

66524-3

66524-3

No. 66524-3-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

JON L. WILKERSON, Appellant,

v.

CITY OF SEATAC, Respondent.

REPLY BRIEF FOR THE APPELLANT

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2011 OCT 28 PM 4:47

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I. INTRODUCTION

The focus of the present appeal is whether or not the Recreational Use Statute (RCW 4.24.210) applies to an injury suffered by Appellant/Plaintiff Jon Wilkerson at the Des Moines Creek Trail (“the Park”) owned by the City of SeaTac (“the City”). Jon Wilkerson was involved in a biking accident which left him paralyzed and stranded overnight in the Park. Applying the Recreational Use Statute, the trial court dismissed Appellant’s Complaint and its three separate claims of negligence (which had asserted that the City was negligent in knowingly permitting a dangerous latent condition to exist on its public land and then by failing to rescue Appellant after he was injured). On appeal, Wilkerson asserts that the Recreational Use Statute does not immunize the Respondent/Defendant City for injuries on public land where:

- 1) The owner of the land (the City) knew of a specific danger on the land (man-made bike jumps at the “Softies” site in the Park) but intentionally chose not to take action such as posting warnings about the known dangers (Assignment of Error 1);

- 2) An issue of fact exists as to whether or not the injury causing condition on the City of SeaTac’s land was “latent” – i.e., a non-readily ascertainable danger. (Assignment of Error 1)

3) At the time of his secondary injuries (post paralysis), Appellant was not engaged in recreation nor using the land (and instead, his post bike accident injuries arises from the failure of the City/Police to Patrol the Park and rescue him). (Assignment of Error 2)

II. FACTUAL OPPOSITION

Despite no apparent disagreement with the factual section of Appellant Wilkerson's brief, the City nevertheless chose to give its own factual introduction to the case. In doing so, the City has seemingly attempted to divert the Court's attention from Assignment of Error #1 (the application of the recreational immunity and latency).¹

The City began its briefing by alleging that the area of the Park where Jon was injured was "secluded". (Pg 1, City's Resp.) No citation to the record was provided. While "seclusion" was not an issue in the trial court proceedings, the important context is that, regardless of whether it was a "secluded area" or not, the City knew about the Softies.² Thus "seclusion"

¹ While its stated goal was to focus on recreational immunity, the City's brief appears to try and divert the focus of the appeal from the application of recreational immunity by addressing non-material issues or arguments. For example, in the "Introduction" section of its brief, the City asserts that Wilkerson is requiring that the City "protect" him (Pg 1, ¶1) Thus, the City is attempting to argue its defense to the underlying claim of negligence which has not been reached). However, actual negligence is not the issue on appeal. Instead, at trial, the City will be free to maintain all defenses to the allegations of negligence after the recreational use/immunity statute is held inapplicable).

² Defendant City had been on notice of the Softies site since as early as 2003. (CP 464, Dep. Tr. of J White p. 12 Lns 6-10). And, Park supervisors had notice in 2004 or 2005 when they visited the park themselves. (CP 445, Tr. of C. Ledbetter pg. 65 Lns 16-22; CP 454 Dep. Tr of R Chouinard, p. 18 Lns 4-5). The City was also on notice as to at least six serious bike injuries in the Park prior to Jon Wilkerson's injury. (Dep. Tr. Acting Chief

is irrelevant. Next, the City alleges that Jon Wilkerson considered himself an “expert” mountain bike jumper. (Pg 2, City’s Resp.) However, that characterization is exceedingly overbroad. Jon Wilkerson testified that he was an experienced mountain biker who had some experience taking and making jumps, and would call himself a “beginner jumper”. (CP 525, Decl. J. Wilkerson ¶4-7) This is an important clarification because the question of whether or not the danger posed by the injury causing condition (the lead-in to the jump) was “readily apparent” to the recreational user is the key element to the first Assignment of Error. (What may be apparent to an “expert” bike jumper may not be readily apparent to the general class of recreational users, a class in which Appellants assert Jon fell within). Also, the City asserts that Wilkerson was “training” for a bike trip to Whistler. (Pg 2, City’s Resp.) Wilkerson was not “training” for any competition or event, but instead, went to the Softies site to practice some small jumps in advance of a later recreational trip to Whistler that Jon had hoped to take with friends. (CP 524, ¶3)³

Wiwel at CP 481 (p.35) Lns 5-25, (p.36) Lns 1-10, CP 482 (p.38) Lns 8-25, p.39 Lns 1-5, CP 483 (p.43) Lns 4-13)

³ The City also attempts to raise irrelevant issues (such as potential bike failure or shock unfamiliarity) (Pg 3, City’s Resp.); however, the City presented no such testimony about any mechanical failure or other bike issue and those suggestions must be disregarded. Despite the City’s attempts, there are no other factors at issue on this appeal other than the application of the recreational use/immunity statute (and whether or not a duty existed between the City and Jon Wilkerson with respect to his post-accident injuries).

