opinion creates confusion for the lower courts, property owners, patrons and their lawyers. This Court should accept review to provide badly needed clarity on how the immunity statute should be construed.

VII. CONCLUSION

Property owners that charge a fee for the use of their property are not entitled to immunity under the recreational use statute. The Port charges a fee for the exclusive use of its park or for those who wish to use the boat dock.

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

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

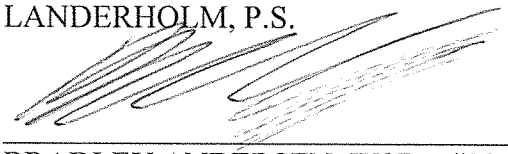
The restrooms are an integral part of the park and boat dock. Therefore, the Port should not have been granted immunity for an injury that occurred on the path to the restroom.

This Court should therefore accept review to clarify the law and to resolve the conflict amongst the lower courts.

DATED this 28th day of April, 2016.

Respectfully Submitted,

LANDERHOLM, P.S.



BRADLEY ANDERSEN, WSBA #20640
Of Attorneys for Appellant, John A. Hively

STATE OF WASHINGTON)
) ss.
County of Clark)

I, HEATHER A. DUMONT, being first duly sworn on oath, depose and state that I am now and at all times herein mentioned was, a citizen of the United States, a resident of the State of Washington, and over the age of 21 years.

On the 28th day of April, 2016, a copy of **PETITION FOR REVIEW** was delivered via email and First Class United States Mail, postage prepaid, to the following person(s):

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Heather A. Dumont
HEATHER A. DUMONT

SUBSCRIBED AND SWORN to before me this 28th day of April, 2016 by HEATHER A. DUMONT.

JUNE M. BORJA
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXP. MARCH 19, 2018

June Borja
NOTARY PUBLIC for the State of Washington, Residing in the County of Clark.
My Commission Expires: 03/19/2018

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

March 29, 2016

JOHN A. HIVELY, Appellant, v. PORT OF SKAMANIA COUNTY, WASHINGTON, a Washington municipal Corporation,, Respondent.	No. 46875-1-II ORDER GRANTING IN PART AND DENYING IN PART MOTION TO PUBLISH

Respondent has moved to publish the opinion filed on February 23, 2016. The Court has determined that the opinion in this matter satisfies the criteria for publication in part. It is therefore

ORDERED that the motion to publish is granted in part on the issue of the recreational land use immunity and denied on the issue of latency. Therefore, it is hereby

ORDERED that the opinion filed by the Court on February 23, 2016, shall be modified on page 1 to designate it as published in part. It shall be modified on page 6, following the last sentence of the paragraph prior to the heading "III. Latent Condition" by adding the following language:

> We affirm the trial court's order granting summary judgment dismissal and order denying reconsideration.
>
> A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

It is further

ORDERED, that the opinion's final paragraph reading:

> A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

is deleted. It is further

ORDERED, that this opinion will be published in part.

Dated this 29th day of March, 2016.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

Melnick, J.
MELNICK, J.

Filed
Washington State
Court of Appeals
Division Two

February 23, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN A. HIVELY, Appellant, v. PORT OF SKAMANIA COUNTY, WASHINGTON, a Washington municipal corporation, Respondent.	No. 46875-1-II UNPUBLISHED OPINION

SUTTON, J. — John A. Hively appeals the trial court's order granting summary judgment, denying reconsideration, and dismissing his negligence claim against the Port of Skamania County (the Port) for injuries caused by his fall in one of the Port's parks, Teo Park. Hively argues that the trial court erred in ruling that the Port is entitled to immunity under the recreational use statute, former RCW 4.24.210(1) (2009),[1] because material issues of fact exist as to whether the place that he fell was sufficiently attenuated from the fee-generating areas of the Port's properties and whether there was a latent condition. Because we disagree, we affirm the trial court's order granting summary judgment and dismissal.

FACTS

Hively traveled to Teo Park in Stevenson, Washington, a property owned by the Port on the Columbia River waterfront. Teo Park is physically connected to two other Port properties,

[1] RCW 4.24.210 was amended in 2011 and 2012, although those changes do not have any effect on our analysis.

Bob's Beach and Stevenson Landing, by an asphalt path. There is a restroom along this path, which has a second path that is not at issue here that also provides access to the restroom.

Hively headed down the asphalt path, which was shaded by trees. After a few steps, Hively tripped and fell onto the path, injuring himself. In his deposition testimony, Hively stated that when he fell he was looking straight ahead, and he did not see the pothole due to a shadowed area created by the bright sun. Hively expected that the path would be hazard-free, and before he fell he did not notice any potholes or irregularities on the path.

The Port does not charge a fee to enter Teo Park, Bob's Beach, or Stevenson Landing, and they are open to the public. The restroom is also open to the public, except during the winter season when it is closed. Occasionally, the Port rents Teo Park to private parties for a fee, but the path along the waterfront and the restroom remain open to the public while the park is rented. The Port also charges cruise ships a fee to dock at the pier at Stevenson Landing, but again the pier remains accessible to the public without a fee even when ships are docked there.

