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No. 66524-3-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION I
SEATTLE, WA

JON L. WILKERSON, Appellant,

v.

CITY OF SEATAC, Respondent.

BRIEF OF APPELLANT

NOAH DAVIS, WSBA #30939
Attorney for Jon Wilkerson,
Appellant
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281

ORIGINAL

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I. INTRODUCTION

Appellant Jon Wilkerson was seriously injured in a bicycle accident at the Des Moines Creek Park on June 21st, 2006. After crashing and landing on his head, Jon lay motionless until being found by other park users the next day. Jon Wilkerson brought suit in the King County Superior Court against the City of SeaTac for, inter alia, negligence and the failure to rescue. The Honorable Michael Hayden dismissed Plaintiff's case in two stages (in response to two separate Motions for Summary Judgment) – which also now correspond with the two assignments of error.

II. ASSIGNMENTS OF ERROR

No. 1 The trial court erred in entering the order of October 19, 2010, granting the defendant's motion for summary judgment re: recreational use immunity and dismissing the Plaintiff's claims (CP 569-571), and denying the plaintiff's motion for reconsideration (CP 631).

No. 2 The trial erred in erred in entering the order of December 10, 2010, granting the defendant's motion for summary judgment re: duty to rescue and dismissing the Plaintiff's claims. (CP 756-758)

Issues Pertaining to Assignments of Error

No. 1 Did the trial court incorrectly grant summary judgment dismissal of Count 1 of the Complaint based on the recreational use statute where (a) genuine issues of material fact exist as to whether the hazardous

conditions causing Jon Wilkerson's injury was latent and (b) genuine issues of material fact exist as to whether the City's conduct in failing to clear, maintain or warn of the lack of maintenance at the bike park was willful and wanton such as to rise to intentional conduct? (Assignment of Error 1)

No. 2 Did the trial court incorrectly grant summary judgment dismissal of Jon Wilkerson's negligence claims under Counts 2&3 of the Complaint based on the recreational use statute when the Plaintiff Jon Wilkerson was not engaging in recreation (nor claiming injury from a use of the land) at the time his claims under Counts 2&3 of the Complaint arose; and (b) the Defendant City of SeaTac's representations to Jon Wilkerson created a duty (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. Events leading up to Jon Wilkerson's injury

In June of 2006, Jon Wilkerson had just arrived in Washington by way of Arkansas to take a job as a physical therapist (CP 524-542, *Wilkerson Decl.* at 524 ¶1). During an off day Jon decided to go bike riding in preparation for a later trip to Whistler with friends. (CP 524-542 *Wilkerson Decl* at 1, ¶2) However, as Jon was unfamiliar with bike parks in Washington, he decided to ask at a local bike shop (where he had gone to buy a helmet). (CP 524-542, *Wilkerson Decl.* at 525, ¶¶8-9) Jon was

told by a Kent bike shop manager that there was a popular area in the Des Moines Creek Park (“the Park”) with man-made jumps known as the “softies”. (CP 524-542, *Wilkerson Decl.* at 524 ¶3).

On June 21st, 2006, Jon traveled to the Park in his Ford Expedition with his bike hitched to the rack on the back. (CP 524-542, *Wilkerson Decl.* at 525, ¶10) Upon arrival, the first thing that Jon noticed was that the parking lot was fenced-in. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at CP 658 ¶6). The fence extended around the entrance to the Park in both directions (North and South) and it appeared to Jon that the entire Park was fenced in. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658 ¶7)¹ Jon also saw that the Park’s parking lot had a swinging gate with a padlock attached. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658 ¶8).

After parking his car in the Park’s small parking lot, Jon saw and read a large white sign that was posted in the parking lot at the entry to the paved bike trail. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658 ¶11) The sign read, in relevant part:

The Park is patrolled by the City of SeaTac
The Park is operated by the City of SeaTac
Park is closed from dusk to dawn
Parking is only permitted during Park hours

¹ See also CP 448, Ex. 6 (Photo) to Dep. Tr. of C Ledbetter.

Unauthorized vehicles will be impounded

(CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658 ¶12)²

Based on the sign and the fence, Jon believed that in case he needed assistance he would be safe with the patrols that would be monitoring the Park. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 659 ¶14). As a result, he also decided to leave his cell phone in the car. (CP 632-746, *Wilkerson Decl.* at 659 ¶15).³ However, and despite all the signals that it did, the City of SeaTac did not actually maintain the bike park and its jumps.⁴

B. The Softies

After riding around the park on a couple of the “single-tracks” for a short while, Jon located “the Softies” area. (CP 524-542, Decl J. Wilkerson, at 525, ¶11) Jon looked generally over the series of dirt jumps and “rolled” over some of the jumps. (CP 524-542, Decl. of J. Wilkerson, at 525, ¶12). However, all of the other actual jumps were too big and

² CP 449 (Photo), Attached to *Coluccio Decl.*: CP 422-511). The park is closed from dusk to dawn. (CP 422-511, *Coluccio Decl.*, Ex. 2. Dep. Tr. C Ledbetter at CP 443, Lns 15-24). And, the City of SeaTac does operate and is responsible for the park (CP 443 Dep. Tr. C Ledbetter Lns 4-14). Also, a City official reported that a motorcycle officer drives down the trail. (CP 443 Dep. Tr C. Ledbetter, Pg 59 Lns 1-3).

³ After reading on the sign that the Park closes at dusk, it was also Jon’s belief that, at dusk, the parking lot gate would also be shut and locked by Park workers. (CP 632-746 Opposition to Summary Judgment, *Wilkerson Decl.* at 658, ¶13).

⁴ (CP 422-511, *Collucio Decl.* Ex. 3: Dep Tr. R. Chouinard at CP 457 (p30) Ln 1-4; CP 422-511, *Collucio Decl* Ex. 4: Dep. Tr. J. White at CP 463 (p.10) Lns 7-19).

imposing for Jon, and outside his comfort and skill level. (CP 524-542, *Wilkerson Decl.*, at 525, ¶13)

Although Jon was an avid bike mountain bike rider who had some experience taking dirt jumps on a mountain bike, he was by no means an expert. (CP 524-542, *Wilkerson Decl.*, at 525, ¶5; CP 544-545, *Carson Decl.* ¶¶5-8). And, he was far from being an expert dirt bike jumper. (CP 524-542, *Wilkerson Decl.* at 525, ¶¶6-7; CP 544-545, *Carson Decl.* ¶¶5-8). In fact, Jon had only some experience with dirt jumps. (CP 524-542, *Wilkerson Decl.*, at 525, ¶¶4,7; CP 544-545 *Carson Decl.* ¶¶5-8)

As he looked over the jumps, he saw amid the bigger jumps, a smaller jump (which had a crevice or drop in the middle) known as a gap jump and felt that this jump was within his abilities. (CP 524-542, *Wilkerson Decl.* at 525, ¶¶14-16)

Q Did you have any concerns about your ability to accomplish the jump before you attempted the jump?

A No.

Q So, you were confident that this was not something that was over your head so to speak?

A No, this was within my skill set.

(CP 422-511 Coluccio Decl, Attach 1: Dep Tr. J. Wilkerson, at 432 (p.36)

Line 25, (p.37) Lines 1-5)

Jon looked over the jump, including the size of the jump (and the pitch of the ramp) as well as the size of the gap and thought everything

looked ok and believed that he would have no trouble clearing the jump. (CP 524-542, *Wilkerson Decl.* at 525, ¶¶15-16). However, what Jon did not notice, see or appreciate was the S-curved, angled lead-in to the jump. (CP 524-542, *Wilkerson Decl.* at 526, ¶25) And Jon this was not something that would be apparent to a rider of Jon's skill level. (CP 413-420, *Morris Decl.* at CP 416¶1-3; CP 547-556, *Bridgers Decl* at CP 553 ¶25: "not obvious").

Jon did not see any condition or know that there was some condition that would make this jump a more technical jump than the bigger jumps that he chose not to take (CP 524-542, *Wilkerson Decl.* at 526, ¶28, 527, ¶¶28-34; CP 547-556, *Bridgers Decl* at CP 553 ¶¶22, 24; CP 413-420, *Morris Decl.* at CP 417 Lns. 4-14) – and thus take the jump from one which was in Jon's skill set to one which would was not a beginner jump and thus outside his skill set. (CP 524-542, *Wilkerson Decl.* at CP 525, ¶13, at CP 526 ¶28, at CP 527 ¶28; CP 433 Dep. Tr. J. *Wilkerson* (p.41) Lns. 8-25, (p.42) Lns 13-23)

C. The Approach to the Jump

Believing the jump to be a less advanced jump (and within his skill set) (CP 524-542, *Wilkerson Decl.* 526, ¶21), Jon went up to the top of little bit of a hill to begin the run into the jump., CP 432 Dep. Tr. J. *Wilkerson*, p.36 Lns 11-13) However, as he came down from the

approach leading into the jump, he was first forced to turn left, then back right, then left. (CP 524-526, *Wilkerson Decl.* at 527, ¶¶31-32 and Attachments 4,5,6 at CP 535-540; CP 512-522, *Iftner Decl. Attach 2* at p.4 ¶4; CP 547-556, *Bridgers Decl* at 551 ¶18; CP 413-420, *Morris Decl* at CP 416 Lns 17-21).

This series of subtle but quick turns require a rider to re-align himself and his bike as he rides down the ramp towards the jump which in turn affects the rider's speed. (CP 547-556, *Bridgers Decl.* at 551 ¶18; CP 413-420 *Morris Decl.* at CP 416, Ln 12 CP 512-522; *Iftner Decl. Attach 2* at p.4 ¶4).⁵ If the rider does not have enough speed going into the jump, he can "case" the jump (i.e., crash). CP 413-420 *Morris Decl.* at 416 Lns. 4-11; CP 524-542, *Wilkerson Decl.* at 527, ¶33; CP 430 Dep. Tr. J. *Wilkerson* p.33 Lns 24-25, p.34 Lns 1-2) The speed necessary to clear the jump was determined to be 16.4 m.p.h. (CP 512-522, *Iftner Decl. Attach 2* at p.4 "Opinions"). This was a speed that a rider (like Jon), on a more probably than not basis, would not attain on their first jump. CP 512-522, *Iftner Decl. Attach 2* at p.4 "Opinions".⁶

⁵ The angled entry also has an effect on the mechanics of the body (and the physics of making the jump). (CP 547-556, *Bridgers Decl.* at 550-51 ¶16; CP 413-420 *Morris Decl.* at 416 Ln 12). To account for the subtle turns, the rider approaches the jump with less speed than is needed to clear the jump. (CP 547-556, *Bridgers Decl.* at 552¶20; CP 512-522, *Iftner Decl.* at p.4 "Opinions").

⁶ See CP 413-420, *Morris Decl.* at 415: "I have come to the conclusion that it was not the jump itself that caused Jon to crash, but the curvy nature of the lead-in, or approach, to

D. The Jump and the Crash

Jon felt that he did everything right when he took the jump, and he should have cleared the relatively small gap. (CP 524-542, *Wilkerson Decl.* at 527, ¶32). But, something unexpected happened and Jon didn't clear the jump. (CP 524-542, *Wilkerson Decl.*, at 527, ¶31-35; CP 429 Dep. Tr. J. Wilkerson, p.28. Lines 7-24) Jon's back tire hit the landing jump (CP 524-542, *Wilkerson Decl.* at 527, ¶34; CP 429 Dep. Tr J. Wilkerson, Pg. 28, Lines 7-24), and Jon was propelled up over the handlebars, landing on the top of his head. (CP 524-542, *Wilkerson Decl.*, Pg. 4, ¶34; CP 433 Dep. Tr J. Wilkerson, Pg. 47, Lines 8-22).

This was because it was more likely than not that Jon was not able to reach the speed necessary to clear the jump (16.4 m.p.h) (CP 512-522, *Iftner Decl.* Attach 2 at p.4 "Opinions"; CP 547-556, *Bridgers Decl* at CP 552 ¶20) While Jon testified that a rider normally knows the speed necessary to roll into a jump (see Dep. Tr. J. Wilkerson, pg 27, Lines 3-11), what wasn't known or apparent to Jon was that in order to get lined up with this jump,⁷ Jon would have to maneuver through an S-curved, kinked approach. (CP 524-542, *Wilkerson Decl.* at 526, ¶25; CP 547-556, *Bridgers Decl.* at 551 ¶18 CP 413-420; CP 512-522, *Iftner Decl.* Attach 2

the jump itself that caused the crash, which more probably than not reduced his speed enough to prevent him from successfully completing the jump."

⁷ Jon believed that he had been properly lined up. (CP 429 Dep. Tr. Wilkerson, Pg. 29, Lines 2-12)

at p.4 “Opinions”) The result was that Jon’s inability to clear the jump followed by the crash and the spinal cord injury that left him paralyzed and helpless. (CP 524-528 *Wilkerson Decl.* at CP 527 (p.4) ¶35; CP 434 Dep. Tr. J. Wilkerson p.47 lines 3-7)

Q Let’s talk about speed. If you hadn’t been going fast enough to carry the distance, that could have caused your back wheel to drop down, correct?

A Yes

(CP 430 Dep. Tr. J. Wilkerson, pp 33-34, Lines 24-25, 1-2).

E. The next 18 hours

Unable to move, and realizing the serious nature of his injuries, Jon began calling out for help. (CP 632-746 Opposition to Summary Judgment, *Wilkerson Decl.* at CP 660, ¶25.) Jon knew he wasn’t far from the paved trail that ran through the center of the Park as he called for help. (CP 632-746 Opp. To Summary Judgment, *Wilkerson Decl.* at CP 660, ¶26) Believing the Park to be patrolled and supervised, Jon believed that one of the patrols would hear him and someone would find him shortly. (CP 632-746 Opp. To Summary Judgment, *Wilkerson Decl.* at CP 660, ¶27) But after calling out for some time, Jon lost consciousness. (CP 632-746 Opp. To Summary Judgment, *Wilkerson Decl.* at CP 660, ¶28).

Over the next approximately 18 hours, Jon laid motionless next to the jump. (CP 632-746 Opp. To Summary Judgment: *Wilkerson Decl.* at

CP 660, ¶29; and *Incident Report, Dated June 22, 2006*, Ex. 8 to *Wiwel Dep.*, at CP 742, 745) His Ford Expedition, with bike rack down (but no bike) remained throughout the late afternoon, evening, night and morning in the parking lot at the entrance to the Park. (CP 632-746, *Wilkerson Decl.* at CP 660 (p.4) ¶31).

As a result of being left out in the Park, Jon's body temperature dropped so much that when he was found, he was in a hypothermic state. (CP 632-746 Opp. To Summary Judgment: *Incident Report, Dated June 22, 2006*, Ex. 8 to *Wiwel Dep.*, at CP 745: "Pt was probably injured 48 hrs earlier, due to Low temp, 78 & cold.") Thereafter, Jon went into cardiac arrest. (CP 632-746, *Wilkerson Decl.* at CP 660 (p.4) ¶30).

And, as a result of the cardiac arrest, Jon received emergent care that resulted in a lacerated lung during the procedure. (CP 1-8 Summons and Complaint at CP 5, ¶¶27-28)

III. SUMMARY OF ARGUMENT

Appellant Jon Wilkerson's Complaint asserted that the Defendant City was negligent in three ways, first by failing to maintain the Softies site, clear them or to warn of its dangers (which could have prevented Jon's injury); second, by failing to supervise the Park; and third, for failing to rescue him after his injury. (CP 1-8 Complaint)

The City defended the first allegation by asserting that the recreational immunity statute precluded its liability. Appellant disagreed and asserted that either the recreational immunity statute as applied to the facts does not preclude negligence, or that factual issues remain with respect to the application of recreational immunity.