The City next asserts that Wilkerson “inspected” the dirt jumps prior to taking the injurious jump. (Pg 3, last ¶, City’s Resp.) However, what Wilkerson testified to was to looking over the jumps at which time he determined that, with the exception of the one small jump he chose to take, the other jumps were too big and imposing for him. (CP 525, ¶12-16, Decl. J. Wilkerson) Thus, no formal or in depth inspection was undertaken (if that is the implication from the City).⁴

The City also tries to center on Jon’s belief that he felt that he could successfully complete the jump, as the City writes that Jon believed that the jump was “safe”. (Pg 4, City’s Resp.) Jon did believe that he would successfully complete the jump. (CP 526, ¶22-24, Decl. J. Wilkerson) But this is because he did not see the subtle s-curve approach. (CP 526 at ¶25) The subtle s-curve approach was something that would not have been seen or noticed or apparent to the class of riders which Jon belonged. (CP 553 ¶23-25, Decl. of L. Bridgers)

What Wilkerson did not know was that the small gap jump that he thought was within his skill set was actually an advanced, technical and difficult jump because of the non-obvious s-curve lead-in. (CP 552, ¶22) Thus, based on what he saw and knew at the time (i.e. no knowledge of a

⁴ The use of the word “inspection” may be used to paint a picture that Appellant took more exacting action than he did (which wasn’t the case). Instead, Wilkerson looked over the jumps in the Park, rolled over one or two other than the jump he took, and then saw a small jump that was within his “skill set” (CP 525, ¶12-14, Decl. J. Wilkerson).

hidden danger), Jon believed it to be safe for him to take the jump. That Jon Wilkerson believed that it was safe for him to take the jump at the time that he approached it does not overcome a latent defect (as the City would suggest) – but instead, this fact supports it.⁵

The City asserts that Jon’s failure to successfully make the small gap jump was “human error” (i.e. error in “technique”). (Pg. 6, City’s Resp.) The City offered no expert testimony upon which to base this argument. Instead it is pure speculation and conjecture and is not based on any ground supportable in the record. It is also not an issue on appeal.⁶

The issue on appeal is whether recreational immunity presents an insurmountable barrier to Appellant’s assertion of a claim for negligence

⁵ The City highlights other limited phrases or words from the record but takes them out of context. These references include that Jon “rode up and down the jump approach before attempting the jump” and that Jon approached the jump “straight”. (Pg. 4, ¶2, City’s Resp.) However, it is clear that Jon only rode down the approach to the jump one time. (CP 526, ¶23, Decl. J. Wilkerson). The City’s factual version (Page 4) gives the implication that Jon Wilkerson did a practice run. He did not. At page 8, the City actually asserts that this was the case but it is not. Jon made clear that he only rode the approach one time. (CP 526, ¶23) As for coming into the jump “straight”, the City writes this because Jon testified that he felt that he was lined up with the jump. (Pg. 4, ¶2, City’s Resp.) However, as the only experts in the case testified, in order for Jon to have been lined up with the jump, Jon would have had to navigate an s-curved approach for the first time which clearly would have affected Jon’s speed and thus his ability to make the jump. (CP 550, ¶14; CP 552, ¶¶18, 20, Decl. of L. Bridgers) Having successfully navigated the subtle s-curve turns is the only way Wilkerson could have been lined up with the jump, and it is that navigation that affected Wilkerson’s speed and ability to make the jump. (Id) Here, the S-curved lead in affected the speed and physics of the bicyclist (Jon), and made the jump a very technical one that only experienced bike jumpers should be taking. (CP 547-556, *Bridgers Decl.* at 552 ¶22-23; CP 413-420 *Morris Decl.* at 417 ¶16)

⁶ The City is free, however, to argue comparative fault at trial.

together with a post injury claim relating to the failure to patrol and rescue.

III. ARGUMENT IN REPLY

A. THE RECREATIONAL USE STATUTE DOES NOT INSULATE THE CITY FROM LIABILITY IN THIS CASE (ASSIGNMENT OF ERROR #1)

Washington's Recreational Use Statute, RCW 4.24.210, limits the liability of landowners who allow the public to use their land for recreational purposes unless the conduct is intentional, or, a person is injured by a "known", "dangerous", "artificial", "latent" condition for which no warning signs have been posted. Appellant Jon Wilkerson asserts that both exceptions to RCW 4.24.210 immunity apply in this case.

First, the Recreational Use Statute does not apply because the hazardous conditions were known,⁷ artificial,⁸ dangerous⁹ and latent.

⁷ See footnote 2, *supra*. For purposes of its summary judgment motion (and this Appeal), the Defendant City admitted that it had "knowledge" as defined under the recreational use statute. (VR: p.8, Lines 21-25 (10/19/2010); CP 102-118, Def.'s MSJ at CP 111(p.10, fn2)) Thus, this issue should not be in dispute. If it was, summary judgment would have been improper and the jury would have to determine whether or not the City of SeaTac knew (or should have known about the Softies and the attendant dangers).

