

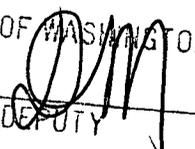
No. 47192-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

2015 MAY 18 PM 1:18

STATE OF WASHINGTON

BY 
DEPUTY

WENDIE DICKIE, Appellant,

v.

WASHINGTON STATE PARKS AND RECREATION COMMISSION, Respondent.

OPENING BRIEF OF APPELLANT

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I. Introduction

Appellant Dickie made a claim against the Washington State Parks Department (hereinafter “State Parks”) for injuries she sustained while descending a wood surfaced ramp from an elevated deck at Cape Disappointment State Park. State Parks moved for summary judgment, asserting that RCW 4.2 4.210(4) (a) immunized the State of Washington from tort liability because the injury causing condition was not was “latent.” The trial court agreed, and granted the motion. Plaintiff appeals.

II. Assignments of Error

Assignments of Error

1. The trial court erred in entering the order of January 9, 2015, granting State Park’s Motion for Summary Judgment.

Issues Pertaining to Assignments of Error

1. Does RCW 4.2 4.210(4) (a) require an injured Plaintiff to prove that a danger was “hidden” in order to establish that the danger was “latent?”
2. In determining whether the condition that injured Plaintiff was latent under RCW 4.2.210(4)(a), could a jury consider the facts

and circumstances surrounding the location and use of the artificial condition that caused Plaintiff's injuries?

3. Is there a material factual issue on whether the condition that injured Plaintiff was "latent" under RCW 4.2 4.210(4) (a) when Defendant's own employee admits that the condition giving rise to the injury was not apparent on visual inspection?

III. STATEMENT OF THE CASE

1. Facts

On November 13, 2010, Plaintiff was visiting the Cape Disappointment State Park with her husband. Plaintiff was looking at an unoccupied yurt (a tent like structure made available to park visitors as an overnight accommodation). CP p. 86, Ex. 4-3, 5 (Deposition of Plaintiff); CP p. 95, Ex. 5 (photograph of yurt). The yurt was built on an elevated wooden deck, and a wooden ramp provided access to and from the structure. CP p. 95, Ex. 5 (photograph of yurt).

As Plaintiff was descending the ramp to return to her car, she slipped and fell on the ramp's wooden surface, landing on her left knee, sustaining a serious fracture. CP 88, Ex. 4-6-10 (Deposition of Plaintiff); CP p. 101, Ex. 7 (Incident Report). Within minutes after Plaintiff's injury, State Parks Ranger Davis reported to the accident scene, and did not

observe any outward signs that the deck where Plaintiff fell was slippery. CP p. Ex. 2-4 (Deposition of Ranger Davis). However, Ranger Davis, upon setting foot on the deck, described it as “slippery.” CP p. 68, Ex. 2-4, 5.

Defendant had not posted any signs warning park visitors of slippery surfaces at or near the yurts or included warnings in park brochures. CP p. 57, Ex. 1-6-8. (Deposition of Ranger Benenati); CP p. 78, Ex. 3-6 (Deposition of Park Manager Roberts).

2. Motion for Summary Judgment and RCW 4.24.210

The Parks Department moved for Summary Judgment, asserting that because the injury causing condition was latent, it was immune from liability under RCW 4.24.210(4)(a). This statute generally immunizes landowners from tort liability when land owners open their property available for recreation. The statute provides, in relevant part:

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners **** 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.

However, landowners remain liable where a known dangerous artificial latent condition without warning signs causes an injury. Subsection (4) (a) provides in relevant part:

“(4)(a) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” RCW 4.24.210(4) (a).

At oral argument, Plaintiff Dickie argued that the condition of the deck was analogous to a rotting board, and as such, was a “latent” condition. The Court disagreed, finding that a rotten board is “truly a condition that is sort of hidden” RP, p. 12.

The court elaborated:

“I find that the recreational use statute does apply here. Even though the testimony of the park ranger was that it is not apparent to him when looking at it, the slipperiness of the surface I think is one of those conditions that is not necessarily hidden in comparison to the cases that have found the same type of condition, and so the court’s granting the motion.” RP, p.12.