On the second and third allegations or Counts of the Complaint, the City asserts that not only does the recreational use statute provide immunity to the City but under Washington law it had no duty to rescue Jon once he was injured. Appellant argues that the City made representations which gave rise to the duty, that his car was actually seen by a City employee, and that the City should have a heightened duty of care when it is aware of injuries from biking in the park.

IV. ARGUMENT

A. Standard of Review

In reviewing a summary judgment order, the Court of Appeals engages in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Marincovich*, 114 Wn.2d at 274, 787 P.2d 562. The burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that

summary judgment is proper as a matter of law. *Atherton Condo. Assn. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The moving party is held to a strict standard since any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. *Atherton Condo. Assn.*, 115 Wn.2d at 516. All facts submitted and reasonable inferences therefrom are considered in the light most favorable to the nonmoving party. *Ibid.* Where there disputed questions of fact, summary judgment is not appropriate. *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959); *see also* RCW 4.44.090 (issues of fact are to be decided by a jury – which under Article 1, § 21 of the Washington State Constitution “remain inviolate” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644, 771 P.2d 711 (1989)).

B. Assignment of Error #1: Recreational Immunity does not shield the City from liability in this case

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. The statute reads in part:

(1) [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.

....

(4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.

RCW 4.24.210 (1), (4)

In this case, there are two reasons why RCW 4.24.210 does not apply. First, because the hazardous conditions were known, artificial, dangerous and latent. And second, because the City's conduct was willful and wanton such as to rise to an intentional act. In reviewing these arguments and RCW 4.24.210 (and the arguments which follow in part two of this brief), it also important to note that because the statute is in derogation of the common law, the statute must be strictly construed.

Matthews v. Elk Pioneer Days, 64 Wn. App. 433, 824 P.2d 541 (1992).

1. Recreational Immunity does not apply to insulate the City where, without having posted warning signs the hazardous conditions causing Jon Wilkerson's injury were known to the City, were dangerous, artificial and latent.

One fact that should not be in dispute is that there were no warning signs (regarding the softies, or any bike jumps in the park) posted before Jon's injury (CP 524-542, *Wilkerson Decl.* at 526 ¶28). Thus, the first significant issue is to identify the injury causing condition.

i. Injury Causing Condition

Under the recreational use statute, the injury-causing condition is “the specific object or instrumentality that caused the injury, viewed in relation to other external circumstances in which the instrumentality is situated or operates.” *Ravenscroft v. Washington Water Power Co*, 136 Wn.2d 911, 921, 969 P.2d 75 (1998). Our Supreme Court has held that “[i]dentifying the condition that caused the injury is a factual determination.” *Van Dinter v. City of Kennewick*, 121 Wn. 2d 38, 44, 846 P.2d 522 (1993).

In *Van Dinter*, the plaintiff was injured when his eye struck an antenna on a caterpillar-shaped playground structure. *Van Dinter* at 40. At the time of the accident, he had been engaged in a water fight on a grassy area next to the caterpillar. *Ibid.* Van Dinter claimed that the condition causing his injury was the proximity of the caterpillar to the grassy area. *Van Dinter* at 43. The defendant City argued that the injury-causing condition was the caterpillar. *Ibid.* The *Van Dinter* court, 121 Wn.2d at 44 agreed with Plaintiff Van Dinter's characterization, stating:

To view the caterpillar or some part of it, such as the antennae, as having been the injury-causing condition would be to artificially isolate some particular aspect of the total condition that caused Van Dinter's injury. We also must give Van Dinter the benefit of every reasonable inference that can be drawn from the facts. Consequently, we hold that the condition that caused Van Dinter's injury was the caterpillar's placement, rather than the caterpillar as viewed in isolation.

The *Ravenscroft* court also took a broad view of the injury-causing condition. The plaintiff in *Ravenscroft* was injured when the boat in which he was riding struck a submerged tree stump in an area of the Spokane River known as Long Lake. *Ravenscroft* at 815. The Washington Water Power Company (WWP) created Long Lake when it raised the elevation of the Long Lake reservoir. *Id.* at 915-916. When WWP did so, the trees along the banks became surrounded by water and were near the middle of the new water channel. *Id.* at 916. Years later, after the trees had died, WWP had them cut, but the remaining tree stumps remained below the water's surface when the reservoir was at the maximum level. *Ibid.* The *Ravenscroft* court held that, although the specific object that caused the injury was the tree stump, it was necessary to view the stump in relation to other external factors, such as the location of the stump in the water channel and the artificially high water level. *Id.* at 921.

Here, Appellant asserts that the injury-causing condition was the S-curved, angled approach that prevented Jon from gaining enough speed to clear the gap jump. (CP 547-556, *Bridgers Decl.* at 552 ¶¶14, 20-21); CP 512-522, *Iftner Decl. Attach 2* at p.4 “Opinions”; CP 413-420, *Morris Decl.* at 415, ¶8 Lns 9-13) If the City had contested this, then the injury causing condition is a material fact in dispute that must be resolved by the jury. Otherwise, the injury causing condition is the S-curved, angled

approach that prevented Jon from gaining enough speed to clear the jump and the Parties may move on to the next consideration – artificialness.

ii. The injury-causing condition was artificial

For purposes of RCW 4.24.210, the definition of “artificial” is its ordinary meaning. *Ravenscroft* 136 Wn.2d at 922. As defined in *Webster's*, “artificial” means “contrived through human art or effort and not by natural causes detached from human agency: relating to human direction or effect in contrast to nature: (a): formed or established by man's efforts, not by nature.” *Webster's Third New International Dictionary* 124 (1986).

For purposes of the Summary Judgment and the appeal the Defendant City admitted that the bike jumps and 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)⁸ Thus, the fact that the jumps and lead-ins to the jumps were man-made should not be in dispute. If it was, then a factual issue would remain for the jury.

iii. The City of SeaTac knew about the Softies

⁸ See also CP 413-420, *Morris Decl.* at CP 414, ¶6, Ln 21; CP 464, Dep. Tr. J. White p.13 Lns 22-25, p.14 Lns 1-2; and CP 422-511, *Coluccio Decl.* Ex. 5: Answer to Request for Admission at CP 473-474, RFA#20: The topography of the park “had been physically altered”.

The next issue for consideration under the recreational statute immunity defense is whether the City knew of the danger. It is a plaintiff's burden to prove knowledge of the condition on the part of the landowner. *Tabak v. State*, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994). If actual knowledge is denied, the plaintiff must "come forward with evidentiary facts from which a trier of fact could reasonably infer actual knowledge, by a preponderance of the evidence." *Ibid*. Actual knowledge may be established by circumstantial evidence. *Ibid*.

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 453 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. (CP 422-511, Coluccio Decl., Ex. 6 thereto: 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)⁹

For purposes of its summary judgment motion (and thus on this Appeal), the Defendant City admits that it had "knowledge" as defined

⁹ Notwithstanding that an earlier answer from the City to a Request for Admission appeared to dispute that it had notice of bikers being injured taking man-made jumps at the Des Moines Creek Park. See CP 474 Answer to RFA #24.

under the recreational use statute. (VR: p.8, Lines 21-25; CP 102-118, Def.'s MSJ at 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).

iv. The unmaintained bike jumps created a dangerous condition at Des Moines Creek Park

The next consideration then is whether there existed a dangerous condition. A condition is dangerous if it poses an unreasonable risk of harm. *Tabak v. State*, 73 Wn. App. 691, 697, 870 P.2d 1014 (1994).¹⁰ Here, two biking experts 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)

In addition to the non-obvious curved, or kinked lead-in to the jump presenting an unreasonably dangerous condition to recreational users like Jon (i.e. beginning and intermediate bikers), the bike park and jumps were dangerous because the City did not take any steps to make the Park safe (such as to re-design the jumps, clear the jumps or put up any signs or warnings that the trails were not maintained or designed by the Park).

¹⁰ See also *Unzen v. City of Duluth*, 683 N.W.2d 875, 880 (Minn.App. 2004), *review denied* (Minn. Oct. 27, 2004) (even a seemingly harmless apparatus can be dangerous and involve an 'unreasonable risk of death or serious injury where there is evidence that a condition is likely to cause death or serious bodily harm to persons.

And by the time Jon Wilkerson was injured, there had been at least six very serious biking injuries at the Park.¹¹

The City did not dispute the dangerousness of the jump at summary judgment as it relates to the recreational use statute.¹² If the City disputed “dangerousness” as it applied to the lead-in or to the jump, then an issue of fact would have arisen.

v. Genuine issues of material fact exist as to whether or not the condition that caused Jon Wilkerson’s injuries was latent.

Last is the issue of whether or not the condition that caused Jon Wilkerson’s injuries was a latent one. This is the issue which the City contested at oral argument and which the Court agreed and granted Summary Judgment on. (CP 569-571, Order of Judge M. Hayden; see also VR 10/19/10)

Generally, latency is a factual question for the jury. *Cultee v. City of Tacoma*, 95 Wn. App. 505, 522, 977 P.2d 15 (1999). “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,

¹¹ CP 422-511, Coluccio Decl., Ex. 6: 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

¹² VR p.7, Lines 10-15:

“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.”

846 P.2d 522 (1993). 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) (emphasis omitted). “[L]atency 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).

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, 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:

In this case, the driver of the boat testified by affidavit that the submerged stumps were not apparent to him. Other witnesses filed affidavits stating that other boats had hit the stumps, indicating they were not readily apparent.

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.

In *Cultee*, a young girl drowned at the Nalley Ranch owned by the City of Tacoma. There was a levee along the edge of the ranch that held back the waters of Hood Canal. The levee broke, flooding part of the east side of a road on the ranch at high tide. *Cultee* at 508. The victim, with her two cousins, visited the ranch and stopped to check the water's depth along the side of the road at a point where there was no water on the road itself. Thereafter, the road became covered with two to four inches of muddy water. The victim rode her bicycle over about eight feet of the road when she got off to turn around. As she was getting back on her bicycle, she got too close to the edge and fell in. *Id.* at 510. The court found a question of fact existed as to whether the condition was latent. It was not clear if the road edge was apparent when the victim fell into the water. There was also a question of fact as to whether the victim was killed by the depth of the water alone, or a combination of the water obscuring the edge of the road and an abrupt drop into deep water. *Id.* at 522-523. The court accordingly determined summary judgment was inappropriate.

In denying summary judgment, 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 (footnotes omitted).

In the present case, John testified that he did not see the S-curved approach to the jump. (CP 524-542, Wilkerson Decl. at 526¶25) Thus, it was not readily apparent to him. Not only did Jon Wilkerson not see the S-curve approach, but two experts also testified that the S-curved, kinked lead into the jump was not 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; see also CP 547-556, *Bridgers Decl.* at 549 ¶11: "no clear or obvious danger with the jump standing alone".)

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. This is something that Jon obviously did not notice or appreciate and which clearly had an impact on his ability to make the jump.

* * *

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)

Thus Jon was not alone as most beginning and intermediate bike jumpers would also not see or appreciate the S-curve approach and the impact it would have on their ability to clear the jump. (*Id.*; see also CP 413-420 *Morris Decl.* at 415 ¶11)¹³ Thus, evidence was submitted that the

¹³ 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; CP 413-420 *Morris Decl.* at 417 ¶16)

curved or kinked approach was not seen or noticed by Jon Wilkerson and not “apparent” or “obvious” to the beginning to intermediate biker. And thus, not “readily apparent” to the recreational user as that term is defined by the case law. As a result, it would appear that either this condition (the S-curved, kinked approach) was latent, or else, a factual issue exists as to whether or not it was “readily apparent” to recreational users.

Despite the evidence that the curved lead in (the artificial condition) was not seen by Jon and not readily apparent to recreational users,¹⁴ the trial court found that the bike path leading up to the jump was capable of being seen. (VR p.30, Lns 23-25) However, there was no evidence presented by the Defendant that the S-curve was in fact “capable of being seen”. It appears undisputed that it “may have been capable of being seen”, but the question is whether it was readily apparent to the recreational user. And, according to the trial court, there was no evidence presented that the s-curve lead in was incapable of being seen. (VR pg 30. Lns 22-23). As a result, the trial court found that no latent condition could exist. (VR pg. 32, Lns. 2-9)

¹⁴ While the magic words “readily apparent” may not appear throughout the declarations, the terms “would not be apparent” (CP 416 lns 2-3), “not visibly dramatic” (CP 553 lns 8-9) and “not obvious” (CP 553, lns. 21-22) do appear in the declarations. Thus, there is a factual question as to whether or not, and based on the evidence and the testimony, the s-curved or kinked approach, was “readily apparent” to the recreational user.

Appellant asserts that the trial court applied an incorrect legal standard for determining latency under the recreational immunity statute. The correct standard is whether or not the condition causing the injury was “readily apparent to the recreational user”, and not whether or not the condition was “capable of being seen”.¹⁵

2. Application of the Recreational Statute Does Not Apply Where Intentional Conduct is Present.

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. RCW 4.24.210(1) reads:

Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners or others in lawful possession and control of any lands . . . who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, . . .bicycling. . .without charging a fee of any kind therefor, shall not be liable for *unintentional* injuries to such users.

(Emphasis added).

While intentional conduct would include a person shoving a bystander off his bike, it also includes situations where the tortfeasor has acted *willfully or wantonly*. The City of SeaTac’s policies, actions and

¹⁵ In addition, with, as the Court concluded, the approach to the jump curved in some fashion, “it would not have been readily apparent to the biker that he could not acquire sufficient speed to clear the jump.” (VR p.30, Lns 17-20). This conclusion may also serve as a basis for denying the Motion for Summary judgment if the injury causing condition was both the curved approach and the effect on physics/speed (before the jump and the resulting injury).

non-actions in this case demonstrate willful and wanton misconduct. In *Jones v. United States*, 693 F.3d 1299 (9th Cir. 1982), in considering the recreational immunity act, the court equated the words "intentional" in RCW 4.24.210 with "willful and wanton misconduct":

The parties agree that if the Recreational Use Act is applicable, the Government's liability is measured under Washington common law definitions of willful and wanton conduct, as set forth in Washington Pattern Instruction 14.01 and in *Adkisson v. Seattle*, 42 Wn.2d 676, 258 P.2d 461 (1953). They disagree with respect to the trial court's application of those definitions to the facts of this case.

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.

The court in *Adkisson*, in distinguishing between negligence and willful or wanton misconduct, wrote:

Willful or wanton misconduct is not, properly speaking, within the meaning of the term "negligence". Negligence and willfulness imply radically different mental states. Negligence conveys the idea of neglect or inadvertence, as

distinguished from premeditation or formed intention. 258 P.2d at 465.

Jones, 693 F.3d at 1304-1305.¹⁶

In concluding that appellants had failed to show that the Government's conduct was willful or wanton, the district court wrote:

The evidence established that the extent of the danger was not actually or reasonably known to the Government. Its failure to put up signs and ropes was negligence which proximately contributed to the plaintiff's accident but it did not constitute "an intentional failure to do an act" nor was it "in reckless disregard of the consequences." The National Park Rangers were justifiably concerned that the placing of signs might mislead people into going to other areas. The only prior accident 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. The slope itself was quite steep and the Rangers could well have thought that anyone looking at it and exercising reasonable caution would not attempt to use an inner tube on that slope.

....

. . .the condition, the natural cirque was not created by the Government and it did not reasonably know that it posed the substantial danger that we all now know exists for tubing on that slope. The court noted further that the impact of tubing and the inherent dangers involved therein were not apparent to the public or the Government on April [1]6, 1977.

¹⁶ See also *M.M. v. Fargo Public School Dist. No. 1*, 2010 ND 102, 783 N.W.2d 806, 817 (N.D. 2010) approving the following jury instruction as it relates to recreational immunity:

Willfull and wanton misconduct' requires knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; an ability to avoid the resulting harm by ordinary care and diligence in the means at hand; and the omission of such care and diligence to avert threatened danger when to an ordinary person it must be apparent that the result would likely prove disastrous to another. Willfull and wanton actions are reckless, heedless, malicious; characterized by extreme recklessness or foolhardiness; recklessly disregarding of the rights or safety of others or of consequences.