⁸ The Defendant City admitted that the bike jumps and trail lead-in were artificial:
THE COURT: The trail leading up would be part of the artificial...
MR. FLOYD: Yeah, I agree, Your Honor. I don't think artificial is an issue....
(VR p.8, Lns 19-22 (10/19/2010)).

⁹ The City did not dispute the dangerousness of the jump as it relates to the recreational use statute:

THE COURT: You would agree that based on – if I were, as I must in summary judgment, accept all facts and inferences in their favor, that I would say this is a dangerous condition?

MR. FLOYD: I think, for purposes of this argument, I would have to agree, Your Honor."

The second reason why recreational immunity does not apply is because the City's conduct was willful and wanton to such a degree as to give rise to an intentional act (or a question of fact with regard to intent).

1. Latent Condition

At summary judgment, the Defendant City only contested the "latency" factor under the recreational use/immunity statute.¹⁰ When beginning the analysis of "latency", the Court must first identify the injury causing condition. Here, the trial court correctly identified the injury causing condition to be the S-curved, kinked approach to the jump that prevented Jon from gaining enough speed to clear the gap jump.¹¹

(VR p.7, Lines 10-15 (10/19/2010)). If the City disputed "dangerousness", then an issue of fact would have arisen. Two biking experts also testified that the jump was dangerous due to an s-curved lead-in that was not obvious or apparent to beginning to intermediate bike jumpers. (CP 413-420 *Morris Decl.* at 415-416 ¶11)

¹⁰ See FN 9-11, *supra* and VR 10/19/10. The trial court agreed and ultimately granted summary judgment on the issue of latency only. (CP 569-571, Hayden Order)

¹¹ VR 10/19/10; see also CP 547-556, *Bridgers Decl.* at 550 ¶14; CP 552 ¶¶20-21; CP 512-522, *Iftner Decl. Attach 2* at p.4 "Opinions"; CP 413-420, *Morris Decl.* at 415, ¶8 Lns 9-13 The City did not contest this finding of the Court— that the injury causing condition was the subtle s-curved or kinked approach. Therefore, for purposes of this Appeal, it should not be in dispute. If it is in dispute, then it would be a material fact in dispute. See *Van Dinter v. City of Kennewick*, *infra* at 44. Nevertheless, at page 7 of their Brief, the City seemingly attempts to bring this into issue by addressing the timing of Jon's identification of the latent condition that caused his injury. (Pg.8 City's Resp). This issue is irrelevant. And it is reasonable that a paralyzed plaintiff could not identify what caused him to crash because it was not readily apparent to him at the time of the injury. Jon testified that he did not see the injury causing condition. The City also chose not to depose Wilkerson's experts, nor to hire an expert of their own. Thus, the City has no grounds to defend against the latent condition other than by trying to impugn the credibility of Appellant. The City also alleges at pg 14, ¶2 of their brief that there was no unknown condition, but they provide no basis for making such a statement. (A latent condition is a hidden danger that is not readily apparent to the recreational user at the time of engaging in recreation). At pg. 17, ¶2 the City refers to the latent condition as "an alleged" S-curve as if to dispute its existence.

It was the injury causing condition which, in turn, caused the loss of speed (CP 552, ¶20 Decl. L. Bridgers). The Respondent City also champions lack of speed as the cause of the crash. (Pg. 5, City's Resp.)

The difference of opinion that forms the basis of this appeal (and the basis of disagreement with the trial court) is not what the injury causing condition was, but whether or not that condition was latent. This analysis turns on whether or not the s-curved lead-in to the jump (i.e. the injury causing condition) *was readily apparent* to the recreational user.

i. Latency asks whether the condition was *Readily Apparent to the Recreational User*

“Latent” as used in the recreational use statute means “not readily apparent to the recreational user.” *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 45, 846 P.2d 522 (1993). Generally, what is latent is a factual question for the jury. *Cultee v. City of Tacoma*, 95 Wn. App. 505, 522, 977 P.2d 15 (1999). However, “latency should be viewed from the plaintiff's perspective; the same condition might be latent to one and patent to another, depending on the viewer's vantage point.” *Davis v. State*, 102 Wn. App. 177, 192-193, 6 P.3d 1191 (2000), *aff'd*, 114 Wn.2d 612 (2001). And, the question under the statute “is whether the injury causing condition - not the specific risk it poses - is readily apparent to the

ordinary recreational user.” *Ravenscroft v. Washington Water Power Co*, 136 Wn.2d 911, 925, 969 P.2d 75 (1998).