IV. SUMMARY OF ARGUMENT

The trial court incorrectly interpreted RCW 4.24.210(4) (a) to require that Plaintiff establish a “hidden” injury causing condition to overcome the statute’s general grant of immunity. The correct inquiry is whether the injury causing condition was not readily apparent. There is a

material factual issue of latency when considering the deck's condition, location and use, as well as State Parks employee testimony that the deck's slippery condition was not readily apparent.

V. ARGUMENT

1. Standard of Review

This Court reviews an order granting summary judgment *de novo*. *In re Estate of Black*, 153 Wash.2d 152, 160, 102 P.3d 796 (2004); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party must prove that there is no genuine issue of material fact. *Black*, 153 Wash.2d at 160–61, 102 P.3d 796. If the moving party meets its burden, the non-moving party must present evidence supporting a genuine factual issue for trial. *Black*, 153 Wash.2d at 161, 102 P.3d 796.

In determining whether material factual disputes exist, the Court views all evidence and inferences therefrom in a light favorable to the non-movant. *Black*, 153 Wash.2d at 160–61, 102 P.3d 796. A court can find no material factual dispute as a matter of law only where one

reasonable conclusion arises from the facts . *Sherman v. State*, 128 Wash.2d 164, 184, 905 P.2d 355 (1995).

2. The Recreational Land Use Statute

The Recreational Land Use State, RCW 4.24.210 (1), provides a general grant of immunity to landowners who make their property available to recreational users. The statute provides, in relevant part:

“Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners, hydroelectric project owners, or others in lawful possession and control of any lands **** 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.” RCW 4.24.210(1).

However, subsection four of the statute provides an exception to the general grant of immunity. Landowners remain liable where a known dangerous artificial latent condition absent warning signs causes an injury.

This part of the statute provides:

“(4)(a) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.” RCW 4.24.210(4)(a).

Each of the terms in subsection four; “known,” “dangerous,” “artificial,” and “latent” modify the term “condition.” *Van Dinter v. City of Kennewick*, 121 Wash.2d 38, 46, 846 P.2d 522 (1993). Therefore, an injured plaintiff must prove all three aspects of the injury causing condition. *Tabak v. State*, 73 Wash. App. 691, 695, 870 P. 2d 1014 (1994). State Parks raised only the issue of latency.

The term “condition” means the object or instrumentality that caused the injury, viewed in relation to other external circumstances in which the instrumentality is situated or operates. *Ravenscroft v. Wash. Water Power Co.*, 136 Wash.2d 911, 921, 969 P.2d 75 (1998). The injury causing condition cannot be viewed in isolation. Instead, the condition must be viewed in context with its surroundings and its use. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 44, 846 P.2d 522 (1993). Identifying the condition that actually caused the injury is a factual issue. *Van Dinter*, 121 Wash.2d at 44, 846 P.2d 522; *Cultee v. City of Tacoma*, 95 Wash. App. 505, 977 P. 2d 15, 22 (1999). In reviewing a motion for summary judgment, the court adopts the plaintiff’s view of the injury causing condition. *Swinehart v. The City of Spokane*, 145 Wash. App. 836, 846, 187 P. 3d 345 (2008).

A “condition” is “latent” when the condition is “not readily apparent” to the recreational user. *Widman v. Johnson*, 81 Wash. App. 110, 114, 912 P. 2d 1095 (1996). The dangerous condition itself must be latent, and the landowner will not be held liable where the “patent condition posed a latent or an obvious danger.” *Van Dinter*, 121 Wash. 2d at 46, 846 P. 2d 522. Stated another way, “the question is whether the injury causing condition-not the risk it poses-is readily apparent to the ordinary user.” *Ravencroft II*, 136 Wash. 2d at 925, 969 P. 2d 75. Latency is typically a factual question unless reasonable minds could only reach one conclusion from the evidence on the record. *Van Dinter* at 47.

3. The Trial Court Erred in Interpreting RCW 4.24.210 to Require Proof of a “Hidden” Condition.

In making its ruling, the trial court emphasized that the “slipperiness of the deck” was not “hidden” in comparison to the facts of the other unidentified higher court decisions. RP, p. 12. In making this ruling, the trial court incorrectly interpreted RCW 4.24.210 (4) to require proof of a “hidden” condition as opposed to a condition that is not “readily apparent.” *See, Ravencroft II* at 114; *Van Dinter* at 925. By not giving the term “latent” its ordinary meaning of “not readily apparent,” the trial court imposed a more rigorous standard upon Plaintiff than that provided

for in the statute. *See, Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813, 828 P.2d 549 (1992)(an undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated). The trial court erred in interpreting the statute to provide for this heightened standard of proof.