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

Unlike the *Jones* case, the facts of this case do support a finding of willful and wanton misconduct on the part of the City of Sea-Tac. In *Jones*, the danger was not actually or reasonably known to the National Park Service. In this case, high ranking City of Sea-Tac personnel admit that they knew about the Softies site, and the City had specific knowledge of riders getting injured on bike jumps at the park (CP 422-511, Coluccio Decl., Ex. 6 thereto: 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). And, despite the knowledge of an illegal bike park on its property with jumps (and the knowledge that riders were being hurt at a “bike park” on its property (See *Id.* at CP 481 (p36)), the City deliberately and intentionally chose to do nothing about correcting that danger.¹⁷

Thus, unlike the situation in *Jones*, here the City of Sea-Tac intentionally failed to take any action with regard to “the Softies” site even though it knew about these dangers. The City consciously and chose not to bulldoze the softies, not to perform some maintenance or design, or, at the very least, to simply post warning signs about the bike park and its jumps. On top of all this, and unlike the *Jones* case, there were known

¹⁷ 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, pg. 28, Lns 1-5; CP 464 Dep. Tr. of Jay White pg. 12 Lns 6-25, p. 13 Lns 1-14)

injuries at the Des Moines Creek Park from bicycle jumping accidents. (CP479-485 Dep. Tr. Acting Chief Wiwel pg. 35 Lns 22-25, pg 36 Lns 1-10, pg 38 Lns 21-25, pg 39 Lns 1-5, pg 48, Lns 21-25). Thus, Jon Wilkerson argues, the City had a duty to do something to address this known danger to protect future bikers. Instead, 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, rises to the level of reckless, willful and wanton conduct.

Given the significant differences between the *Jones* case and this case, genuine issues of material fact exist as to whether or not the City acted willfully and/or wantonly in failing to do anything to protect the users of the softies at its park. The existence of these factual differences should defeat the City of Sea-Tac's motion for summary judgment.

C. ASSIGNMENT OF ERROR #2: The Superior Court incorrectly applied the recreational use immunity statute to Jon's post accident injuries and the failure to rescue.

As discussed below, the recreational use statute does not apply to post accident claims of Appellant— relating to hypothermia, and cardiac and lung injuries— because Jon Wilkerson was not engaged in recreation when those injuries occurred and Jon was not “using” the land. There are

also issues of fact as to whether Defendant City breached its duty to Jon, and the legal issue as to whether or not the public duty is lawful.

1. The recreational use statute does not insulate the City from liability in this case because Jon was not using the land for “recreation” at the time his claim arose, and it is not the land which caused the injury.

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.

At the time that Jon’s claim arose under Complaint Causes of Action Numbered 2 & 3— relating to hypothermia and cardiac and lung injuries after laying exposed to the elements (CP 1-8) — Jon was not using the City’s land for the purpose of recreation. What constitutes “recreation” or “using the land” under the statute appears to be a question of first instance for the Washington appellate courts. However these issues have been addressed by courts in other states as discussed below.

i. Using the Land for the Purpose of Outdoor Recreation

At the time that Jon’s claim arose against the City under Causes of Action numbered 2 & 3, Jon was lying paralyzed in the Park. (CP 1-8, Complaint) This is the moment that his claims arise under Counts 2&3 of

the Complaint for negligence relating to the Defendant City's failure to act arise. (CP 1-8, Complaint) Does the "recreational use/immunity" statute apply to such a situation?

If a person is engaging in recreation at the time that he is injured and sues for those injuries (sustained while engaged in recreation), then there is little question that the recreational use/immunity statute would apply unless (as set forth above, there is a known, artificial latent condition or, else, some intentional conduct). However, a different situation is present when the person injured is not engaging in recreation at the time his injuries arise.

And, determining whether the person injured was engaging in recreation at the time he was injured is the first test in determining whether or not recreational immunity applies. Cf. *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 [the plaintiff] was engaged in a recreational activity."); *Sievert v. American Family Mut. Ins. Co.*, 190 Wis.2d 623, 528 N.W.2d 413, 415 (Wis. 1995) ("In deciding the applicability of the recreational immunity statute, the court must first determine whether the activity in which Robert Sievert was engaged at the

time of his injury is within the statutorily defined phrase ‘recreational activity’.”)

The Wisconsin Supreme Court addressed this issue in *Sievert*, 190 Wis.2d 623, finding that an injury that occurred while walking across land used for recreational purposes did not mean that the injured person was using the land for recreation.

[W]e do not agree with [the defendant] that the characteristics of the property on which [plaintiff] was injured are determinative. [Plaintiff]'s act of walking onto the Pierres' dock does not become a recreational activity merely because the Pierres' property was used by the Pierres for recreational (as well as other) activities. Nor was the activity recreational under the statute because it occurred on a dock, a structure ordinarily used for boating, fishing and swimming, all of which are identified as recreational activities in sec. 895.52(1)(g), Stats. 1991-92. As *Linville* teaches, the test to determine whether an activity is recreational focuses on the "nature of the activity," not the nature of the property. *Linville*, 184 Wis.2d at 716, 516 N.W.2d 427.

Furthermore, the *Linville* test does not assess the activity of the property owner. Thus, we disagree with [defendant's] contention that Everett Pierre's activity at the time of the accident is significant in resolving whether [plaintiff]'s activity was recreational under the statute. The delineation of an activity as recreational does not turn on the nature of the property owner's activity but rather on the nature of the property user's activity.

Sievert, 528 N.W.2d at 416-417.

Other courts have also addressed the question of what is “recreation”, and have found limitations on the reaches of the recreational immunity statute. See, e.g., *Rintelman v. Boys & Girls Clubs of Greater*

Milwaukee, Inc., 707 N.W.2d 897, 905 (Wis.App. 2005) (the "mere presence on property suitable for recreational activity when a plaintiff is injured does not, *ipso facto*, make applicable [the Wisconsin immunity statute]"); *M.M. v. Fargo Public School Dist. No. 1*, 2010 ND 102, 783 N.W.2d 806 (N.D. 2010) (students are not engaged in "recreation" under the immunity statute while attending school); *Kappenman v. Klipfel*, 2009 ND 89, 765 N.W.2d 716 (N.D. 2009) (traveling on public roads is not recreation); *Liberty v. State Dept. of Transportation*, 342 Or. 11, 148 P.3d 909 (Or. 2006) (traveling through public lands to get to a place where recreation is to occur is not recreation); *Leet v. City of Minot*, 2006 ND 191, 721 N.W.2d 398, 406 (N.D. 2006) ("[T]he plain language of the statute is not so broad as to include a person present on the property for purposes of the person's employment.").

Based on the strict reading of the statute, and giving its words plain meaning,¹⁸ Jon was not engaged in recreation as a matter of law at the time that Jon's claim arose – since, once injured, Jon was no longer engaging in recreation. And at that time, Jon did not yet have a claim for negligence against the City. His claim for negligence does not arise or ripen until he suffered damages as a result of the City's failure to

¹⁸ When we interpreting a statute, the Court is to give effect to the plain meaning of the statutory language. *Cherry v. Municipality of Metro Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991).

supervise and patrol the park and rescue him. While Jon had admittedly engaged in recreation on the land and this recreation gave rise to his paralysis, the complained of conduct against the City in Counts 2&3 of the complaint are not in relation to the recreational use of the property, instead, the Counts 2&3 of the Complaint are in relation to conduct by the City after Jon was injured and no longer using the property for recreation. (CP 1-8, Complaint)

ii. 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 (CP 1-8, Complaint) 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. Jon was present on the land, but his claims under Counts 2&3 of the Complaint do not stem from his "use" of that land.¹⁹ (CP 1-8, Complaint)

While Washington courts have not specifically addressed this issue, the Wisconsin Supreme Court has, and has held that functions such as "rescue and treatment" are not granted immunity under the recreational use statute.

¹⁹ Jon's paralysis stemmed from the use of the land, but his claims for failure to supervise, patrol and rescue do not.

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). The court explained:

To interpret the language of sec. 895.52(2)(b), Stats., to include injury resulting from negligent rescue and treatment by the paramedics in this case, would produce absurd consequences.

Consider the hypothetical given to the defendants at oral argument. The defendants were asked if a health care provider employed by the City would be immune if he or she provided negligent medical care to David once David was transported to the hospital. The defendants answered that both the health care provider and the City as its employer would still be immune under the statute. Their claim is that the immunity provided by the statute stems from the activity, and that the immunity spills over to negligent behavior by any City employee (regardless of their connection to the recreational land) who provides medical services to David for injuries sustained while recreating. Such services could conceivably take place days or even weeks after the recreational activity, at facilities far removed from the site of recreation, and by persons in no way connected to the land on which the accident occurred. Such a result is absurd. . . .

The more rational result, consistent with the focus and purpose of the statute, is to immunize from liability only the landowner who is the same entity under the law as the employer of the persons whose alleged negligence caused injury. We hold that the City as landowner and the City as employer of the paramedics are not the same entity for purposes of the recreational immunity

statute, and therefore the City is not immune from liability for the negligence of its paramedic employees.

The City has two distinct roles here. First, it owns the Pond. In this role, it is entitled to immunity from suits claiming that the Pond was negligently maintained or that the City's or its employees' (whose employment is connected to the Pond) actions with respect to the Pond were negligent. . . .

On the other hand, the City operates its paramedic services for the public benefit of providing emergency medical treatment. It does not operate these services for any reason connected to the Pond. It is mere coincidence that the City is both owner of the Pond and provider of public rescue and medical treatment services. Further, the paramedics' employment, as employees of the City in this capacity, is unrelated to the Pond. The paramedics provide emergency medical treatment in every part of the City, no matter the situs. Thus the City's rescue attempts and medical treatment are separate and apart from the City's ownership of or activities as owner of recreational land. We therefore conclude that the City as the paramedics' employer is not immune from the Linvilles' claims of negligent rescue and medical treatment.

Accordingly, we affirm the court of appeals' denial of recreational immunity under sec. 895.52(2)(b), Stats., to the paramedics and the City for negligent rescue and treatment. In light of this conclusion, a genuine issue of fact exists with respect to whether the City and the paramedics were liable for negligent rescue and treatment of David, and therefore summary judgment was improperly granted by the circuit court.

Linville 184 Wis.2d at 720-724, 516 N.W.2d 427, 432-433. *Cf. Kosky v. International Ass'n of Lions Clubs*, 210 Wis.2d 463, 475-77, 565 N.W.2d 260 (Wis.App. 1997) (activities giving rise to injury not related to condition of land, but to detonation of fireworks).²⁰

²⁰ The Oregon Supreme Court has also recognized "use of the land" as being a material part of their recreational immunity statute:

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 therefore unrelated to the condition of the property). The same reasoning applies regardless of whether the City of SeaTac is the landowner and also performing the functions of the third party.

Similarly here, and although Jon had entered the land for the purpose of engaging in recreation, at the time that his claims for the cardiac and lung injuries arose, he was no longer using the land for the purpose of outdoor recreation. Jon was simply present on the land, and his claims arise from the City's negligent conduct unrelated to the maintenance or condition on the land. Instead, Jon's claims relate to the failure to act (i.e. a failure to supervise, patrol and rescue). The statute is not meant to insulate the landowner for all conduct that occurs on the land – only conduct for which the user engages that is in fact a recreational use of the land. To read the statute to grant immunity for negligent actions that are unrelated to the actual use of the land or that relate to a physical

[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, 655 (Or. 2009) (emphasis in original).

condition on the land would unnecessarily broaden the statute well beyond the limited purposes that was enacted.

Furthermore, if the Court were to broaden the scope of the recreational immunity statute, it would render the exception for “known dangerous, artificial, latent conditions” superfluous because it make the exception irrelevant in cases involving the conduct of others after an initial injury has occurred. The California Supreme Court recently addressed a similar issue in *Klein v. United States*:

The second reason [for finding that recreational immunity does not extend to all conduct such as actions based on vehicular negligence arising on public land] is based on a comparison of the statutory language describing the safe-premises and hazard-warning immunities. It is a general rule of statutory construction that “[w]hen one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.” . . . Had the Legislature intended to extend the liability shield to negligently conducted activities, such as dangerous driving, it could simply have provided, in the first paragraph, that a landowner owes no duty of care to avoid, prevent, remedy, or give any warning of hazardous conditions, uses, structures, or activities, on the land. The Legislature did not do so. Instead, it selected language carrying a strong implication that the safe-premises immunity is narrower than the hazard-warning immunity, and does not extend to unsafe activities such as negligent driving of a vehicle.

The third reason relies on another statutory construction principle, that courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous. . . .The broad construction of the safe-premises immunity provision that the United States urges us to adopt would violate this rule. The duty to ‘keep the premises safe’,

as the United States views it, encompasses not only the duty to prevent or remedy hazardous *conditions* on the property, and possibly also to guard against criminal activity by third parties, but also the duty to use due care in the conduct of *any* activity on the property. In other words, the United States would have us construe the language in Civil Code section 846's first paragraph absolving landowners of the duty 'to keep the premises safe' as absolving landowners of any duty of care to avoid personal injury to recreational users of their land. But such a broad reading of the safe-premises immunity would encompass tort claims based on a failure to warn of potentially dangerous activities because, as to such activities, a landowner can 'keep the premises safe' either by conducting the activities in a safe manner or by warning others of the risks posed by those activities. Therefore, it is not reasonable to construe the phrase 'keep the premises safe' as encompassing one of those alternative safety approaches but not the other. Unless the phrase 'keep the premises safe' is construed narrowly to mean preventing or remedying dangerous physical conditions on the property, the alternative expansive construction renders superfluous the separate liability shield for failures to warn of hazardous activities. To give independent meaning and purpose to Civil Code section 846's hazard-warning clause, we construe Civil Code section 846's safe-premises clause more narrowly to encompass only premises liability claims arising from alleged breaches of property-based duties.

Klein v. United States, 50 Cal.4th 68, 79-81, 235 P.3d 42 (Cal 2010)

For the same reasons, the recreational use statute should not apply to Complaint Counts 2 & 3 alleging negligence. (CP 1-8, Complaint).

2. Jon Wilkerson has an Actionable Claim against the City

In order to have an actionable claim, Jon must set forth the existence of a duty that extended from the City of SeaTac. After recreational immunity, this was the only issue raised by the City's Motion

for Summary Judgment.²¹ Thus, Jon must show the existence of a Duty, or, raise a question of fact regarding the existence of a duty.

The City of SeaTac knew that it did not regularly supervise or patrol the Park (CP 632-746 Opposition to MSJ, Ex 3: Dep Tr. C. Ledbetter at CP 685, (p.58) lns 1-25) but failed to inform Park users, including Jon.²² However, Jon reasonably relied on the representations that the City of SeaTac made as he entered the land – that there were precautions in place (i.e. monitoring/patrols) such that if he was hurt, he would not be abandoned in an unconscious state, especially not overnight in the Park. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶¶ 18-21, 660, ¶27)

i. By their Representations the City of SeaTac created a Duty to Jon

In its Motion for Summary Judgment, the City set forth the four exceptions to the public duty doctrine under *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785-86, 30 P.3d 1261 (2001), including (3) the failure by governmental agents to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff and (4) a special relationship between a plaintiff and the government stemming

²¹ The issues of breach, proximate cause and damages were not raised or contested by the Defendant City's Motion for Summary Judgment.