In *Ravenscroft*, the plaintiff sustained injuries when the boat in which he was riding struck a submerged tree stump in a man-made lake. *Ravenscroft* at 815. After the Court of Appeals had held that underwater stumps in a reservoir were “obvious or visible as a matter of law,” the Supreme Court reversed the order of summary judgment, finding that the record did not support the Court of Appeals’ holding because the boat’s driver testified that the stumps were not apparent to him and other witnesses had seen other boats hit the stumps. The Court wrote:

The record does not support a conclusion that the submerged stumps near the middle of the channel were obvious or visible as a matter of law. The question of whether this particular condition is latent is one of fact and, therefore, an order of summary judgment is not appropriate on that issue.

Ravenscroft at 924- 926.

Similarly, in *Cultee*, after a young girl drowned on public lands owned by the City of Tacoma, the appellate court found that a question of fact existed as to whether the condition that caused the girl to fall in and drown was latent. Thus summary judgment was inappropriate. The court in *Cultee* emphasized that all aspects of the dangerous condition must be examined in determining whether the condition is latent or patent:

[T]he City makes much of Jesse's statement that he did not jump in after Reabecka because the water 'looked too deep.' This, the City argues, establishes that the condition was 'obvious.' Again, there are questions of fact concerning whether the condition that killed Reabecka was the depth of the water alone, or a combination of the muddy water obscuring the eroded edge of the road and an abrupt drop into deep water. Moreover, Jesse did not say that he *observed* that the water was too deep. Rather, once Reabecka fell into the water, he realized the water was deep, and, as a child who could not swim, he did not think he could help by jumping in after her.

The City's attempt to isolate various elements of the 'condition' that resulted in Reabecka's death ignores the court's duty to examine together all aspects of the 'condition' before deciding if the condition was either latent or patent as a matter of law, or a jury question. *See Ravenscroft II*, 136 Wn.2d at 924-926. If the Nalley Ranch was open to the public for recreational use, such that the statute applies, a genuine issue of material fact as to latency remains and summary judgment was inappropriate.

Cultee at 523 (emphasis in original).

Similarly here, the Respondent City argues that because the Plaintiff's experts were able to see the latent condition after the injury, then, it must not be latent. (Pg. 8, City's Resp.) While it is not in dispute that Appellant's experts visited the Park site after the accident and were able to identify the injury causing condition, it does not follow that the "capable of being seen" standard that the Court found and that the City asserts is the correct standard for determining "latency" under *Ravenscroft* and *Cultee*.

The latency question is premised on whether or not the injury causing condition (here, the subtle s-curve) was "readily apparent" to the recreational user at the time of the injury. *See Ravenscroft*, 136 Wn.2d at

925. This requires examining all aspects of the condition and determining what was apparent, and not what simply may have or should have been apparent. *See Cultee* at 523

- ii. **Taking the evidence in the light most favorable to the non-moving party, genuine issues of material fact exist as to whether or not the condition that caused Jon Wilkerson's injuries was latent.**

Unless the Court decides as a matter of law that a latent condition exists, then at the very least, when taking the evidence in the light most favorable to the non-moving party, a genuine issue of fact exists as to whether the s-curved, kinked condition that caused Appellant Jon Wilkerson's injuries was a latent one. Cf. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982) (when reviewing a summary dismissal the court must accept as true the non-moving party's version of the facts)

Despite the testimony from Appellant Jon Wilkerson that he did not see the s-curved approach (the injury causing condition)¹² and despite the absence of any testimony from the City that the injury-causing condition "could be seen" at the time of the Appellant's injury, the trial court applied a "capable of being seen" standard and granted summary judgment.¹³

In addition to Jon Wilkerson's testimony that he did not see the S-curve approach and the City's failure to produce a single witness to state

¹² CP 524-542, Wilkerson Decl. at 526¶25

¹³ VR p.30, Lns 23-25 (10/19/2010).

that the s-curve approach was capable of being seen by Wilkerson (or recreational users in his class), the only experts in the case testified that the S-curved, kinked lead into the jump was non-obvious and would not be apparent to beginning or even intermediate bike jumpers.

While Jon testified that he reviewed the size of the gap and the pitch of the jump, what he did not consider and what a beginner to even an intermediate jump would most likely not consider *because of the subtleness* is the curved approach leading into the jump and the effect that the approach would have on the ability of the rider to complete the jump. These conditions **would not be apparent** to a rider of Jon's skill level.

(CP 413-420 Morris Decl. at 415-416 ¶11)(emphasis added).¹⁴

23. While *the S-curve after the berm is not visibly dramatic*, it affects the direction, physics and speed of the rider attempting to take the jump and therefore has a significant impact on the rider's ability to successfully clear the jump, especially on a first attempt.

* * *

25. **It is my opinion that that the dangers posed by the S-curved lead-in to the jump were not obvious for Jon** and other beginning to intermediate jumpers (perhaps all jumpers until you actually watched an experienced rider take the jump so that you can see the effect and their body/bike movements as they go into the jump).