The path along the waterfront on the way to the restroom, where Hively fell, was paved with asphalt in 1997, but over time the surface of the path had become broken and irregular. The Port knew about the condition of the path, but did not consider it to be dangerous because the irregularities were "open and obvious and consistent with other rough or natural trails on Port park property." Clerk's Papers at 54 (CP). Prior to Hively's fall, the Port had not installed signs warning of the path's conditions. Hively's lawsuit was the first time the Port had heard of a person tripping on this particular path.

Hively sued the Port for negligence. The Port moved for summary judgment, arguing that it was entitled to recreational use immunity under former RCW 4.24.210. Hively cross-moved for summary judgment. The trial court granted the Port's motion for summary judgment, denied

Hively's motion, dismissed Hively's claim with prejudice, and denied Hively's motion for reconsideration. Hively appealed.

ANALYSIS

I. STANDARD OF REVIEW

We review a trial court's grant of summary judgment de novo and engage in the same inquiry as the trial court. *Wash. Fed. v. Harvey*, 182 Wn.2d 335, 339, 340 P.3d 846 (2015). Summary judgment is proper where, viewing the facts in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). When the supporting facts are undisputed, the trial court may determine immunity as a question of law. *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 987 (2014). We review a trial court's ruling on a motion for reconsideration for abuse of discretion. *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 120, 325 P.3d 327 (2014).

II. RECREATIONAL USE IMMUNITY

Hively argues that the Port is not entitled to summary judgment because the Port is not immune from suit under the recreational use immunity statute, former RCW 4.24.210. We disagree.

Under former RCW 4.24.210, landowners who allow the public to use their land for recreational purposes without charging a fee are immune from suit for unintentional injuries that occur on the land. Former RCW 4.24.210(1) creates an exception to common law invitee premises

liability.[2] *Camicia*, 179 Wn.2d at 694. The purpose of recreational use immunity is to encourage landowners and those in lawful possession of land to make it available to the public for recreational purposes by limiting their liability. RCW 4.24.200; *Jewels v. City of Bellingham*, 183 Wn.2d 388, 394, 353 P.3d 204 (2015).

To be entitled to immunity under the recreational use statute, the landowner must prove that the land in question is (1) open to members of the public, (2) for recreational purposes, and (3) for which "'no fee of any kind [is] charged.'" *Camicia*, 179 Wn.2d at 695-96 (quoting *Cregan v. Fourth Mem'l Church*, 175 Wn.2d 279, 284, 285 P.3d 860 (2010)). The landowner bears the burden to prove entitlement to immunity because recreational use is an affirmative defense. *Camicia*, 179 Wn.2d at 693. Hively concedes that the Port meets the first and second elements, but argues that the Port fails to meet the third element because the Port charges a fee to cruise ships to dock at Stevenson Landing and to parties who wish to exclusively rent Teo Park.

A landowner may charge a fee to use part of its land and maintain immunity for recreational use of the remainder of the land. *Plano v. City of Renton*, 103 Wn. App. 910, 914, 14 P.3d 871 (2000). To maintain recreational use immunity and charge a fee, "[a] landowner must only show that it charges no fee for using the land or water area where the injury occurred." *Plano*, 103 Wn. App. at 915. A landowner is not entitled to immunity when the place that the injury occurred is a "necessary and integral part" of the fee-generating area. *Plano*, 103 Wn. App. at 915. It is

[2] Any public or private landowners or others in lawful possession and control of 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, including but not limited to camping, picnicking, swimming, hiking, bicycling, or viewing or enjoying scenic sites *without charging a fee of any kind*, shall not be liable for unintentional injuries to such users. *See* former RCW 4.24.210(1) (emphasis added).

undisputed that the Port does not charge a fee for public use of either the path where Hively fell or the restroom to which the path led.

Hively relies on *Plano* to argue that the path where he fell was a necessary and integral part of the Port's fee-generating areas (i.e., the pier and Teo Park itself when it is rented exclusively) as a matter of law. In *Plano*, anyone who used the dock, the fee-generating area in that case, was required to use one of two connecting ramps that led to the dock where Plano's injury occurred. *Plano*, 103 Wn. App. at 915. The ramps had been built specifically to provide access to the dock and a paying patron could not pay the required fee without walking up one of the ramps. *Plano*, 103 Wn. App. at 915. Thus, the *Plano* court held that the undisputed facts established that the ramps were a necessary and integral part of the dock and the City of Renton was not entitled to immunity when a non-paying user injured herself on one of them. *Plano*, 103 Wn. App. at 915.

The facts of this case are not analogous to *Plano*. A person is not *required* to pay for or use either the path or the restroom as a part of any paid access for or use of either Teo Park or the pier. Hively concedes that it is unnecessary for a person to reach the restroom by walking on the path where he fell because another path also provides access to the restroom from the pier. No evidence suggests that the path where Hively's injury occurred was constructed specifically for the purpose of providing access to the Port's fee-generating areas. While John McSherry, the executive director of the Port, agreed that the restroom is "a key part" of Teo Park and that it is an "important part of all of the recreation activities that occur on the waterfront," this fact is undisputed and thus the trial court could determine the issue of immunity as a matter of law. CP at 111, 204. Therefore, following the reasoning of *Plano*, there is no genuine issue of material fact that the path or the restroom were an integral part of the Port's fee-generating areas and the

trial court properly granted summary judgment to the Port under former RCW 4.24.210.[3] Necessarily, the trial court also properly denied Hively's motion for reconsideration.