²² Later, the City of SeaTac changed their warning signs to let the public know that riders were at their own risk and that the trails off the pave path are not maintained. (CP 444, Dep. Tr. Ledbetter., p.61, lns 3-35 and p.62 lns 1-13).

from explicit and/or inherent assurances. (CP 585-594, Motion for Summary Judgment)

ii. The City of SeaTac gratuitously assumed a duty to Plaintiff by its explicit and inherent assurances regarding the supervision and patrolling of the Park.

As a general rule, “one who undertakes to act in a given situation has a duty to follow through with reasonable care, even though he or she had no duty to act in the first instance.” *Borden v. City of Olympia*, 113 Wn. App. 359, 369, 53 P.3d 1020 (2002). In *Borden*, the City of Olympia claimed that it did not owe a duty of due care to plaintiffs in that case because it did not actively participate in the drainage project at issue in the case; it only approved and permitted plans submitted by the developer. After citing the general rule quoted above, the Court rejected this argument stating:

A City does not undertake to act if it goes no farther than reviewing and permitting a project submitted by a private developer, but in our view it does if it actively participates in designing and funding the project. A trier of fact could find from the record here that the City “actively participated for nearly two years in the ongoing planning and problem-solving process;” that the City “provided considerable hydrologic modeling and technical review;” and that “[n]early all of this work was in excess of [the City's] typical ‘consultant’ role.” A trier of fact could also find that the City paid a substantial portion of the project's cost. These facts are sufficient to support a finding that the City actively participated in the 1995 project, and, if such a finding is made, that the City owed a duty of due care.

Borden 113 Wn.App. at 369-370 (footnotes and citations omitted).

This issue has also been recently addressed by the Indiana Court of Appeals.

In *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 769 (Ind.Ct.App.1986), *modified on denial of reh'g* 521 N.E.2d 981 (Ind.Ct.App.1988), *trans. denied*, we determined premises liability of a tavern owner for injuries to patrons does not extend to third persons beyond the boundaries of the tavern's premises. However, we noted a tavern owner could assume a duty to persons beyond the boundaries of a tavern. In *Ember*, a bar patron was beaten by three men outside the bar. We reversed summary judgment for the bar, finding genuine issues of material fact as to whether the bar gratuitously assumed a duty to its patron after he left the premises.

We noted the bar took several affirmative actions that revealed its intent to gratuitously assume a duty. It distributed flyers encouraging local residents to call about disturbing conduct by bar patrons. The flyers expressed the bar's concern if something in the neighborhood was disturbing residents "even if it doesn't pertain to" the bar. *Id.* at 770. 'Thus, the Pub contemplated wide dissemination of a broad offer of help to persons in the vicinity of its business.' *Id.* The bar had assured neighborhood residents its staff would patrol the parking lots 'in the area.' *Id.* A security officer from the bar had in fact helped with a neighborhood problem even though it had nothing to do with the bar and occurred down the street. The bar wrote to the Alcoholic Beverage Commission detailing the steps it had taken to preserve peace and order in the vicinity of the bar, and it employed security guards outside the bar. 'Thus, the Pub's representations and conduct do give rise to the reasonable inference that it assumed a duty to patrol the area surrounding its premises and to protect persons (including patrons) within that vicinity from criminal activity.' *Id.*

Schlotman v. Taza Cafe, 868 N.E.2d 518, 523-524 (Ind.App. 2007)

Here, as in *Borden* and *Ember*, the City gratuitously assumed a duty by the written representations that it made, particularly when placed in the context in which they were made. The City of SeaTac operates and maintains a Park with: 1) a fenced-in parking lot (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 658, ¶¶6-10, and Attachs 1-2 at CP 662-663); 2) a fence that appears to extend around the entrance to the Park in both directions (North and South), such that the entire Park appears fenced in (*Id* at CP 658 ¶7); 3) a padlock on the swinging gate to the fence (*Id* at CP 658 ¶8), indicating that the gate to the Park parking lot can be shut and locked; and 4) in the parking lot, as one enters the trail into the Park, a large white sign guards the entrance and affirmatively states that:

The Park is patrolled by the City of SeaTac

The Park is operated by the City of SeaTac

Park is closed from dusk to dawn

Parking is only permitted during Park hours

Unauthorized vehicles will be impounded

(CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658, ¶¶11-12 and Attachments 3-6 at CP 664-667)

The Defendant City's Parks Director also agreed that the sign indicating that the park is operated by the City means that the City is responsible for the park:

- Q. The next line is “Park is operated by City of SeaTac parks and Recreation Department.”
What does “park is operated” mean to you?
- A. That the City of SeaTac Parks and Recreation Department is responsible for the park.

(CP 443 Dep. Tr. C *Ledbetter* at p.59, Lns. 4-8)

These affirmative representations in the context of a secured entry Park, convinced Jon to enter the Park with the reasonable belief that there was supervision and public safety. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶21). And, as Jon believed that the Park had closing hours and would be patrolled, he needn’t bring his cell phone with him, and if something happened to him, help would be available. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶21).²³

Instead of fulfilling its representation to park users that it patrolled the Park, the Defendant City did not. And, despite the known existence of a bike park and jump section and knowledge that a number of bike riders had been seriously hurt bicycling or taking jumps at the Park (prior to Jon’s injury),²⁴ the City undertook no effort to look for injured park users,

²³ Jon testified through his declaration that he would likely not have taken the jump in the first place (without having a friend present), had he not been given indications that the Park was safe and patrolled by the City of SeaTac. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶16, ¶18). And he testified that he would not have taken the jump had he known that if he was injured and immobile, that he could be left abandoned in the Park overnight. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶21).

²⁴ CP 632-746 Opposition to MSJ: Ex B Davis Decl, Attach 6 thereto: *Wiwel Dep* at CP 700 (p.14) lns. 22-25, (p.15) lns. 1-14, (p.16) lns. 16-18, CP 701 (p.17) lines 7-13, CP 702 (p.22) lns. 11-23, CP 703 (p.26) lns 2-7, 23-24, CP 704 (p.35) lns 14-25, CP 705 (p.

even when a vehicle was seen unattended in the Park parking lot after closing hours. According to the incident report, a high ranking, management level City employee (the Fire Department Battalion Chief) admitted that Jon's car was seen in the parking lot 2 days prior to Jon being found. (CP 632-746 Opposition to MSJ: Ex B Davis Decl, Attach 6 thereto: *Wiwel Dep* at CP 707 (p.47) lns 1-8, and Exhibit 8 thereto, at CP 745). And yet, the City took no action –despite the Fire Department's (and thus the City's) knowledge of at least six serious prior bicycling injuries at the Park in less than a 3 year span prior to Jon Wilkerson's injury on June 22, 2006.

By making the representations that it did make, the City of SeaTac went beyond common law duties and created a special duty to supervise and patrol the Park for the safety of its invitees. As a result, it then had to follow through and exercise reasonable care in fulfilling that duty.

iii. Duty to Rescue

The Defendant City acknowledges that it was aware that Jon's vehicle was left unattended overnight in the Park parking lot (and thus remained long after the Park had closed). In fact, the City of SeaTac Fire Department Battalion Chief Richardson reported that he had seen Jon's vehicle at 1:00 am, many hours prior to Jon being found unconscious. CP

36) lns 1-3, (p.37) lns 5-24, (p.38) lns 21-25, (p.39) lns 1-14, CP 706 (p.40) lns 23-24, (p.41) lns 1, 7-10, (p.42) lns 20-21, (p.43) lns 5-13.

632-746 Opposition to MSJ: Ex B Davis Decl, Attach 6 thereto: *Wiwel Dep* at CP 707 (p.47) lns 1-8, and Exhibit 8 thereto, at CP 745). The City also admitted that the City Ordinance SMC 2.45.190 makes it unlawful for a person to leave his vehicle in a park area after closing and that the vehicle will be towed. (CP 585-594, Motion for Summary Judgment at 590, lines 21-24) And, the City admitted that it had knowledge of at least six serious bicycling injuries in the Des Moines Creek Park in less than a three year span prior to Jon's injury. (CP 479-485 Dep. Tr. B. Wiwel, and CP 422-511, *Coluccio Decl. Ex.8: Incident Reports CP 500-511*)

Nevertheless, and despite one of the City's highest ranking Fire and Rescue personnel seeing an SUV left in the Park's parking lot, inside the fenced area (not outside of it or adjacent to), after 1:00 am, well after closing hours, with the bike rack down, at a time when at least six known serious bicycling accidents had occurred (see FN 24 supra), the City still asserts that it had no duty to take any action to rescue Jon Wilkerson.

The knowledge of the City with respect to bike accidents in the Park, coupled with Jon's SUV (with an empty bike rack) being left overnight in a Park that was closed (which therefore made it unlawful for his vehicle to remain there) created a duty to take some reasonable action to locate Jon. Searching a 96 acre park was not necessary. The City need only have taken reasonable steps such as proceeding down the paved trail

calling out, or visiting only those areas where past accidents had occurred (such as the “Softies jump park”) and which were known to the City as a place where riders had been seriously injured.

3. The Public Duty Doctrine should be abolished because it is inconsistent with the waiver of sovereign immunity

Under the public duty doctrine

[n]o liability may be imposed for a public official's negligent conduct unless it is shown that ‘the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.* a duty to all is a duty to no one).’

Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

Based on the law as it currently stands, a plaintiff must fall within one of the established exceptions to the public duty doctrine in order to demonstrate that he or she was owed a duty of care by a governmental entity. *See, e.g., Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). It is only once a plaintiff has established that it was owed a duty of care as an exception to the public duty doctrine that claimants can then proceed in tort against municipalities to the same extent as if the municipality were a private person. *J & B Dev. Co.*, 100 Wn.2d 299, 305-306, 669 P.2d 468 (1983).

Too often, the application of the judicially created public duty doctrine blocks plaintiffs with otherwise meritorious claims from bringing

suit merely because party being sued is a public entity. Even more egregious is the fact that the plaintiff often could prevail in his or her suit if the party being sued was a private person or corporation instead of a governmental entity. Thus, the Public Duty Doctrine creates special immunities and privileges for governmental entities that are not enjoyed by private persons and corporations. Because it creates special immunities and privileges that directly contradict the legislature's broad waiver of sovereign immunity, the Public Duty Doctrine amounts to little more than judicial legislation. For this reason, this Court should refuse to apply the doctrine in this case and instead hold Defendant City of Sea-Tac accountable for its tortious conduct to the same extent as if it was a private person or corporation as the Legislature has directed.

The Legislature abrogated sovereign immunity decades ago. RCW 4.92.090; RCW 4.96.010 (state and local governments, "whether acting in [their] governmental or proprietary capacity," "shall be liable for damages arising out of [their] tortious conduct to the same extent as if [they] were a private person or corporation"). Like private persons or corporations, the Defendants should be held to a duty of reasonable care, as defined by traditional tort principles. The public duty doctrine is inconsistent with the Legislature's waiver of sovereign immunity.

The public duty doctrine has been criticized in several opinions by former Justice Robert Utter. *See, e.g., Taylor v. Stevens County*, 111 Wn.2d 159, 172, 759 P.2d 447 (1988) (Utter, J., concurring); *Bailey v. Forks*, 108 Wn.2d 262, 267, 737 P.2d 1257 (1987) (Utter, J., writing for majority)²⁵ As Justice Utter argued in these opinions, there is no valid reason to analyze the duty of a governmental defendant any differently than that of a private defendant, especially in light of the abrogation of sovereign immunity and the statutes expressly stating that the liability of a governmental defendant shall be the same as a private defendant.

For this reason, a number of states have abrogated the public duty doctrine.²⁶ In *Leake v. Cain*, 720 P.2d 152, 159-60 (1986), for example, the Colorado Supreme Court abolished the public duty doctrine:

The major criticism leveled at the public duty doctrine rule is its harsh effect on plaintiffs who would be entitled to recover for their injuries but for the public status of the tortfeasor. . . . In apparent contravention of these statutes [abrogating sovereign immunity], the public duty rule makes the public status of the defendant a crucial factor in determining liability. Courts rejecting the public duty rule reason that proof of one of the elements in an action for negligence should not be made more difficult simply because the defendant is a public entity.

...

²⁵ See also *Chambers-Castanes v. King County*, 100 Wn.2d 275, 290, 669 P.2d 451 (1983) (Utter, J., concurring); *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 309, 699 P.2d 468 (1983) (Utter, J., concurring).

²⁶ See 38 A.L.R. 4th 1194 at § 4 (citing cases from Alaska, Arizona, Colorado, Louisiana, Nebraska, Oregon, and Wisconsin as having abolished the public duty doctrine).

Perhaps the most persuasive reason for the abandonment of the public duty rule is that it creates needless confusion in the law and results in uneven and inequitable results in practice. . . .

...
Finally, whether or not the public duty rule is a function of sovereign immunity, the effect of the rule is identical to that of sovereign immunity. Under both doctrines, the existence of liability depends entirely upon the public status of the defendant. The doctrine of sovereign immunity was abrogated in *Evans v. Board of County Commissioners*, 174 Colo. 97, 482 P.2d 968 (1971). Nothing in the provisions of the statutes dealing with governmental immunity . . . leads us to conclude that the General Assembly intended to reintroduce a concept so closely related to absolute sovereign immunity. Quite the contrary, [the statute] instructs courts to resolve the plaintiff's claim without regard to the public status of the defendant.

Accordingly, we reject the public duty rule in Colorado.

See also Schear v. Board of County Commissioners, 687 P.2d 728, 731, 734 (N.M. 1984) (abolishing public duty doctrine in New Mexico).

While the exceptions to the public duty doctrine are satisfied in this case, and the City owed a duty of reasonable care to Jon Wilkerson, it should not be necessary to go through this analysis in order to establish the City's duty. The public duty doctrine should be abolished.

VI. CONCLUSION

With respect to Jon Wilkerson's claim for negligence Count 1, summary judgment in favor of the Defendant City was inappropriate since the recreational use statute does not apply (either because of the existence of a known, dangerous artificial condition or because of willful and

wanton conduct). With respect to Appellant Jon Wilkerson's claims for negligence under Counts 2&3 of the Complaint (by the City's failing to supervise the Park and for failing rescue him after his injury), the recreational use statute also does not apply to immunize the City and instead, the Court should find that a common law duty does exist in relation to Jon Wilkerson (and the peculiar facts of this case or the overruling of the public duty doctrine).

Respectfully submitted this 8th day of June 2011.



Noah Davis, WSBA #30939
Attorney for Jon Wilkerson,
Appellant
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104
206.709.8281

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COURT OF APPEALS
DIVISION ONE
MAY 09 2011

No. 66524-3-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

JON L. WILKERSON, Appellant,

v.

CITY OF SEATAC, Respondent.