(CP 547-556, *Bridgers Decl* at CP 553 ¶23-25) (emphasis added)

The condition that Jon faced was a subtle curve (See CP 413-420 Morris Decl. at 415-416 ¶11), a curve that was "not visibly dramatic" (CP

¹⁴ See also CP 547-556, *Bridgers Decl*. at 549 ¶11: "no clear or obvious danger with the jump standing alone".

547-556, Bridgers Decl at CP 553 ¶23-25) and one which “bike jumpers would not see”. (City’s Resp., Pg 14, Last Sentence, quoting CP 395)

Despite this evidence, the City attempts to misconstrue Jon Wilkerson’s arguments and argue that Appellant’s situation was akin to that in *Van Dinter*, 121 Wn. 2d at 43, where the condition at issue was the placement of an antennae a caterpillar-shaped structure in proximity to a grassy area.¹⁵ In *Van Dinter*, the injury causing condition was obvious. *Id.* at 46. Whereas here, the injury causing condition was not obvious, and there exists no testimony (other than the trial court’s conclusion that it was “capable of being seen”) that it was “obvious” or readily apparent.

The City also argues that the “Wilkerson offered no evidence that the site conditions were not readily apparent to him, much less to the “general class of recreational users.” (City’s Resp. Pg.18) While “site conditions” is not the issue, and instead, the issue is the latent condition lead-in to the jump at issue, Wilkerson did testify (and as the City admits on page 16, ¶2 of its brief) that he did not see the s-curve approach. (CP 526, ¶25 Decl. J.

¹⁵ The City also asserts that “Wilkerson and his experts argued a theory rejected in *Van Dinter*”. (Pg. 14, ¶3 City’s Resp.) The City fails to cite to the argument was allegedly made in *Van Dinter*, 121 Wn. 2d at 46, which instead, dealt with the distinction between a patent condition and a latent danger (and not the issue on Appeal here):

We recognize that Preston may be interpreted as supporting Van Dinter’s position. However, the Preston court incorrectly suggests that if the danger presented by the injury-causing condition is latent, then this is enough to satisfy the latency requirement of RCW 4.24.210, even when the condition itself is patent. (Preston, 48 Wash.App. at 892-93, 741 P.2d 71.) This interpretation is incorrect because, in effect, it treats ‘latent’ as modifying ‘dangerous’ rather than ‘condition’. We overrule Preston to the extent it suggests this interpretation.”

Wilkerson) And two experts testified that it was not apparent and not obvious and would likely not be seen by the general class of recreational users.¹⁶ This position was also adopted in the City's Response. (Pg. 14, City's Resp, Last Sentence: "bike jumpers would not see.")

Thus the only evidence that was submitted was that the injury-causing condition was not apparent.¹⁷ And, on the other hand, the City did not produce any evidence to disprove this notion or show that the condition was readily apparent!

As a result, Appellant respectfully requests that the Court find either that this condition (the S-curved, kinked approach) was latent, or else, that a factual issue exists as to whether or not it was "readily apparent" to recreational users.

2. The City's conduct was Willful (i.e. Intentional)

While RCW 4.24.210 provides a basis of immunity for landowners from suits by users of their land for recreational purposes, that immunity does not apply when there is intentional conduct. Here, it is asserted that the City of SeaTac's policies, actions and non-actions demonstrate willful and wanton misconduct which rise to the level of intentional conduct.

¹⁶ CP 413-420 Morris Decl. at 415-416 ¶11; CP 547-556, Bridgers Decl at CP 553 ¶23-25

¹⁷ CP 524-542, Wilkerson Decl. at 526¶25; CP 413-420 Morris Decl. at 415-416 ¶11; CP 547-556, Bridgers Decl at CP 553 ¶23-25

The only case that appears to address the nature of willful and wanton conduct rising to the level of intentional conduct under the Washington Recreational Use State is *Jones v. United States*, 693 F.3d 1299 (9th Cir. 1982). There the Ninth Circuit found the standard to be interchangeable:

As the district court noted, Washington Pattern Instruction 14.01 defines willful misconduct as

the intentional doing of an act ... or the intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert the injury.

Wanton misconduct under the same instruction is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do, in reckless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or should know that such conduct would in a high degree of probability result in substantial harm to another.

Jones, 693 F.3d at 1304-1305.

The City counters by arguing that the *Jones* case excludes findings of intentional conduct in situations where the defendant did not create the dangerous condition. However, the *Jones*, court contrasted cases in which defendants had created and had knowledge of a danger whereas in the case before it the defendant that did not create the condition and “did not reasonably know that it posed the substantial danger...” *Jones*, 693 F.3d at 1304-1305. What is different between the *Jones* case and the present case is actual knowledge of a dangerous condition. In *Jones*, “[t]he only

prior incident in the area had been after the snow season and was not such as would alert them to the fact that the plaintiff might be injured as she was.” *Jones*, 693 F.3d at 1305.