III. LATENT CONDITION

Hively also argues that the trial court improperly granted summary judgment in favor of the Port because a question of fact remained on whether the condition of the path where Hively fell was latent. We disagree.

"Nothing in [former RCW 4.24.210] 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." Former RCW 4.24.210(4)(a). Our Supreme Court also recently clarified that for a plaintiff to hold a landowner liable under former RCW 4.24.210(4)(a), the condition must satisfy a known, dangerous, artificial, and latent condition and that each of these four adjectives "modify the noun [condition] independent of one another." *Jewels*, 183 Wn.2d at 397 (citing *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 45 n.2, 846 P.2d 522 (1993)). Thus, the landowner owes a duty to public invitees to warn of latent conditions even if the landowner is entitled to immunity for recreational use. *Camicia*, 179 Wn.2d at 702. While the Port knew that the surface of the path had become irregular and "consistent with other rough or natural trails on Port park property," this lawsuit was the first time that the Port had any knowledge of a person tripping on this path. CP at 54.

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[3] While the trial court stated, "My finding is that the restroom can be reached by other access routes. And . . . the path does not exist to provide access to the pier or park," contrary to Hively's argument, the use of the word "finding" does not transform an issue of law into an issue of fact. Verbatim Report of Proceedings at 10-11. Furthermore, to the extent the trial court actually made a finding of fact by using that word, Hively did not object, and therefore he has waived that issue. RAP 2.5(a).

A condition is latent when it is not readily-apparent to the recreational user of the land. *Jewels*, 183 Wn.2d at 398. Whether the plaintiff noticed the condition is irrelevant to this objective inquiry. *Jewels*, 183 Wn.2d at 398 (what one particular recreational user sees "'is immaterial'") (quoting *Widman v. Johnson*, 81 Wn. App. 110, 114-15, 912 P.2d 1095 (1996)). Instead, we ask "whether the condition is readily apparent to the general class of recreational users." *Jewels*, 183 Wn.2d at 398. We focus on whether the condition itself is readily apparent to recreational users, rather than the "specific risk" that the condition poses. *Ravenscroft v. Water Power Co.*, 136 Wn.2d 911, 925, 969 P.2d 75 (1998). We analyze the condition in the context of other factors and not the condition in isolation. *Cultee v. City of Tacoma*, 95 Wn. App. 505, 516-17, 977 P.2d 15 (1999).

Hively cites *Ravenscroft* and *Cultee* to support his argument that the issue of latency is a genuine issue of material fact here. But in *Ravenscroft* the injury-causing condition, submerged stumps covered by water that concealed them, created a genuine issue of fact on whether the condition was latent.[4] *Ravenscroft*, 136 Wn.2d at 925-26. Similarly, in *Cultee*, the injury-causing condition, the muddy water on the road hiding the eroded edge and the steep drop off into the deep adjacent water, was not readily apparent.[5] *Cultee*, 95 Wn. App. at 522. Thus, neither the *Ravenscroft* court nor the *Cultee* court could say that the condition was obvious as a matter of law.

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[4] The submerged stumps near the middle of the channel were not obvious or visible as a matter of law when the driver of a boat saw no floating debris or stumps of any kind in the water and there was no indication of the presence of any submerged objects or hazards in the direction he was traveling. *Ravenscroft*, 136 Wn.2d at 916. Further, other witnesses filed affidavits that they had seen others come into contact with the submerged condition, which indicated that they were not readily apparent. *Ravenscroft*, 136 Wn.2d at 925.

[5] *Cultee* also presented a genuine issue of material fact regarding precisely what condition led to the plaintiff's death. *Cultee*, 95 Wn. App. at 523. This issue was central to the appellate court's holding that summary judgment was improper based on the latency question. No such question exists in this case.

No such analogous facts exist in this case. Hively testified that he did not see the pothole when he was looking straight ahead as he walked, and he was not expecting a hazard to be on the path. But, unlike the plaintiffs in *Ravenscroft* and *Cultee*, Hively did not present any evidence that the pothole was not readily apparent to the general class of recreational users. No evidence suggests that the pothole was physically submerged, as in *Ravenscroft*, or otherwise covered or hidden, as in *Cultee*. Thus, there is no genuine issue of material fact regarding latency in this case. Therefore, the trial court properly granted summary judgment in favor of the Port and properly denied Hively's motion for reconsideration.

CONCLUSION

We hold that the trial court properly granted summary judgment to the Port because no genuine issue of material fact existed on whether the Port was entitled to immunity or whether the pothole was a latent condition. Therefore, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

Melnick, J.
MELNICK, J.

LANDERHOLM PS

April 28, 2016 - 5:02 PM

Transmittal Letter

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