BRIEF OF APPELLANT

NOAH DAVIS, WSBA #30939
Attorney for Jon Wilkerson,
Appellant
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104
206-709-8281

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<i>Kappenman v. Klipfel</i> , 2009 ND 89, 765 N.W.2d 716 (N.D. 2009).	33
<i>Klein v. United States</i> , 50 Cal.4th 68, 235 P.3d 42 (Cal. 2010).	38-39
<i>Kosky v. International Ass'n of Lions Clubs</i> , 210 Wis.2d 463,	

565 N.W.2d 260 (Wis.App. 1997).	31, 36
<i>Leake v. Cain</i> , 720 P.2d 152 (Colo. 1986).	49
<i>Leet v. City of Minot</i> , 2006 ND 191, 721 N.W.2d 398, 406 (N.D. 2006).	33
<i>Liberty v. State Dept. of Transportation</i> , 342 Or. 11, 148 P.3d 909 (Or. 2006)	33
<i>Linville v. Janesville</i> , 184 Wis.2d 705, 516 N.W.2d 427 (1994).	32, 35-36
<i>M.M. v. Fargo Public School Dist. No. 1</i> , 2010 N.D. 102, 783 N.W.2d 806 (N.D. 2010)	27, 33
<i>Rintelman v. Boys & Girls Clubs of Greater Milwaukee, Inc.</i> , 707 N.W.2d 897 (Wis.App. 2005).	32
<i>Schear v. Board of County Commissioners</i> , 687 P.2d 728, 734 (N.M. 1984).	50
<i>Schlotman v. Taza Cafe</i> , 868 N.E.2d 518 (Ind.App. 2007).	42
<i>Sievert v. American Family Mut. Ins. Co.</i> , 190 Wis.2d 623, 528 N.W.2d 413 (Wis. 1995).	31-32

B. Constitutional Provisions

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C. Statutes

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WIS. STAT. § 895.5234, 36, 38

D. Other Authorities

Webster's Third New International Dictionary 124 (1986).16

I. INTRODUCTION

Appellant Jon Wilkerson was seriously injured in a bicycle accident at the Des Moines Creek Park on June 21st, 2006. After crashing and landing on his head, Jon lay motionless until being found by other park users the next day. Jon Wilkerson brought suit in the King County Superior Court against the City of SeaTac for, inter alia, negligence and the failure to rescue. The Honorable Michael Hayden dismissed Plaintiff's case in two stages (in response to two separate Motions for Summary Judgment) – which also now correspond with the two assignments of error.

II. ASSIGNMENTS OF ERROR

No. 1 The trial court erred in entering the order of October 19, 2010, granting the defendant's motion for summary judgment re: recreational use immunity and dismissing the Plaintiff's claims (CP 569-571), and denying the plaintiff's motion for reconsideration (CP 631).

No. 2 The trial erred in erred in entering the order of December 10, 2010, granting the defendant's motion for summary judgment re: duty to rescue and dismissing the Plaintiff's claims. (CP 756-758)

Issues Pertaining to Assignments of Error

No. 1 Did the trial court incorrectly grant summary judgment dismissal of Count 1 of the Complaint based on the recreational use statute where (a) genuine issues of material fact exist as to whether the hazardous

conditions causing Jon Wilkerson's injury was latent and (b) genuine issues of material fact exist as to whether the City's conduct in failing to clear, maintain or warn of the lack of maintenance at the bike park was willful and wanton such as to rise to intentional conduct? (Assignment of Error 1)

No. 2 Did the trial court incorrectly grant summary judgment dismissal of Jon Wilkerson's negligence claims under Counts 2&3 of the Complaint based on the recreational use statute when the Plaintiff Jon Wilkerson was not engaging in recreation (nor claiming injury from a use of the land) at the time his claims under Counts 2&3 of the Complaint arose; and (b) the Defendant City of SeaTac's representations to Jon Wilkerson created a duty (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. Events leading up to Jon Wilkerson's injury

In June of 2006, Jon Wilkerson had just arrived in Washington by way of Arkansas to take a job as a physical therapist (CP 524-542, *Wilkerson Decl.* at 524 ¶1). During an off day Jon decided to go bike riding in preparation for a later trip to Whistler with friends. (CP 524-542 *Wilkerson Decl* at 1, ¶2) However, as Jon was unfamiliar with bike parks in Washington, he decided to ask at a local bike shop (where he had gone to buy a helmet). (CP 524-542, *Wilkerson Decl.* at 525, ¶¶8-9) Jon was

told by a Kent bike shop manager that there was a popular area in the Des Moines Creek Park (“the Park”) with man-made jumps known as the “softies”. (CP 524-542, *Wilkerson Decl.* at 524 ¶3).

On June 21st, 2006, Jon traveled to the Park in his Ford Expedition with his bike hitched to the rack on the back. (CP 524-542, *Wilkerson Decl.* at 525, ¶10) Upon arrival, the first thing that Jon noticed was that the parking lot was fenced-in. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at CP 658 ¶6). The fence extended around the entrance to the Park in both directions (North and South) and it appeared to Jon that the entire Park was fenced in. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658 ¶7)¹ Jon also saw that the Park’s parking lot had a swinging gate with a padlock attached. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658 ¶8).

After parking his car in the Park’s small parking lot, Jon saw and read a large white sign that was posted in the parking lot at the entry to the paved bike trail. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658 ¶11) The sign read, in relevant part:

The Park is patrolled by the City of SeaTac
The Park is operated by the City of SeaTac
Park is closed from dusk to dawn
Parking is only permitted during Park hours

¹ See also CP 448, Ex. 6 (Photo) to Dep. Tr. of C Ledbetter.

Unauthorized vehicles will be impounded

(CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658 ¶12)²

Based on the sign and the fence, Jon believed that in case he needed assistance he would be safe with the patrols that would be monitoring the Park. (CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 659 ¶14). As a result, he also decided to leave his cell phone in the car. (CP 632-746, *Wilkerson Decl.* at 659 ¶15).³ However, and despite all the signals that it did, the City of SeaTac did not actually maintain the bike park and its jumps.⁴

B. The Softies

After riding around the park on a couple of the “single-tracks” for a short while, Jon located “the Softies” area. (CP 524-542, Decl J. Wilkerson, at 525, ¶11) Jon looked generally over the series of dirt jumps and “rolled” over some of the jumps. (CP 524-542, Decl. of J. Wilkerson, at 525, ¶12). However, all of the other actual jumps were too big and

² CP 449 (Photo), Attached to *Coluccio Decl.*: CP 422-511). The park is closed from dusk to dawn. (CP 422-511, *Coluccio Decl.*, Ex. 2. Dep. Tr. C Ledbetter at CP 443, Lns 15-24). And, the City of SeaTac does operate and is responsible for the park (CP 443 Dep. Tr. C Ledbetter Lns 4-14). Also, a City official reported that a motorcycle officer drives down the trail. (CP 443 Dep. Tr C. Ledbetter, Pg 59 Lns 1-3).

³ After reading on the sign that the Park closes at dusk, it was also Jon’s belief that, at dusk, the parking lot gate would also be shut and locked by Park workers. (CP 632-746 Opposition to Summary Judgment, *Wilkerson Decl.* at 658, ¶13).

⁴ (CP 422-511, *Collucio Decl.* Ex. 3: Dep Tr. R. Chouinard at CP 457 (p30) Ln 1-4; CP 422-511, *Collucio Decl.* Ex. 4: Dep. Tr. J. White at CP 463 (p.10) Lns 7-19).

imposing for Jon, and outside his comfort and skill level. (CP 524-542, *Wilkerson Decl.*, at 525, ¶13)

Although Jon was an avid bike mountain bike rider who had some experience taking dirt jumps on a mountain bike, he was by no means an expert. (CP 524-542, *Wilkerson Decl.*, at 525, ¶5; CP 544-545, *Carson Decl.* ¶¶5-8). And, he was far from being an expert dirt bike jumper. (CP 524-542, *Wilkerson Decl.* at 525, ¶¶6-7; CP 544-545, *Carson Decl.* ¶¶5-8). In fact, Jon had only some experience with dirt jumps. (CP 524-542, *Wilkerson Decl.*, at 525, ¶¶4,7; CP 544-545 *Carson Decl.* ¶¶5-8)

As he looked over the jumps, he saw amid the bigger jumps, a smaller jump (which had a crevice or drop in the middle) known as a gap jump and felt that this jump was within his abilities. (CP 524-542, *Wilkerson Decl.* at 525, ¶¶14-16)

Q Did you have any concerns about your ability to accomplish the jump before you attempted the jump?

A No.

Q So, you were confident that this was not something that was over your head so to speak?

A No, this was within my skill set.

(CP 422-511 Coluccio Decl, Attach 1: Dep Tr. J. Wilkerson, at 432 (p.36)

Line 25, (p.37) Lines 1-5)

Jon looked over the jump, including the size of the jump (and the pitch of the ramp) as well as the size of the gap and thought everything

looked ok and believed that he would have no trouble clearing the jump. (CP 524-542, *Wilkerson Decl.* at 525, ¶¶15-16). However, what Jon did not notice, see or appreciate was the S-curved, angled lead-in to the jump. (CP 524-542, *Wilkerson Decl.* at 526, ¶25) And Jon this was not something that would be apparent to a rider of Jon's skill level. (CP 413-420, *Morris Decl.* at CP 416¶1-3; CP 547-556, *Bridgers Decl* at CP 553 ¶25: "not obvious").

Jon did not see any condition or know that there was some condition that would make this jump a more technical jump than the bigger jumps that he chose not to take (CP 524-542, *Wilkerson Decl.* at 526, ¶28, 527, ¶¶28-34; CP 547-556, *Bridgers Decl* at CP 553 ¶¶22, 24; CP 413-420, *Morris Decl.* at CP 417 Lns. 4-14) – and thus take the jump from one which was in Jon's skill set to one which would was not a beginner jump and thus outside his skill set. (CP 524-542, *Wilkerson Decl.* at CP 525, ¶13, at CP 526 ¶28, at CP 527 ¶28; CP 433 Dep. Tr. J. *Wilkerson* (p.41) Lns. 8-25, (p.42) Lns 13-23)

C. The Approach to the Jump

Believing the jump to be a less advanced jump (and within his skill set) (CP 524-542, *Wilkerson Decl.* 526, ¶21), Jon went up to the top of little bit of a hill to begin the run into the jump., CP 432 Dep. Tr. J. *Wilkerson*, p.36 Lns 11-13) However, as he came down from the

approach leading into the jump, he was first forced to turn left, then back right, then left. (CP 524-526, *Wilkerson Decl.* at 527, ¶¶31-32 and Attachments 4,5,6 at CP 535-540; CP 512-522, *Iftner Decl. Attach 2* at p.4 ¶4; CP 547-556, *Bridgers Decl* at 551 ¶18; CP 413-420, *Morris Decl* at CP 416 Lns 17-21).

This series of subtle but quick turns require a rider to re-align himself and his bike as he rides down the ramp towards the jump which in turn affects the rider's speed. (CP 547-556, *Bridgers Decl.* at 551 ¶18; CP 413-420 *Morris Decl.* at CP 416, Ln 12 CP 512-522; *Iftner Decl. Attach 2* at p.4 ¶4).⁵ If the rider does not have enough speed going into the jump, he can "case" the jump (i.e., crash). CP 413-420 *Morris Decl.* at 416 Lns. 4-11; CP 524-542, *Wilkerson Decl.* at 527, ¶33; CP 430 Dep. Tr. J. *Wilkerson* p.33 Lns 24-25, p.34 Lns 1-2) The speed necessary to clear the jump was determined to be 16.4 m.p.h. (CP 512-522, *Iftner Decl. Attach 2* at p.4 "Opinions"). This was a speed that a rider (like Jon), on a more probably than not basis, would not attain on their first jump. CP 512-522, *Iftner Decl. Attach 2* at p.4 "Opinions".⁶

⁵ The angled entry also has an effect on the mechanics of the body (and the physics of making the jump). (CP 547-556, *Bridgers Decl.* at 550-51 ¶16; CP 413-420 *Morris Decl.* at 416 Ln 12). To account for the subtle turns, the rider approaches the jump with less speed than is needed to clear the jump. (CP 547-556, *Bridgers Decl.* at 552 ¶20; CP 512-522, *Iftner Decl.* at p.4 "Opinions").

⁶ See CP 413-420, *Morris Decl.* at 415: "I have come to the conclusion that it was not the jump itself that caused Jon to crash, but the curvy nature of the lead-in, or approach, to

D. The Jump and the Crash

Jon felt that he did everything right when he took the jump, and he should have cleared the relatively small gap. (CP 524-542, *Wilkerson Decl.* at 527, ¶32). But, something unexpected happened and Jon didn't clear the jump. (CP 524-542, *Wilkerson Decl.*, at 527, ¶31-35; CP 429 Dep. Tr. J. Wilkerson, p.28. Lines 7-24) Jon's back tire hit the landing jump (CP 524-542, *Wilkerson Decl.* at 527, ¶34; CP 429 Dep. Tr J. Wilkerson, Pg. 28, Lines 7-24), and Jon was propelled up over the handlebars, landing on the top of his head. (CP 524-542, *Wilkerson Decl.*, Pg. 4, ¶34; CP 433 Dep. Tr J. Wilkerson, Pg. 47, Lines 8-22).

This was because it was more likely than not that Jon was not able to reach the speed necessary to clear the jump (16.4 m.p.h) (CP 512-522, *Iftner Decl.* Attach 2 at p.4 "Opinions"; CP 547-556, *Bridgers Decl* at CP 552 ¶20) While Jon testified that a rider normally knows the speed necessary to roll into a jump (see Dep. Tr. J. Wilkerson, pg 27, Lines 3-11), what wasn't known or apparent to Jon was that in order to get lined up with this jump,⁷ Jon would have to maneuver through an S-curved, kinked approach. (CP 524-542, *Wilkerson Decl.* at 526, ¶25; CP 547-556, *Bridgers Decl.* at 551 ¶18 CP 413-420; CP 512-522, *Iftner Decl.* Attach 2

the jump itself that caused the crash, which more probably than not reduced his speed enough to prevent him from successfully completing the jump."

⁷ Jon believed that he had been properly lined up. (CP 429 Dep. Tr. Wilkerson, Pg. 29, Lines 2-12)

at p.4 “Opinions”) The result was that Jon’s inability to clear the jump followed by the crash and the spinal cord injury that left him paralyzed and helpless. (CP 524-528 *Wilkerson Decl.* at CP 527 (p.4) ¶35; CP 434 Dep. Tr. J. Wilkerson p.47 lines 3-7)

Q Let’s talk about speed. If you hadn’t been going fast enough to carry the distance, that could have caused your back wheel to drop down, correct?

A Yes

(CP 430 Dep. Tr. J. Wilkerson, pp 33-34, Lines 24-25, 1-2).

E. The next 18 hours

Unable to move, and realizing the serious nature of his injuries, Jon began calling out for help. (CP 632-746 Opposition to Summary Judgment, *Wilkerson Decl.* at CP 660, ¶25.) Jon knew he wasn’t far from the paved trail that ran through the center of the Park as he called for help. (CP 632-746 Opp. To Summary Judgment, *Wilkerson Decl.* at CP 660, ¶26) Believing the Park to be patrolled and supervised, Jon believed that one of the patrols would hear him and someone would find him shortly. (CP 632-746 Opp. To Summary Judgment, *Wilkerson Decl.* at CP 660, ¶27) But after calling out for some time, Jon lost consciousness. (CP 632-746 Opp. To Summary Judgment, *Wilkerson Decl.* at CP 660, ¶28).

Over the next approximately 18 hours, Jon laid motionless next to the jump. (CP 632-746 Opp. To Summary Judgment: *Wilkerson Decl.* at

CP 660, ¶29; and *Incident Report, Dated June 22, 2006*, Ex. 8 to *Wiwel Dep.*, at CP 742, 745) His Ford Expedition, with bike rack down (but no bike) remained throughout the late afternoon, evening, night and morning in the parking lot at the entrance to the Park. (CP 632-746, *Wilkerson Decl.* at CP 660 (p.4) ¶31).

As a result of being left out in the Park, Jon's body temperature dropped so much that when he was found, he was in a hypothermic state. (CP 632-746 Opp. To Summary Judgment: *Incident Report, Dated June 22, 2006*, Ex. 8 to *Wiwel Dep.*, at CP 745: "Pt was probably injured 48 hrs earlier, due to Low temp, 78 & cold.") Thereafter, Jon went into cardiac arrest. (CP 632-746, *Wilkerson Decl.* at CP 660 (p.4) ¶30).