4. The Trial Court Erred in Failing to View the Condition in Context of its Location and Use.

Applying the correct standard, and considering all relevant evidence, there is a material factual issue of latency. The trial court erred in considering the slippery deck in isolation, and not in context with its location or use in determining whether there was material evidence of a “latent” injury causing condition. The slippery deck where Plaintiff suffered her injury was part of a structure that provided shelter accommodations to park guests. As such, the general class of recreational users reasonably expected that the deck, even in foul weather, was reasonably safe for use. In viewing this evidence in the non-moving party’s favor, the trial court should have considered the slippery deck and its location and use from the standpoint of a recreational user. *See, Van Dinter* at 46.

5. The Trial Court Erred in Disregarding Evidence of a “Latent” Condition.

In its ruling, the trial court acknowledged that a State Parks employee testified that the slipperiness of the deck was not “apparent,” but nonetheless went on to find that because the condition was not sufficiently “hidden,” Plaintiff failed to create a jury question on the issue of latency. The State Parks employee’s testimony alone establishes that the fact that the deck was slippery was not readily apparent:

“Q: Did the deck look dangerous to you at all when you first arrived. Did you make any conclusions about that, that it looked like it was hazardous in any way?”

A: No.

Q: Did you walk on the deck or check to see if it was slippery at any time?

A: Yes.

Q: When was that?

A: After she slipped, after the event.

Q: Was she still on the scene, or was it after she left by ambulance, if you remember?

A: I don’t remember.

Q: And what did you—what did you determine when you did that?

A: It was slippery.”

CP p. 68, 69, Ex. 2-4, 5 (Deposition of Davis).

The trial court erred in disregarding this centrally relevant testimony.

VI. CONCLUSION

The trial court interpreted RCW 4.24.210(4)(a) to require Plaintiff to prove that the condition that caused her injury was “hidden,” when the relevant inquiry is whether the injury causing condition is “not readily apparent.” The trial court also failed to consider the condition in context with its location, use, and State Parks employee testimony that established a latent condition.

May 15, 2015

Respectfully submitted,



Joe Di Bartolomeo
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VII. APPENDIX

RCW 4.24.210

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners, hydroelectric project owners, or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, aviation activities including, but not limited to, the operation of airplanes, ultra-light airplanes, hanggliders, parachutes, and paragliders, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, rafting, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

(2) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowner or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who offer or allow such land to be used for purposes of a fish or wildlife cooperative project, or allow access to such land for cleanup of litter or other solid waste, shall not be liable for unintentional injuries to any volunteer group or to any other users.

(3) Any public or private landowner, or others in lawful possession and control of the land, may charge an administrative fee of up to twenty-five dollars for the cutting, gathering, and removing of firewood from the land.

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

(i) A fixed anchor used in rock climbing and put in place by someone other than a landowner is not a known dangerous artificial latent condition and a landowner under subsection (1) of this section shall not be liable for unintentional injuries resulting from the condition or use of such an anchor.

(ii) Releasing water or flows and making waterways or channels available for kayaking, canoeing, or rafting purposes pursuant to and in substantial compliance with a hydroelectric license issued by the federal energy regulatory commission, and making adjacent lands available for purposes of allowing viewing of such activities, does not create a known dangerous artificial latent condition and hydroelectric project owners under subsection (1) of this section shall not be liable for unintentional injuries to the recreational users and observers resulting from such releases and activities.

(b) Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance.

(c) Usage by members of the public, volunteer groups, or other users is permissive and does not support any claim of adverse possession.

(5) For purposes of this section, the following are not fees:

(a) A license or permit issued for statewide use under authority of chapter 79A.05 RCW or Title 77 RCW;

(b) A pass or permit issued under RCW 79A.80.020, 79A.80.030, or 79A.80.040; and

(c) A daily charge not to exceed twenty dollars per person, per day, for access to a publicly owned ORV sports park, as defined in RCW 46.09.310, or other public facility accessed by a highway, street, or nonhighway road for the purposes of off-road vehicle use.