Whereas here, high ranking City personnel admit that they knew about the Softies site, and the City’s battalion fire chief had specific knowledge of riders getting injured on bike jumps at the park.¹⁸ And, despite the knowledge of an unauthorized bike jump park on its property (and the knowledge that riders were being hurt at a “bike park” on its property) (See *Id.* at CP 481), the City deliberately and intentionally chose to do nothing about warning, minimizing or correcting that danger.¹⁹ It did not, even at the very least, simply post warning signs about the unmaintained bike park and its jumps. Instead of taking some action, the City’s established policy appeared to be one of putting its head in the sand, doing nothing, and by doing nothing, look to be shielded by the recreational use/immunity statute. To do nothing, in light of the evidence before it, raises a factual question as to whether or not the City’s actions were reckless, willful and wanton such as to rise to intentional conduct.

¹⁸ Dep. Tr. Acting Chief Wiwel at CP 481 (p.35) Lns 5-25, (p.36) Lns 1-10, CP 482 (p.38) Lns 8-25, p.39 Lns 1-5, CP 483 (p.43) Lns 4-13

¹⁹ CP 446 Tr. of C. Ledbetter p. 69 Lns 9-25, p. 70 Lns 1-8; CP 456, Dep. Tr. R Chouinard p. 27 Ln 25, p. 28, Lns 1-5; CP 464 Dep. Tr. of Jay White p. 12 Lns 6-25, p. 13 Lns 1-14)

B. THE TRIAL COURT INCORRECTLY APPLIED THE RECREATIONAL USE STATUTE TO JON'S POST ACCIDENT INJURIES RELATED TO THE FAILURE TO RESCUE (ASSIGNMENT OF ERROR #2):

As asserted in Appellant's opening brief, the recreational use statute should not apply to the injuries which arose after Appellant was no longer engaged in recreation (and instead, after he lay paralyzed and stranded – giving rise to claims of hypothermia, cardiac and lung damage) See Counts 2&3 of the Complaint, CP 1-8) The reasons that the Recreational Use Statute should not apply to these secondary injury claims are: 1) because Jon Wilkerson was not engaged in recreation when those injuries occurred and; 2) because Jon was not “using” the land at that time.²⁰

Washington's Recreational Use Statute, RCW 4.24.210(1) provides:

[A]ny public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban . . . who allow members of the public to use them for the purposes of outdoor recreation . . . without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

Appellant does not dispute that Jon entered the City's land for the purpose of recreation. However, after he was injured on the bike jump, Jon lay paralyzed and helpless and was no longer recreating on the land. Thus, the Recreational Use Statute does not apply (to bar Appellant's Counts 2&3 of the Complaint – see CP 1-8, Complaint) What constitutes

²⁰ The Wisconsin courts would place the burden of proving the applicability of the immunity statute on the City here. See *Rintelman v. Boys & Girls Clubs*, 288 Wis.2d 394, 707 N.W.2d 897 (WI App. 2005). (“[B]ecause the Club proposed applying recreational immunity as a barrier to liability, it has the burden of demonstrating the statute applies.”)

“recreation” or “using the land” under the statute appears to be a question of first instance for the Washington appellate courts.

1. The Statute Only Applies to Recreational Users

In order for the Recreational Use Statute to apply, the Court must first determine whether the person injured was “us[ing the land] for purposes of recreation”. RCW 4.24.210(1) The Washington statute intentionally employs the words “use” and “user”.²¹ “Use” as employed in the statute is a verb²² (i.e. to avail oneself of, to employ), while “user” is a noun (i.e. a person who avails or employs something).²³ Thus, the statute only contemplates granting immunity to landowners for injuries to persons who are availing themselves of recreation – and not for injuries to persons who are not availing themselves of recreation. Using this reasoning, the Recreational Use Statute would not apply to bar claims for the injuries that arose as a result of conduct or inaction by the City/landowner which occurred Appellant stopped recreating (i.e. after he lay paralyzed). Instead, the public duty doctrine and standards of negligence are the shields that the City may employ to defend against such claims.

²¹ Cf. *Van Scoik v. State, Dept. of Natural Resources*, 149 Wn.App. 328, 203 P.3d 389 (Wash.App. Div. 3 2009) (“The plain language of the statute provides that the immunity is limited to unintentional, not intentional, injuries regardless of who causes them”)

²² See e.g., Online Merriam-Webster dictionary: <http://www.merriam-webster.com/dictionary/use%5B2%5D> (9/16/11)

²³ See Online Learners Dictionary <http://www.learnersdictionary.com/search/user> (9/16/11)

What the Washington statute does not provide, is immunity to landowners from suits brought by persons who had “entered” the land for the purpose of recreation. Thus, just because a person may have “entered” the land for purposes of recreation, unless he was “using” the land for recreation, the recreational statute simply does not apply. This interpretation is consistent with subparagraph (2) of RCW 4.24.210 which includes the additional provision: “or allow access to”. This provision does not appear in subsection (1) and thus the legislature could have chosen to include but did not:

(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.