And, as a result of the cardiac arrest, Jon received emergent care that resulted in a lacerated lung during the procedure. (CP 1-8 Summons and Complaint at CP 5, ¶¶27-28)

III. SUMMARY OF ARGUMENT

Appellant Jon Wilkerson's Complaint asserted that the Defendant City was negligent in three ways, first by failing to maintain the Softies site, clear them or to warn of its dangers (which could have prevented Jon's injury); second, by failing to supervise the Park; and third, for failing to rescue him after his injury. (CP 1-8 Complaint)

The City defended the first allegation by asserting that the recreational immunity statute precluded its liability. Appellant disagreed and asserted that either the recreational immunity statute as applied to the facts does not preclude negligence, or that factual issues remain with respect to the application of recreational immunity.

On the second and third allegations or Counts of the Complaint, the City asserts that not only does the recreational use statute provide immunity to the City but under Washington law it had no duty to rescue Jon once he was injured. Appellant argues that the City made representations which gave rise to the duty, that his car was actually seen by a City employee, and that the City should have a heightened duty of care when it is aware of injuries from biking in the park.

IV. ARGUMENT

A. Standard of Review

In reviewing a summary judgment order, the Court of Appeals engages in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Marincovich*, 114 Wn.2d at 274, 787 P.2d 562. The burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that

summary judgment is proper as a matter of law. *Atherton Condo. Assn. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The moving party is held to a strict standard since any doubt as to the existence of a genuine issue of material fact is resolved against the moving party. *Atherton Condo. Assn.*, 115 Wn.2d at 516. All facts submitted and reasonable inferences therefrom are considered in the light most favorable to the nonmoving party. *Ibid.* Where there disputed questions of fact, summary judgment is not appropriate. *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959); *see also* RCW 4.44.090 (issues of fact are to be decided by a jury – which under Article 1, § 21 of the Washington State Constitution “remain inviolate” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644, 771 P.2d 711 (1989)).

B. Assignment of Error #1: Recreational Immunity does not shield the City from liability in this case

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. The statute reads in part:

(1) [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.

....

(4) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.

RCW 4.24.210 (1), (4)

In this case, there are two reasons why RCW 4.24.210 does not apply. First, because the hazardous conditions were known, artificial, dangerous and latent. And second, because the City's conduct was willful and wanton such as to rise to an intentional act. In reviewing these arguments and RCW 4.24.210 (and the arguments which follow in part two of this brief), it also important to note that because the statute is in derogation of the common law, the statute must be strictly construed. *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 824 P.2d 541 (1992).

1. Recreational Immunity does not apply to insulate the City where, without having posted warning signs the hazardous conditions causing Jon Wilkerson's injury were known to the City, were dangerous, artificial and latent.

One fact that should not be in dispute is that there were no warning signs (regarding the softies, or any bike jumps in the park) posted before Jon's injury (CP 524-542, *Wilkerson Decl.* at 526 ¶28). Thus, the first significant issue is to identify the injury causing condition.

i. Injury Causing Condition

Under the recreational use statute, the injury-causing condition is “the specific object or instrumentality that caused the injury, viewed in relation to other external circumstances in which the instrumentality is situated or operates.” *Ravenscroft v. Washington Water Power Co*, 136 Wn.2d 911, 921, 969 P.2d 75 (1998). Our Supreme Court has held that “[i]dentifying the condition that caused the injury is a factual determination.” *Van Dinter v. City of Kennewick*, 121 Wn. 2d 38, 44, 846 P.2d 522 (1993).

In *Van Dinter*, the plaintiff was injured when his eye struck an antenna on a caterpillar-shaped playground structure. *Van Dinter* at 40. At the time of the accident, he had been engaged in a water fight on a grassy area next to the caterpillar. *Ibid.* Van Dinter claimed that the condition causing his injury was the proximity of the caterpillar to the grassy area. *Van Dinter* at 43. The defendant City argued that the injury-causing condition was the caterpillar. *Ibid.* The *Van Dinter* court, 121 Wn.2d at 44 agreed with Plaintiff Van Dinter's characterization, stating:

To view the caterpillar or some part of it, such as the antennae, as having been the injury-causing condition would be to artificially isolate some particular aspect of the total condition that caused Van Dinter's injury. We also must give Van Dinter the benefit of every reasonable inference that can be drawn from the facts. Consequently, we hold that the condition that caused Van Dinter's injury was the caterpillar's placement, rather than the caterpillar as viewed in isolation.

The *Ravenscroft* court also took a broad view of the injury-causing condition. The plaintiff in *Ravenscroft* was injured when the boat in which he was riding struck a submerged tree stump in an area of the Spokane River known as Long Lake. *Ravenscroft* at 815. The Washington Water Power Company (WWP) created Long Lake when it raised the elevation of the Long Lake reservoir. *Id.* at 915-916. When WWP did so, the trees along the banks became surrounded by water and were near the middle of the new water channel. *Id.* at 916. Years later, after the trees had died, WWP had them cut, but the remaining tree stumps remained below the water's surface when the reservoir was at the maximum level. *Ibid.* The *Ravenscroft* court held that, although the specific object that caused the injury was the tree stump, it was necessary to view the stump in relation to other external factors, such as the location of the stump in the water channel and the artificially high water level. *Id.* at 921.

Here, Appellant asserts that the injury-causing condition was the S-curved, angled approach that prevented Jon from gaining enough speed to clear the gap jump. (CP 547-556, *Bridgers Decl.* at 552 ¶¶14, 20-21); CP 512-522, *Iftner Decl. Attach 2* at p.4 “Opinions”; CP 413-420, *Morris Decl.* at 415, ¶8 Lns 9-13) If the City had contested this, then the injury causing condition is a material fact in dispute that must be resolved by the jury. Otherwise, the injury causing condition is the S-curved, angled

approach that prevented Jon from gaining enough speed to clear the jump and the Parties may move on to the next consideration – artificialness.

ii. The injury-causing condition was artificial

For purposes of RCW 4.24.210, the definition of “artificial” is its ordinary meaning. *Ravenscroft* 136 Wn.2d at 922. As defined in *Webster's*, “artificial” means “contrived through human art or effort and not by natural causes detached from human agency: relating to human direction or effect in contrast to nature: (a): formed or established by man's efforts, not by nature.” *Webster's Third New International Dictionary* 124 (1986).

For purposes of the Summary Judgment and the appeal the Defendant City admitted that the bike jumps and 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)⁸ Thus, the fact that the jumps and lead-ins to the jumps were man-made should not be in dispute. If it was, then a factual issue would remain for the jury.

iii. The City of SeaTac knew about the Softies

⁸ See also CP 413-420, *Morris Decl.* at CP 414, ¶6, Ln 21; CP 464, Dep. Tr. J. White p.13 Lns 22-25, p.14 Lns 1-2; and CP 422-511, *Coluccio Decl.* Ex. 5: Answer to Request for Admission at CP 473-474, RFA#20: The topography of the park “had been physically altered”.

The next issue for consideration under the recreational statute immunity defense is whether the City knew of the danger. It is a plaintiff's burden to prove knowledge of the condition on the part of the landowner. *Tabak v. State*, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994). If actual knowledge is denied, the plaintiff must "come forward with evidentiary facts from which a trier of fact could reasonably infer actual knowledge, by a preponderance of the evidence." *Ibid*. Actual knowledge may be established by circumstantial evidence. *Ibid*.

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 453 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. (CP 422-511, Coluccio Decl., Ex. 6 thereto: 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)⁹

For purposes of its summary judgment motion (and thus on this Appeal), the Defendant City admits that it had "knowledge" as defined

⁹ Notwithstanding that an earlier answer from the City to a Request for Admission appeared to dispute that it had notice of bikers being injured taking man-made jumps at the Des Moines Creek Park. See CP 474 Answer to RFA #24.

under the recreational use statute. (VR: p.8, Lines 21-25; CP 102-118, Def.'s MSJ at 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).

iv. The unmaintained bike jumps created a dangerous condition at Des Moines Creek Park

The next consideration then is whether there existed a dangerous condition. A condition is dangerous if it poses an unreasonable risk of harm. *Tabak v. State*, 73 Wn. App. 691, 697, 870 P.2d 1014 (1994).¹⁰ Here, two biking experts 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)

In addition to the non-obvious curved, or kinked lead-in to the jump presenting an unreasonably dangerous condition to recreational users like Jon (i.e. beginning and intermediate bikers), the bike park and jumps were dangerous because the City did not take any steps to make the Park safe (such as to re-design the jumps, clear the jumps or put up any signs or warnings that the trails were not maintained or designed by the Park).

¹⁰ See also *Unzen v. City of Duluth*, 683 N.W.2d 875, 880 (Minn.App. 2004), *review denied* (Minn. Oct. 27, 2004) (even a seemingly harmless apparatus can be dangerous and involve an 'unreasonable risk of death or serious injury where there is evidence that a condition is likely to cause death or serious bodily harm to persons).

And by the time Jon Wilkerson was injured, there had been at least six very serious biking injuries at the Park.¹¹

The City did not dispute the dangerousness of the jump at summary judgment as it relates to the recreational use statute.¹² If the City disputed “dangerousness” as it applied to the lead-in or to the jump, then an issue of fact would have arisen.

v. Genuine issues of material fact exist as to whether or not the condition that caused Jon Wilkerson’s injuries was latent.

Last is the issue of whether or not the condition that caused Jon Wilkerson’s injuries was a latent one. This is the issue which the City contested at oral argument and which the Court agreed and granted Summary Judgment on. (CP 569-571, Order of Judge M. Hayden; see also VR 10/19/10)

Generally, latency is a factual question for the jury. *Cultee v. City of Tacoma*, 95 Wn. App. 505, 522, 977 P.2d 15 (1999). “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,

¹¹ CP 422-511, Coluccio Decl., Ex. 6: 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

¹² VR p.7, Lines 10-15:

“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.”

846 P.2d 522 (1993). 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) (emphasis omitted). “[L]atency 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).

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, 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:

In this case, the driver of the boat testified by affidavit that the submerged stumps were not apparent to him. Other witnesses filed affidavits stating that other boats had hit the stumps, indicating they were not readily apparent.

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.

In *Cultee*, a young girl drowned at the Nalley Ranch owned by the City of Tacoma. There was a levee along the edge of the ranch that held back the waters of Hood Canal. The levee broke, flooding part of the east side of a road on the ranch at high tide. *Cultee* at 508. The victim, with her two cousins, visited the ranch and stopped to check the water's depth along the side of the road at a point where there was no water on the road itself. Thereafter, the road became covered with two to four inches of muddy water. The victim rode her bicycle over about eight feet of the road when she got off to turn around. As she was getting back on her bicycle, she got too close to the edge and fell in. *Id.* at 510. The court found a question of fact existed as to whether the condition was latent. It was not clear if the road edge was apparent when the victim fell into the water. There was also a question of fact as to whether the victim was killed by the depth of the water alone, or a combination of the water obscuring the edge of the road and an abrupt drop into deep water. *Id.* at 522-523. The court accordingly determined summary judgment was inappropriate.

In denying summary judgment, 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 (footnotes omitted).

In the present case, John testified that he did not see the S-curved approach to the jump. (CP 524-542, Wilkerson Decl. at 526¶25) Thus, it was not readily apparent to him. Not only did Jon Wilkerson not see the S-curve approach, but two experts also testified that the S-curved, kinked lead into the jump was not 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; see also CP 547-556, *Bridgers Decl.* at 549 ¶11: "no clear or obvious danger with the jump standing alone".)

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. This is something that Jon obviously did not notice or appreciate and which clearly had an impact on his ability to make the jump.

* * *

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)

Thus Jon was not alone as most beginning and intermediate bike jumpers would also not see or appreciate the S-curve approach and the impact it would have on their ability to clear the jump. (*Id.*; see also CP 413-420 *Morris Decl.* at 415 ¶11)¹³ Thus, evidence was submitted that the

¹³ 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; CP 413-420 *Morris Decl.* at 417 ¶16)

curved or kinked approach was not seen or noticed by Jon Wilkerson and not “apparent” or “obvious” to the beginning to intermediate biker. And thus, not “readily apparent” to the recreational user as that term is defined by the case law. As a result, it would appear that either this condition (the S-curved, kinked approach) was latent, or else, a factual issue exists as to whether or not it was “readily apparent” to recreational users.

Despite the evidence that the curved lead in (the artificial condition) was not seen by Jon and not readily apparent to recreational users,¹⁴ the trial court found that the bike path leading up to the jump was capable of being seen. (VR p.30, Lns 23-25) However, there was no evidence presented by the Defendant that the S-curve was in fact “capable of being seen”. It appears undisputed that it “may have been capable of being seen”, but the question is whether it was readily apparent to the recreational user. And, according to the trial court, there was no evidence presented that the s-curve lead in was incapable of being seen. (VR pg 30. Lns 22-23). As a result, the trial court found that no latent condition could exist. (VR pg. 32, Lns. 2-9)

¹⁴ While the magic words “readily apparent” may not appear throughout the declarations, the terms “would not be apparent” (CP 416 lns 2-3), “not visibly dramatic” (CP 553 lns 8-9) and “not obvious” (CP 553, lns. 21-22) do appear in the declarations. Thus, there is a factual question as to whether or not, and based on the evidence and the testimony, the s-curved or kinked approach, was “readily apparent” to the recreational user.

Appellant asserts that the trial court applied an incorrect legal standard for determining latency under the recreational immunity statute. The correct standard is whether or not the condition causing the injury was “readily apparent to the recreational user”, and not whether or not the condition was “capable of being seen”.¹⁵

2. Application of the Recreational Statute Does Not Apply Where Intentional Conduct is Present.

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. RCW 4.24.210(1) reads:

Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners or others in lawful possession and control of any lands . . . who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, . . .bicycling. . .without charging a fee of any kind therefor, shall not be liable for *unintentional* injuries to such users.

(Emphasis added).

While intentional conduct would include a person shoving a bystander off his bike, it also includes situations where the tortfeasor has acted *willfully or wantonly*. The City of SeaTac’s policies, actions and

¹⁵ In addition, with, as the Court concluded, the approach to the jump curved in some fashion, “it would not have been readily apparent to the biker that he could not acquire sufficient speed to clear the jump.” (VR p.30, Lns 17-20). This conclusion may also serve as a basis for denying the Motion for Summary judgment if the injury causing condition was both the curved approach and the effect on physics/speed (before the jump and the resulting injury).

non-actions in this case demonstrate willful and wanton misconduct. In *Jones v. United States*, 693 F.3d 1299 (9th Cir. 1982), in considering the recreational immunity act, the court equated the words "intentional" in RCW 4.24.210 with "willful and wanton misconduct":

The parties agree that if the Recreational Use Act is applicable, the Government's liability is measured under Washington common law definitions of willful and wanton conduct, as set forth in Washington Pattern Instruction 14.01 and in *Adkisson v. Seattle*, 42 Wn.2d 676, 258 P.2d 461 (1953). They disagree with respect to the trial court's application of those definitions to the facts of this case.

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.

The court in *Adkisson*, in distinguishing between negligence and willful or wanton misconduct, wrote:

Willful or wanton misconduct is not, properly speaking, within the meaning of the term "negligence". Negligence and wilfulness imply radically different mental states. Negligence conveys the idea of neglect or inadvertence, as

distinguished from premeditation or formed intention. 258 P.2d at 465.

Jones, 693 F.3d at 1304-1305.¹⁶

In concluding that appellants had failed to show that the Government's conduct was willful or wanton, the district court wrote:

The evidence established that the extent of the danger was not actually or reasonably known to the Government. Its failure to put up signs and ropes was negligence which proximately contributed to the plaintiff's accident but it did not constitute "an intentional failure to do an act" nor was it "in reckless disregard of the consequences." The National Park Rangers were justifiably concerned that the placing of signs might mislead people into going to other areas. The only prior accident 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. The slope itself was quite steep and the Rangers could well have thought that anyone looking at it and exercising reasonable caution would not attempt to use an inner tube on that slope.

....

. . .the condition, the natural cirque was not created by the Government and it did not reasonably know that it posed the substantial danger that we all now know exists for tubing on that slope. The court noted further that the impact of tubing and the inherent dangers involved therein were not apparent to the public or the Government on April [1]6, 1977.