Excerpts of Kevin Davis Deposition, Exhibit Two

CP p. 68, 69

11 Q Okay. When you were at the scene, did you notice any
12 physical evidence of where Ms. Dickie slipped. For
13 example, was there a scuff or scrape in the surface of the
14 decking or sometimes when somebody takes a spill, they
15 might take a little bit of the dirt on the ground with
16 them, and there might be a mark or some kind of evidence
17 Do you remember observing anything like that?

18 A No.

19 Q Did the deck look dangerous to you at all when you first
20 arrived. Did you make any conclusions about that, that
21 looked like it was hazardous in any way?

22 A No.

23 Q Did you walk on the deck or check it to see if it was
24 slippery at any time?

25 A Yes.

Page 2-4

1 Q When was that?

2 A After she slipped, after the event.

3 Q Was she still on the scene, or was this after she left by
4 ambulance, if you remember?

5 A I don't remember.

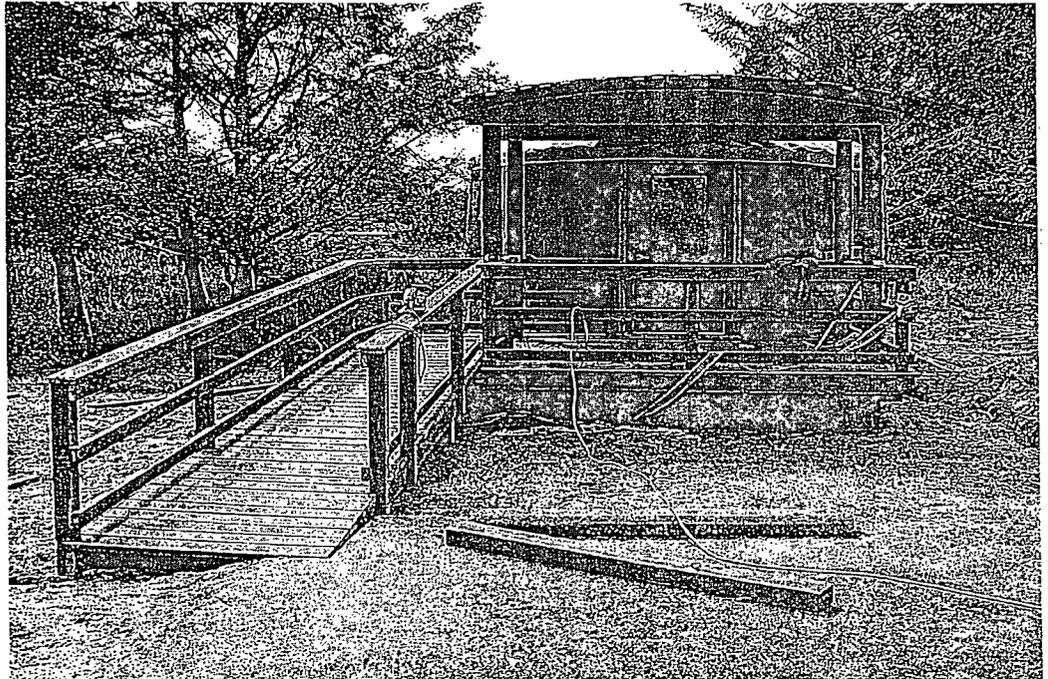
6 Q And what did you -- what did you determine when you did
7 that?

8 A It was slippery.

Exhibit Five

CP p. 95

Photograph of Yurt No. 66 Under Construction



Ex 5

Dickie V PARKS
Yurt 66 Construction

1 **CERTIFICATE OF TRUE COPY**

2 I hereby certify that the foregoing Appellant's Opening Brief is a true and correct copy of
3 the original.

4 DATED: May 15, 2015

5 DI BARTOLOMEO LAW OFFICE, P.C.

6 
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8 Joe Di Bartolomeo, WSBA No. 32273
9 Of Attorneys for Appellant Wendy Dickie
10

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11 **CERTIFICATE OF SERVICE AND MAILING**

12 I hereby certify that I served the foregoing Appellant's Opening Brief to Defendant upon
13 the following:

14
15 Grady Williamson
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21 on May 15, 2015 by a true copy, certified by me as such and contained in a sealed envelope
22 with postage prepaid to said person at their last known address.

23 DI BARTOLOMEO LAW OFFICE, P.C.

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