RCW 4.24.210 (2)²⁴

²⁴ Appellant’s interpretation is also consistent with the finding made by the legislature at the time of the 2003 amendment to the statute, addressing the concern that landowners could be liable for injuries to persons engaged in rock climbing:

Finding -- 2003 c 16: The legislature finds that some property owners in Washington are concerned about the possibility of liability arising when individuals are permitted to engage in potentially dangerous outdoor recreational activities, such as rock climbing. Although RCW 4.24.210 provides property owners with immunity from legal claims for any unintentional injuries suffered by certain individuals recreating on their land, the legislature finds that it is important to the promotion of rock climbing opportunities to specifically include rock climbing as one of the recreational activities that are included in RCW 4.24.210. By including rock climbing in RCW 4.24.210, the legislature intends merely to provide assurance to the owners of property suitable for this type of recreation, and does not intend to limit the application of RCW 4.24.210 to other types of recreation. By providing that a landowner shall not be liable for any unintentional injuries resulting from the condition or use of a fixed anchor used in rock

This is the fundamental difference between the Parties on appeal, as the City argues that once a person has entered the land for the purpose of recreation, the landowner is immune from suit for anything that follows. Thus the City wishes that the Court add in the words or phrase “landowners are immune from suit from those who have entered the land for purposes of recreation.” But that is not the law in Washington and the City offers no authority to support their argument.

In responding to Wisconsin appellate case law which supports Appellant’s position, the City argues that the language in the Wisconsin and Washington recreational immunity statutes vary so much that they are “entirely different statutes”. (See pg. 19 ¶2, City’s Resp.) While it is true that the Wisconsin and Washington statutes are not exactly the same, the difference may be such that the Wisconsin statute grants broader immunity than the Washington statute. The Wisconsin statute (Wisconsin Stat. § 895.52) provides in relevant part:

(2) No duty; immunity from liability.

(a) Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner owes to any person who enters the owner’s property to engage in a recreational activity:

1. A duty to keep the property safe for recreational activities.

climbing, the legislature recognizes that such fixed anchors are recreational equipment used by climbers for which a landowner has no duty of care.
2003 c 16 § 1 (emphasis added) (No mention of “entering”).

2. A duty to inspect the property, except as provided under s. 23.115 (2).

3. A duty to give warning of an unsafe condition, use or activity on the property.

(b) Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property or for any death or injury resulting from an attack by a wild animal.

While the Wisconsin statute begins by stating that landowners owe no duty to persons who “enter the owner’s property to engage in recreation”, it then limits that more expansive language by immunizing landowners from suits from persons “engaging in a recreational activity on the owner’s property.”²⁵ On the other hand, under the Washington there is no initial prohibition of a duty by landowners to persons who entered the land for purposes of recreation, and instead, the Washington Recreational Use Statute only provides immunity to landowners when plaintiffs “use [the land] for the purpose of outdoor recreation”. RCW 4.24.210. The statute refers to users in the active tense. The Washington statute does not extend immunity to landowners for persons who have “used” the land.

²⁵ In Wisconsin, the appellate courts have phrased the initial inquiry (for applying the recreational immunity statute) as determining whether the person was engaged in recreation at the time he was injured. *Cf. Sievert v. American Family Mut. Ins. Co.*, 190 Wis.2d 623, 528 N.W.2d 413, 415 (Wis. 1995); *Kosky v. International Ass'n of Lions Clubs*, 210 Wis.2d 463, 565 N.W.2d 260, 263 (Wis.App. 1997) (“In order for the recreational immunity statute to apply, the injury must have been sustained **while** [plaintiff] was engaged in a recreational activity.”) (emphasis added)

This conclusion is also consistent with Washington law which requires a narrow and strict construction of the statute. *Matthews v. Elk Pioneer Days*, 64 Wn.App. 433, 437, 824 P.2d 541 (1992) (“RCW 4.24.210 is in derogation of the common law rules of liability of landowners and must be strictly construed.”)

Unlike the Wisconsin approach or the Washington statute, the City’s request for an expansive reading of the statute would create broad immunity well beyond what the statute provides and what the Court must assume the legislature intended. According to the City, immunity should be granted to landowners whose trucks negligently strike a plaintiff pedestrian who had entered the land for recreation but was no longer recreating (and instead was in the parking lot loading her family into the car). And the City would have the Court immunize a landowner from liability even though the landowner or his/her agents set a brush fire on public lands that killed a recreational user.

At the time Appellant’s secondary injuries arise, Jon did not yet have a claim for negligence against the City. His claim for negligence does not arise or ripen until after he stopped recreating and begins from the point he laid motionless in the City Park.

2. Claims that are not premised on the use of the land (or maintenance or failure to maintain the land) do not fall under recreational immunity.