¹⁶ See also *M.M. v. Fargo Public School Dist. No. 1*, 2010 ND 102, 783 N.W.2d 806, 817 (N.D. 2010) approving the following jury instruction as it relates to recreational immunity:

Willfull and wanton misconduct' requires knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; an ability to avoid the resulting harm by ordinary care and diligence in the means at hand; and the omission of such care and diligence to avert threatened danger when to an ordinary person it must be apparent that the result would likely prove disastrous to another. Willfull and wanton actions are reckless, heedless, malicious; characterized by extreme recklessness or foolhardiness; recklessly disregarding of the rights or safety of others or of consequences.

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

Unlike the *Jones* case, the facts of this case do support a finding of willful and wanton misconduct on the part of the City of Sea-Tac. In *Jones*, the danger was not actually or reasonably known to the National Park Service. In this case, high ranking City of Sea-Tac personnel admit that they knew about the Softies site, and the City had specific knowledge of riders getting injured on bike jumps at the park (CP 422-511, Coluccio Decl., Ex. 6 thereto: 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). And, despite the knowledge of an illegal bike park on its property with jumps (and the knowledge that riders were being hurt at a “bike park” on its property (See *Id.* at CP 481 (p36))), the City deliberately and intentionally chose to do nothing about correcting that danger.¹⁷

Thus, unlike the situation in *Jones*, here the City of Sea-Tac intentionally failed to take any action with regard to “the Softies” site even though it knew about these dangers. The City consciously and chose not to bulldoze the softies, not to perform some maintenance or design, or, at the very least, to simply post warning signs about the bike park and its jumps. On top of all this, and unlike the *Jones* case, there were known

¹⁷ 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, pg. 28, Lns 1-5; CP 464 Dep. Tr. of Jay White pg. 12 Lns 6-25, p. 13 Lns 1-14)

injuries at the Des Moines Creek Park from bicycle jumping accidents. (CP479-485 Dep. Tr. Acting Chief Wiwel pg. 35 Lns 22-25, pg 36 Lns 1-10, pg 38 Lns 21-25, pg 39 Lns 1-5, pg 48, Lns 21-25). Thus, Jon Wilkerson argues, the City had a duty to do something to address this known danger to protect future bikers. Instead, 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, rises to the level of reckless, willful and wanton conduct.

Given the significant differences between the *Jones* case and this case, genuine issues of material fact exist as to whether or not the City acted willfully and/or wantonly in failing to do anything to protect the users of the softies at its park. The existence of these factual differences should defeat the City of Sea-Tac's motion for summary judgment.

C. ASSIGNMENT OF ERROR #2: The Superior Court incorrectly applied the recreational use immunity statute to Jon's post accident injuries and the failure to rescue.

As discussed below, the recreational use statute does not apply to post accident claims of Appellant— relating to hypothermia, and cardiac and lung injuries— because Jon Wilkerson was not engaged in recreation when those injuries occurred and Jon was not “using” the land. There are

also issues of fact as to whether Defendant City breached its duty to Jon, and the legal issue as to whether or not the public duty is lawful.

- 1. The recreational use statute does not insulate the City from liability in this case because Jon was not using the land for “recreation” at the time his claim arose, and it is not the land which caused the injury.**

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.

At the time that Jon’s claim arose under Complaint Causes of Action Numbered 2 & 3— relating to hypothermia and cardiac and lung injuries after laying exposed to the elements (CP 1-8) — Jon was not using the City’s land for the purpose of recreation. What constitutes “recreation” or “using the land” under the statute appears to be a question of first instance for the Washington appellate courts. However these issues have been addressed by courts in other states as discussed below.

- i. Using the Land for the Purpose of Outdoor Recreation**

At the time that Jon’s claim arose against the City under Causes of Action numbered 2 & 3, Jon was lying paralyzed in the Park. (CP 1-8, Complaint) This is the moment that his claims arise under Counts 2&3 of

the Complaint for negligence relating to the Defendant City's failure to act arise. (CP 1-8, Complaint) Does the "recreational use/immunity" statute apply to such a situation?

If a person is engaging in recreation at the time that he is injured and sues for those injuries (sustained while engaged in recreation), then there is little question that the recreational use/immunity statute would apply unless (as set forth above, there is a known, artificial latent condition or, else, some intentional conduct). However, a different situation is present when the person injured is not engaging in recreation at the time his injuries arise.

And, determining whether the person injured was engaging in recreation at the time he was injured is the first test in determining whether or not recreational immunity applies. Cf. *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 [the plaintiff] was engaged in a recreational activity."); *Sievert v. American Family Mut. Ins. Co.*, 190 Wis.2d 623, 528 N.W.2d 413, 415 (Wis. 1995) ("In deciding the applicability of the recreational immunity statute, the court must first determine whether the activity in which Robert Sievert was engaged at the

time of his injury is within the statutorily defined phrase ‘recreational activity’.”)

The Wisconsin Supreme Court addressed this issue in *Sievert*, 190 Wis.2d 623, finding that an injury that occurred while walking across land used for recreational purposes did not mean that the injured person was using the land for recreation.

[W]e do not agree with [the defendant] that the characteristics of the property on which [plaintiff] was injured are determinative. [Plaintiff]'s act of walking onto the Pierres' dock does not become a recreational activity merely because the Pierres' property was used by the Pierres for recreational (as well as other) activities. Nor was the activity recreational under the statute because it occurred on a dock, a structure ordinarily used for boating, fishing and swimming, all of which are identified as recreational activities in sec. 895.52(1)(g), Stats. 1991-92. As *Linville* teaches, the test to determine whether an activity is recreational focuses on the "nature of the activity," not the nature of the property. *Linville*, 184 Wis.2d at 716, 516 N.W.2d 427.

Furthermore, the *Linville* test does not assess the activity of the property owner. Thus, we disagree with [defendant's] contention that Everett Pierre's activity at the time of the accident is significant in resolving whether [plaintiff]'s activity was recreational under the statute. The delineation of an activity as recreational does not turn on the nature of the property owner's activity but rather on the nature of the property user's activity.

Sievert, 528 N.W.2d at 416-417.

Other courts have also addressed the question of what is “recreation”, and have found limitations on the reaches of the recreational immunity statute. *See, e.g., Rintelman v. Boys & Girls Clubs of Greater*

Milwaukee, Inc., 707 N.W.2d 897, 905 (Wis.App. 2005) (the "mere presence on property suitable for recreational activity when a plaintiff is injured does not, *ipso facto*, make applicable [the Wisconsin immunity statute]"); *M.M. v. Fargo Public School Dist. No. 1*, 2010 ND 102, 783 N.W.2d 806 (N.D. 2010) (students are not engaged in "recreation" under the immunity statute while attending school); *Kappenman v. Klipfel*, 2009 ND 89, 765 N.W.2d 716 (N.D. 2009) (traveling on public roads is not recreation); *Liberty v. State Dept. of Transportation*, 342 Or. 11, 148 P.3d 909 (Or. 2006) (traveling through public lands to get to a place where recreation is to occur is not recreation); *Leet v. City of Minot*, 2006 ND 191, 721 N.W.2d 398, 406 (N.D. 2006) ("[T]he plain language of the statute is not so broad as to include a person present on the property for purposes of the person's employment.").

Based on the strict reading of the statute, and giving its words plain meaning,¹⁸ Jon was not engaged in recreation as a matter of law at the time that Jon's claim arose – since, once injured, Jon was no longer engaging in recreation. And at that time, Jon did not yet have a claim for negligence against the City. His claim for negligence does not arise or ripen until he suffered damages as a result of the City's failure to

¹⁸ When we interpreting a statute, the Court is to give effect to the plain meaning of the statutory language. *Cherry v. Municipality of Metro Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991).

supervise and patrol the park and rescue him. While Jon had admittedly engaged in recreation on the land and this recreation gave rise to his paralysis, the complained of conduct against the City in Counts 2&3 of the complaint are not in relation to the recreational use of the property, instead, the Counts 2&3 of the Complaint are in relation to conduct by the City after Jon was injured and no longer using the property for recreation. (CP 1-8, Complaint)

ii. 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 (CP 1-8, Complaint) 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. Jon was present on the land, but his claims under Counts 2&3 of the Complaint do not stem from his "use" of that land.¹⁹ (CP 1-8, Complaint)

While Washington courts have not specifically addressed this issue, the Wisconsin Supreme Court has, and has held that functions such as "rescue and treatment" are not granted immunity under the recreational use statute.

¹⁹ Jon's paralysis stemmed from the use of the land, but his claims for failure to supervise, patrol and rescue do not.

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). The court explained:

To interpret the language of sec. 895.52(2)(b), Stats., to include injury resulting from negligent rescue and treatment by the paramedics in this case, would produce absurd consequences.

Consider the hypothetical given to the defendants at oral argument. The defendants were asked if a health care provider employed by the City would be immune if he or she provided negligent medical care to David once David was transported to the hospital. The defendants answered that both the health care provider and the City as its employer would still be immune under the statute. Their claim is that the immunity provided by the statute stems from the activity, and that the immunity spills over to negligent behavior by any City employee (regardless of their connection to the recreational land) who provides medical services to David for injuries sustained while recreating. Such services could conceivably take place days or even weeks after the recreational activity, at facilities far removed from the site of recreation, and by persons in no way connected to the land on which the accident occurred. Such a result is absurd. . . .

The more rational result, consistent with the focus and purpose of the statute, is to immunize from liability only the landowner who is the same entity under the law as the employer of the persons whose alleged negligence caused injury. We hold that the City as landowner and the City as employer of the paramedics are not the same entity for purposes of the recreational immunity

statute, and therefore the City is not immune from liability for the negligence of its paramedic employees.

The City has two distinct roles here. First, it owns the Pond. In this role, it is entitled to immunity from suits claiming that the Pond was negligently maintained or that the City's or its employees' (whose employment is connected to the Pond) actions with respect to the Pond were negligent. . . .

On the other hand, the City operates its paramedic services for the public benefit of providing emergency medical treatment. It does not operate these services for any reason connected to the Pond. It is mere coincidence that the City is both owner of the Pond and provider of public rescue and medical treatment services. Further, the paramedics' employment, as employees of the City in this capacity, is unrelated to the Pond. The paramedics provide emergency medical treatment in every part of the City, no matter the situs. Thus the City's rescue attempts and medical treatment are separate and apart from the City's ownership of or activities as owner of recreational land. We therefore conclude that the City as the paramedics' employer is not immune from the Linvilles' claims of negligent rescue and medical treatment.

Accordingly, we affirm the court of appeals' denial of recreational immunity under sec. 895.52(2)(b), Stats., to the paramedics and the City for negligent rescue and treatment. In light of this conclusion, a genuine issue of fact exists with respect to whether the City and the paramedics were liable for negligent rescue and treatment of David, and therefore summary judgment was improperly granted by the circuit court.

Linville 184 Wis.2d at 720-724, 516 N.W.2d 427, 432-433. *Cf. Kosky v. International Ass'n of Lions Clubs*, 210 Wis.2d 463, 475-77, 565 N.W.2d 260 (Wis.App. 1997) (activities giving rise to injury not related to condition of land, but to detonation of fireworks).²⁰

²⁰ The Oregon Supreme Court has also recognized "use of the land" as being a material part of their recreational immunity statute:

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 therefore unrelated to the condition of the property). The same reasoning applies regardless of whether the City of SeaTac is the landowner and also performing the functions of the third party.

Similarly here, and although Jon had entered the land for the purpose of engaging in recreation, at the time that his claims for the cardiac and lung injuries arose, he was no longer using the land for the purpose of outdoor recreation. Jon was simply present on the land, and his claims arise from the City's negligent conduct unrelated to the maintenance or condition on the land. Instead, Jon's claims relate to the failure to act (i.e. a failure to supervise, patrol and rescue). The statute is not meant to insulate the landowner for all conduct that occurs on the land – only conduct for which the user engages that is in fact a recreational use of the land. To read the statute to grant immunity for negligent actions that are unrelated to the actual use of the land or that relate to a physical

[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, 655 (Or. 2009) (emphasis in original).

condition on the land would unnecessarily broaden the statute well beyond the limited purposes that was enacted.

Furthermore, if the Court were to broaden the scope of the recreational immunity statute, it would render the exception for “known dangerous, artificial, latent conditions” superfluous because it make the exception irrelevant in cases involving the conduct of others after an initial injury has occurred. The California Supreme Court recently addressed a similar issue in *Klein v. United States*:

The second reason [for finding that recreational immunity does not extend to all conduct such as actions based on vehicular negligence arising on public land] is based on a comparison of the statutory language describing the safe-premises and hazard-warning immunities. It is a general rule of statutory construction that “[w]hen one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.” . . . Had the Legislature intended to extend the liability shield to negligently conducted activities, such as dangerous driving, it could simply have provided, in the first paragraph, that a landowner owes no duty of care to avoid, prevent, remedy, or give any warning of hazardous conditions, uses, structures, or activities, on the land. The Legislature did not do so. Instead, it selected language carrying a strong implication that the safe-premises immunity is narrower than the hazard-warning immunity, and does not extend to unsafe activities such as negligent driving of a vehicle.

The third reason relies on another statutory construction principle, that courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous. . . . The broad construction of the safe-premises immunity provision that the United States urges us to adopt would violate this rule. The duty to ‘keep the premises safe’,

as the United States views it, encompasses not only the duty to prevent or remedy hazardous *conditions* on the property, and possibly also to guard against criminal activity by third parties, but also the duty to use due care in the conduct of *any* activity on the property. In other words, the United States would have us construe the language in Civil Code section 846's first paragraph absolving landowners of the duty 'to keep the premises safe' as absolving landowners of any duty of care to avoid personal injury to recreational users of their land. But such a broad reading of the safe-premises immunity would encompass tort claims based on a failure to warn of potentially dangerous activities because, as to such activities, a landowner can 'keep the premises safe' either by conducting the activities in a safe manner or by warning others of the risks posed by those activities. Therefore, it is not reasonable to construe the phrase 'keep the premises safe' as encompassing one of those alternative safety approaches but not the other. Unless the phrase 'keep the premises safe' is construed narrowly to mean preventing or remedying dangerous physical conditions on the property, the alternative expansive construction renders superfluous the separate liability shield for failures to warn of hazardous activities. To give independent meaning and purpose to Civil Code section 846's hazard-warning clause, we construe Civil Code section 846's safe-premises clause more narrowly to encompass only premises liability claims arising from alleged breaches of property-based duties.

Klein v. United States, 50 Cal.4th 68, 79-81, 235 P.3d 42 (Cal 2010)

For the same reasons, the recreational use statute should not apply to Complaint Counts 2 & 3 alleging negligence. (CP 1-8, Complaint).

2. Jon Wilkerson has an Actionable Claim against the City

In order to have an actionable claim, Jon must set forth the existence of a duty that extended from the City of SeaTac. After recreational immunity, this was the only issue raised by the City's Motion

for Summary Judgment.²¹ Thus, Jon must show the existence of a Duty, or, raise a question of fact regarding the existence of a duty.

The City of SeaTac knew that it did not regularly supervise or patrol the Park (CP 632-746 Opposition to MSJ, Ex 3: Dep Tr. C. Ledbetter at CP 685, (p.58) lns 1-25) but failed to inform Park users, including Jon.²² However, Jon reasonably relied on the representations that the City of SeaTac made as he entered the land – that there were precautions in place (i.e. monitoring/patrols) such that if he was hurt, he would not be abandoned in an unconscious state, especially not overnight in the Park. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶¶ 18-21, 660, ¶27)

i. By their Representations the City of SeaTac created a Duty to Jon

In its Motion for Summary Judgment, the City set forth the four exceptions to the public duty doctrine under *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785-86, 30 P.3d 1261 (2001), including (3) the failure by governmental agents to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff and (4) a special relationship between a plaintiff and the government stemming

²¹ The issues of breach, proximate cause and damages were not raised or contested by the Defendant City's Motion for Summary Judgment.

²² Later, the City of SeaTac changed their warning signs to let the public know that riders were at their own risk and that the trails off the paved path are not maintained. (CP 444, Dep. Tr. Ledbetter., p.61, lns 3-35 and p.62 lns 1-13).

from explicit and/or inherent assurances. (CP 585-594, Motion for Summary Judgment)

- ii. **The City of SeaTac gratuitously assumed a duty to Plaintiff by its explicit and inherent assurances regarding the supervision and patrolling of the Park.**

As a general rule, “one who undertakes to act in a given situation has a duty to follow through with reasonable care, even though he or she had no duty to act in the first instance.” *Borden v. City of Olympia*, 113 Wn. App. 359, 369, 53 P.3d 1020 (2002). In *Borden*, the City of Olympia claimed that it did not owe a duty of due care to plaintiffs in that case because it did not actively participate in the drainage project at issue in the case; it only approved and permitted plans submitted by the developer. After citing the general rule quoted above, the Court rejected this argument stating:

A City does not undertake to act if it goes no farther than reviewing and permitting a project submitted by a private developer, but in our view it does if it actively participates in designing and funding the project. A trier of fact could find from the record here that the City “actively participated for nearly two years in the ongoing planning and problem-solving process;” that the City “provided considerable hydrologic modeling and technical review;” and that “[n]early all of this work was in excess of [the City's] typical ‘consultant’ role.” A trier of fact could also find that the City paid a substantial portion of the project's cost. These facts are sufficient to support a finding that the City actively participated in the 1995 project, and, if such a finding is made, that the City owed a duty of due care.

Borden 113 Wn.App. at 369-370 (footnotes and citations omitted).

This issue has also been recently addressed by the Indiana Court of Appeals.

In *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 769 (Ind.Ct.App.1986), *modified on denial of reh'g* 521 N.E.2d 981 (Ind.Ct.App.1988), *trans. denied*, we determined premises liability of a tavern owner for injuries to patrons does not extend to third persons beyond the boundaries of the tavern's premises. However, we noted a tavern owner could assume a duty to persons beyond the boundaries of a tavern. In *Ember*, a bar patron was beaten by three men outside the bar. We reversed summary judgment for the bar, finding genuine issues of material fact as to whether the bar gratuitously assumed a duty to its patron after he left the premises.

We noted the bar took several affirmative actions that revealed its intent to gratuitously assume a duty. It distributed flyers encouraging local residents to call about disturbing conduct by bar patrons. The flyers expressed the bar's concern if something in the neighborhood was disturbing residents "even if it doesn't pertain to" the bar. *Id.* at 770. 'Thus, the Pub contemplated wide dissemination of a broad offer of help to persons in the vicinity of its business.' *Id.* The bar had assured neighborhood residents its staff would patrol the parking lots 'in the area.' *Id.* A security officer from the bar had in fact helped with a neighborhood problem even though it had nothing to do with the bar and occurred down the street. The bar wrote to the Alcoholic Beverage Commission detailing the steps it had taken to preserve peace and order in the vicinity of the bar, and it employed security guards outside the bar. 'Thus, the Pub's representations and conduct do give rise to the reasonable inference that it assumed a duty to patrol the area surrounding its premises and to protect persons (including patrons) within that vicinity from criminal activity.' *Id.*

Schlotman v. Taza Cafe, 868 N.E.2d 518, 523-524 (Ind.App. 2007)

Here, as in *Borden* and *Ember*, the City gratuitously assumed a duty by the written representations that it made, particularly when placed in the context in which they were made. The City of SeaTac operates and maintains a Park with: 1) a fenced-in parking lot (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 658, ¶¶6-10, and Attachs 1-2 at CP 662-663); 2) a fence that appears to extend around the entrance to the Park in both directions (North and South), such that the entire Park appears fenced in (*Id* at CP 658 ¶7); 3) a padlock on the swinging gate to the fence (*Id* at CP 658 ¶8), indicating that the gate to the Park parking lot can be shut and locked; and 4) in the parking lot, as one enters the trail into the Park, a large white sign guards the entrance and affirmatively states that:

The Park is patrolled by the City of SeaTac
The Park is operated by the City of SeaTac
Park is closed from dusk to dawn
Parking is only permitted during Park hours
Unauthorized vehicles will be impounded

(CP 632-746, Opp. To Summary Judgment, *Wilkerson Decl.* at 658, ¶¶11-12 and Attachments 3-6 at CP 664-667)

The Defendant City's Parks Director also agreed that the sign indicating that the park is operated by the City means that the City is responsible for the park:

- Q. The next line is “Park is operated by City of SeaTac parks and Recreation Department.”
What does “park is operated” mean to you?
- A. That the City of SeaTac Parks and Recreation Department is responsible for the park.

(CP 443 Dep. Tr. C *Ledbetter* at p.59, Lns. 4-8)

These affirmative representations in the context of a secured entry Park, convinced Jon to enter the Park with the reasonable belief that there was supervision and public safety. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶21). And, as Jon believed that the Park had closing hours and would be patrolled, he needn’t bring his cell phone with him, and if something happened to him, help would be available. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶21).²³

Instead of fulfilling its representation to park users that it patrolled the Park, the Defendant City did not. And, despite the known existence of a bike park and jump section and knowledge that a number of bike riders had been seriously hurt bicycling or taking jumps at the Park (prior to Jon’s injury),²⁴ the City undertook no effort to look for injured park users,

²³ Jon testified through his declaration that he would likely not have taken the jump in the first place (without having a friend present), had he not been given indications that the Park was safe and patrolled by the City of SeaTac. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶16, ¶18). And he testified that he would not have taken the jump had he known that if he was injured and immobile, that he could be left abandoned in the Park overnight. (CP 632-746 Opposition to MSJ, Ex A: *Wilkerson Decl.* at CP 659 ¶21).

²⁴ CP 632-746 Opposition to MSJ: Ex B Davis Decl, Attach 6 thereto: *Wiwel Dep* at CP 700 (p.14) lns. 22-25, (p.15) lns. 1-14, (p.16) lns. 16-18, CP 701 (p.17) lines 7-13, CP 702 (p.22) lns. 11-23, CP 703 (p.26) lns 2-7, 23-24, CP 704 (p.35) lns 14-25, CP 705 (p.

even when a vehicle was seen unattended in the Park parking lot after closing hours. According to the incident report, a high ranking, management level City employee (the Fire Department Battalion Chief) admitted that Jon's car was seen in the parking lot 2 days prior to Jon being found. (CP 632-746 Opposition to MSJ: Ex B Davis Decl, Attach 6 thereto: *Wiwel Dep* at CP 707 (p.47) lns 1-8, and Exhibit 8 thereto, at CP 745). And yet, the City took no action –despite the Fire Department's (and thus the City's) knowledge of at least six serious prior bicycling injuries at the Park in less than a 3 year span prior to Jon Wilkerson's injury on June 22, 2006.

By making the representations that it did make, the City of SeaTac went beyond common law duties and created a special duty to supervise and patrol the Park for the safety of its invitees. As a result, it then had to follow through and exercise reasonable care in fulfilling that duty.

iii. Duty to Rescue

The Defendant City acknowledges that it was aware that Jon's vehicle was left unattended overnight in the Park parking lot (and thus remained long after the Park had closed). In fact, the City of SeaTac Fire Department Battalion Chief Richardson reported that he had seen Jon's vehicle at 1:00 am, many hours prior to Jon being found unconscious. CP

36) lns 1-3, (p.37) lns 5-24, (p.38) lns 21-25, (p.39) lns 1-14, CP 706 (p.40) lns 23-24, (p.41) lns 1, 7-10, (p.42) lns 20-21, (p.43) lns 5-13.

632-746 Opposition to MSJ: Ex B Davis Decl, Attach 6 thereto: *Wiwel Dep* at CP 707 (p.47) lns 1-8, and Exhibit 8 thereto, at CP 745). The City also admitted that the City Ordinance SMC 2.45.190 makes it unlawful for a person to leave his vehicle in a park area after closing and that the vehicle will be towed. (CP 585-594, Motion for Summary Judgment at 590, lines 21-24) And, the City admitted that it had knowledge of at least six serious bicycling injuries in the Des Moines Creek Park in less than a three year span prior to Jon's injury. (CP 479-485 Dep. Tr. B. Wiwel, and CP 422-511, *Coluccio Decl.* Ex.8: Incident Reports CP 500-511)

Nevertheless, and despite one of the City's highest ranking Fire and Rescue personnel seeing an SUV left in the Park's parking lot, inside the fenced area (not outside of it or adjacent to), after 1:00 am, well after closing hours, with the bike rack down, at a time when at least six known serious bicycling accidents had occurred (see FN 24 supra), the City still asserts that it had no duty to take any action to rescue Jon Wilkerson.

The knowledge of the City with respect to bike accidents in the Park, coupled with Jon's SUV (with an empty bike rack) being left overnight in a Park that was closed (which therefore made it unlawful for his vehicle to remain there) created a duty to take some reasonable action to locate Jon. Searching a 96 acre park was not necessary. The City need only have taken reasonable steps such as proceeding down the paved trail

calling out, or visiting only those areas where past accidents had occurred (such as the “Softies jump park”) and which were known to the City as a place where riders had been seriously injured.

3. The Public Duty Doctrine should be abolished because it is inconsistent with the waiver of sovereign immunity

Under the public duty doctrine

[n]o liability may be imposed for a public official's negligent conduct unless it is shown that ‘the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.* a duty to all is a duty to no one).’

Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

Based on the law as it currently stands, a plaintiff must fall within one of the established exceptions to the public duty doctrine in order to demonstrate that he or she was owed a duty of care by a governmental entity. *See, e.g., Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). It is only once a plaintiff has established that it was owed a duty of care as an exception to the public duty doctrine that claimants can then proceed in tort against municipalities to the same extent as if the municipality were a private person. *J & B Dev. Co.*, 100 Wn.2d 299, 305-306, 669 P.2d 468 (1983).

Too often, the application of the judicially created public duty doctrine blocks plaintiffs with otherwise meritorious claims from bringing

suit merely because party being sued is a public entity. Even more egregious is the fact that the plaintiff often could prevail in his or her suit if the party being sued was a private person or corporation instead of a governmental entity. Thus, the Public Duty Doctrine creates special immunities and privileges for governmental entities that are not enjoyed by private persons and corporations. Because it creates special immunities and privileges that directly contradict the legislature's broad waiver of sovereign immunity, the Public Duty Doctrine amounts to little more than judicial legislation. For this reason, this Court should refuse to apply the doctrine in this case and instead hold Defendant City of Sea-Tac accountable for its tortious conduct to the same extent as if it was a private person or corporation as the Legislature has directed.

The Legislature abrogated sovereign immunity decades ago. RCW 4.92.090; RCW 4.96.010 (state and local governments, "whether acting in [their] governmental or proprietary capacity," "shall be liable for damages arising out of [their] tortious conduct to the same extent as if [they] were a private person or corporation"). Like private persons or corporations, the Defendants should be held to a duty of reasonable care, as defined by traditional tort principles. The public duty doctrine is inconsistent with the Legislature's waiver of sovereign immunity.

The public duty doctrine has been criticized in several opinions by former Justice Robert Utter. *See, e.g., Taylor v. Stevens County*, 111 Wn.2d 159, 172, 759 P.2d 447 (1988) (Utter, J., concurring); *Bailey v. Forks*, 108 Wn.2d 262, 267, 737 P.2d 1257 (1987) (Utter, J., writing for majority)²⁵ As Justice Utter argued in these opinions, there is no valid reason to analyze the duty of a governmental defendant any differently than that of a private defendant, especially in light of the abrogation of sovereign immunity and the statutes expressly stating that the liability of a governmental defendant shall be the same as a private defendant.

For this reason, a number of states have abrogated the public duty doctrine.²⁶ In *Leake v. Cain*, 720 P.2d 152, 159-60 (1986), for example, the Colorado Supreme Court abolished the public duty doctrine:

The major criticism leveled at the public duty doctrine rule is its harsh effect on plaintiffs who would be entitled to recover for their injuries but for the public status of the tortfeasor. . . . In apparent contravention of these statutes [abrogating sovereign immunity], the public duty rule makes the public status of the defendant a crucial factor in determining liability. Courts rejecting the public duty rule reason that proof of one of the elements in an action for negligence should not be made more difficult simply because the defendant is a public entity.

...

²⁵ See also *Chambers-Castanes v. King County*, 100 Wn.2d 275, 290, 669 P.2d 451 (1983) (Utter, J., concurring); *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 309, 699 P.2d 468 (1983) (Utter, J., concurring).

²⁶ See 38 A.L.R. 4th 1194 at § 4 (citing cases from Alaska, Arizona, Colorado, Louisiana, Nebraska, Oregon, and Wisconsin as having abolished the public duty doctrine).

Perhaps the most persuasive reason for the abandonment of the public duty rule is that it creates needless confusion in the law and results in uneven and inequitable results in practice. . . .

...

Finally, whether or not the public duty rule is a function of sovereign immunity, the effect of the rule is identical to that of sovereign immunity. Under both doctrines, the existence of liability depends entirely upon the public status of the defendant. The doctrine of sovereign immunity was abrogated in *Evans v. Board of County Commissioners*, 174 Colo. 97, 482 P.2d 968 (1971). Nothing in the provisions of the statutes dealing with governmental immunity . . . leads us to conclude that the General Assembly intended to reintroduce a concept so closely related to absolute sovereign immunity. Quite the contrary, [the statute] instructs courts to resolve the plaintiff's claim without regard to the public status of the defendant.

Accordingly, we reject the public duty rule in Colorado.

See also Shear v. Board of County Commissioners, 687 P.2d 728, 731, 734 (N.M. 1984) (abolishing public duty doctrine in New Mexico).

While the exceptions to the public duty doctrine are satisfied in this case, and the City owed a duty of reasonable care to Jon Wilkerson, it should not be necessary to go through this analysis in order to establish the City's duty. The public duty doctrine should be abolished.

VI. CONCLUSION

With respect to Jon Wilkerson's claim for negligence Count 1, summary judgment in favor of the Defendant City was inappropriate since the recreational use statute does not apply (either because of the existence of a known, dangerous artificial condition or because of willful and

wanton conduct). With respect to Appellant Jon Wilkerson's claims for negligence under Counts 2&3 of the Complaint (by the City's failing to supervise the Park and for failing rescue him after his injury), the recreational use statute also does not apply to immunize the City and instead, the Court should find that a common law duty does exist in relation to Jon Wilkerson (and the peculiar facts of this case or the overruling of the public duty doctrine).

Respectfully submitted this 8th day of June 2011.



Noah Davis, WSBA #30939
Attorney for Jon Wilkerson,
Appellant
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104
206.709.8281

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COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

JON L. WILKERSON,
Appellant,

v.

CITY OF SEATAC,
Respondent.

CASE # 66524-3-I

PROOF OF SERVICE

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AND TO: FRANCIS STANLEY FLOYD
FLOYD PFLUEGER & RINGER PS
200 W Thomas St, Ste 500
Seattle, WA 98119

I, Meghan Rae, do hereby certify that a copy of the attached Brief of Appellant was filed with the Court of Appeals and served by first class mail on Francis Stanley Floyd on January 9, 2011 at the regular business address thereof as identified above.

DATED this 9th day of June 2011

By Meghan D. Rae
Meghan D. Rae, WSBA#43626
IN PACTA PLLC
801 2nd Ave Ste 307
Seattle WA 98104
206.709.8281

ORIGINAL