The second reason why recreational immunity does not apply is because Jon Wilkerson's claims #2 & #3 for the cardiac and lung injuries (suffered due to prolonged exposure to the elements) do not involve his use of the Defendant City's land for recreation. (See CP 1-8, Complaint) Jon was present on the land and had previously engaged in recreation, but by the time his claims under Counts 2&3 of the Complaint arise, they do not stem from Appellant's use of the land for recreation. (CP 1-8) Washington courts have also not specifically addressed this issue. And, as with the first issue, guidance can be found from other State courts, such as Wisconsin, where secondary injury claims for "rescue and treatment" are not granted immunity under the recreational use statute:

We agree with the court of appeals. . . that the City and paramedics are not immune under the recreational immunity statute from claims of negligent rescue and treatment. We conclude that in furnishing rescue and medical treatment the City was acting independent of its functions as owner of recreational land and that its public paramedic services rendered in this case were unrelated to the City's role as owner of the Pond. **The City's immunity for its functions as owner of recreational land cannot shelter its liability for negligently performing another function.** Accordingly, we affirm the decision of the court of appeals.

Linville v. City of Janesville, 184 Wis.2d 705, 516 N.W.2d 427, 428-429

(Wis. 1994) (emphasis added).²⁶

²⁶ Cf. *Ackerville Snowmobile Club, Inc.*, 300 Wis.2d 498, 730 N.W.2d 428 (2007 WI App) ("While the statute is to be liberally construed in favor of immunity, there are some circumstances under which immunity will not apply. For example, immunity will not apply if a negligent act causing injury is unrelated to the condition or maintenance of the

Just because the landowner may be insulated by the recreational use statute does not mean that that immunity is also extended to the negligence of third parties that relate to human actions, interactions (or inactions) and are therefore unrelated to the condition of the property. As the Wisconsin supreme court recognized, extending immunity to landowners “for negligently performing in a capacity unrelated to the land. . .will not contribute to a landowner's decision to open the land for public use.” *Linville v. City of Janesville*, 184 Wis.2d at 719. Thus, refusing to grant immunity where a negligent act is unrelated to the land does not defeat the legislative purpose underlying recreational immunity. *Id.* at 720-21.

Here, Jon Wilkerson was not “using the land for recreation” at the time of his secondary injuries and therefore the Recreational Use State should not apply. The City’s (and City Police’s) separate failure to patrol the Park (as it advertised) and failure to rescue him (after medical personnel saw his truck) have no connection to the maintenance or condition of the land. *Cf. Kosky*, 210 Wis.2d at 475-77 (activities giving rise to injury not related to condition of land, but to detonation of

land.”) In a 2009 opinion, the Oregon Supreme Court has also recognized “use of the land” as being a material part of their recreational immunity statute:

[T]he legislature granted immunity to an owner of land that ‘permits any person to *use* the land for recreational purposes(.)’ ORS 105.682(1). . . . Such landowners are immune from claims for damages that arise out of ‘the *use* of land for recreational purposes(.)’ ORS 105.682(1).

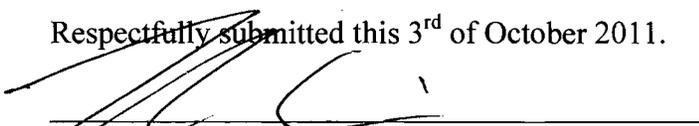
Coleman v. Oregon Parks and Recreation Dept. ex rel. State, 347 Or. 94, 217 P.3d 651.

fireworks). And therefore, the City's negligent conduct in failing to patrol and rescue should not be granted the protections afforded by the statute.

B. SCOPE OF THE COURT'S REVIEW

The City claims that certain issues are not properly before the Court on appeal. However, on appeal from a summary judgment dismissal, the Court of appeals engages in the same analysis at the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 287 P.2d 562 (1990). Thus, all issues that were before the trial court would also be before the Court of Appeals. Nevertheless, as for those issues that the City agrees were not ruled upon by the trial court, though raised by the Parties (e.g. the existence of a duty under, and the Constitutionality of, the Public Duty Doctrine), Appellant also agrees to exclude these from argument, and to have the Appeal focus solely on the application of recreational immunity.²⁷

Respectfully submitted this 3rd of October 2011.



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²⁷ The "record on review" may include the (1) report of proceedings and (2) "clerk's papers". RAP 9.1 All issues "called to the attention of the trial court" are before the appellate court for consideration. RAP 9.12. This allows the appellate court to engage[] in the same inquiry as the trial court." *Wash. Fed. of State Employees, Council 28, AFL-CIO v. Ofc. of Fin. Mgt.*, 121 Wn.2d at 157, 849 P.2d 1201. And because the Court could affirm on any ground supportable in the record (such as the finding that no public duty existed) these issues had to be addressed. *See Nast v. Michels*, 107 Wash.2d 300, 308, 730 P.2d 54 (1986) (court may affirm on any ground supported by the record).