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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 298043

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JACQUELINE SMITH,
Plaintiff-Appellant

v.

BRYAN STOCKDALE, et al.,
Defendant-Respondent

REPLY BRIEF OF APPELLANT JACQUELINE SMITH

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REPLY

A. Vantage Riverstone Resorts (VRR) Cites No Authority, And Ignores The Relevant Testimony, Regarding The Deceptive Nature Of Its Conduct Under The Consumer Protection Act (CPA).

With respect to the unfair-or-deceptive element of Jaci Smith's CPA claim, VRR¹ relies on the superior court's reasoning that it was not unfair or deceptive to charge a \$5 fee to jump from cliffs outside of VRR's permit area because the fee was collected while Ms. Smith was located within the permit area. Resp. Br., at 19-21. The superior court's reasoning has already been addressed in Ms. Smith's opening brief. App. Br., at 10-11. In particular, approving the \$5 fee under these circumstances is akin to charging for unsolicited goods and services, which is itself a per se violation of the CPA. RCW 19.56.020-.030.

VRR does not cite any authority in support of the superior court's reasoning, nor does it acknowledge the relevant testimony. For her part, Jaci Smith testified that she was being charged for cliff jumping based on the words and conduct of VRR employees and the surrounding circumstances. CP 119-20. She did not believe that she was being charged to use the permitted portion of VRR's premises. *Id.*

¹ As in Ms. Smith's opening brief, this reply brief refers to all defendants collectively as "Vantage Riverstone Resorts" or "VRR."

In addition, VRR ignores the testimony of the designated representative of the Grant County Public Utility District (PUD), which owns the cliff jumping area. The PUD representative testified that it would be deceptive to tell customers that they have to pay \$5 to jump from cliffs in the non-permitted area. CP 267. The reason is that VRR has no legal authority to charge for using the cliff jumping area. *Id.* At a minimum, this testimony creates a question of fact regarding the deceptive nature of VRR's conduct.

B. The \$5 Fee VRR Charged For Cliff Jumping On Property It Did Not Own, And Did Not Have A Permit To Use, Satisfies The CPA Injury Element.

The superior court did not grant summary judgment based on the injury element of Jaci Smith's CPA claim. CP 357-58 (letter decision); CP 359-61 (summary judgment order). VRR relies on the injury element as an alternate basis to affirm summary judgment on the CPA claim. Resp. Br., at 16-18. Specifically, VRR argues that personal injuries do not satisfy the CPA injury element. This argument is a straw man because Ms. Smith has never sought to recover for her personal injuries under the CPA. The focus of her CPA claim is the \$5 fee charged by VRR to jump from cliffs located on property that VRR does not own and does not have a permit to use. Because this monetary loss is independent of, and can be

separated from, Ms. Smith's personal injuries, she satisfies the injury element of her CPA claim.

As an initial matter, it is important to highlight that the injury element of a CPA claim is not equivalent to damages. Injury to business or property, as required by RCW 19.86.090, is an element of *liability* under the CPA, separate from the question of damages. The CPA uses the term "injured" rather than "suffering damages" to make it clear that no specific amount of monetary damages need to be proven to establish injury. *Nordstrom v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854-55, 792 P.2d 142 (1990). The seminal CPA case, which originally formulated the elements of a non-per se CPA claim, did not involve a claim for damages. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 788, 794-95, 719 P.2d 531 (1986).

The scope of the CPA injury element is "quite broad." *Keyes v. Bollinger*, 31 Wn.App. 286, 296, 640 P.2d 1077 (1982). CPA injury does not have to be monetary or even quantifiable. *Mason*, 114 Wn.2d at 854. It includes such non-monetary, non-quantifiable injuries such as "inconvenience" resulting from temporary loss of the use or enjoyment of property. *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn.App. 90, 93-94, 605 P.2d 1275 (1979). Once injury is proved, then the injured party

is entitled to recover money damages, if applicable, as well as injunctive relief and attorney fees and costs. RCW 19.86.090.

While CPA injury does not require proof of quantifiable money damages, the injury element is nonetheless satisfied by such proof. “The injury element will be met if the consumer’s property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.” *Mason*, 114 Wn.2d at 854. With a proper understanding of CPA injury, it should be clear that the \$5 fee charged by VRR satisfies the injury element. Based on this injury, Ms. Smith should be entitled to recover damages for the \$5 fee plus interest, injunctive relief to prevent VRR from charging such fees for cliff jumping in the future, and attorney fees and costs.

VRR does not specifically address the \$5 fee in terms of CPA injury, but rather argues that personal injury claims do not fall within the purview of the CPA. VRR principally relies on *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009), and *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn.App. 722, 959 P.2d 1158 (1998), *rev'd in part*, 138 Wn.2d 248, 978 P.2d 505 (1999). Resp. Br., at 17-18. In *Ambach*, the Washington Supreme Court held that the cost of an unnecessary surgery had to be recovered in the context of a medical malpractice action under Ch. 7.70 RCW rather than a CPA claim. 167 Wn.2d at 174-77. Similarly, in *Hiner*,

the Court of Appeals held that lost wages and vehicle damage had to be recovered in the context of a product liability action under Ch. 7.72 RCW, rather than under the CPA. 91 Wn.App. at 729-30.² In both cases, the fact that the expenses in question resulted from the plaintiffs' personal injuries was dispositive. As explained in *Ambach*, the CPA injury element "prevents a plaintiff from claiming expenses for personal injuries as a qualifying injury in and of itself." *Ambach*, at 176. Where "increased costs are incurred *as a result of personal injury* ... the monetary injury cannot be separated from the personal injury and a claim under the CPA cannot be maintained." *Id.* at 169 (emphasis & ellipses added).

In contrast to *Ambach* and *Hiner*, the \$5 fee charged by VRR did not result from Jaci Smith's personal injuries, and can be separated from the expenses resulting from her personal injuries. The fee was charged and paid before Ms. Smith was injured, and she incurred it regardless of whether or not she was subsequently injured. Because it can be separated from her personal injuries in these ways, both temporally and causally, the \$5 fee cannot be considered a mere expense for personal injuries or increased costs incurred as a result of personal injuries within the meaning of the cases cited by VRR.

² On further review, the Supreme Court declined to consider the CPA injury issue. *Hiner*, 138 Wn.2d at 263-64.

VRR also cites *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn.App. 366, 773 P.2d 871 (1989). Resp. Br., at 17 & n.7. In *Stevens*, the Court of Appeals held that damages for personal injuries caused by athletic shoes had to be recovered in the context of a negligence action against the shoe seller, rather than under the CPA. In this way, *Stevens* is similar to *Ambach* and *Hiner*, and it is distinguishable on the same basis as *Ambach* and *Hiner*.

VRR points out that, in *Stevens*, the shoes in question cost \$15. Resp. Br., at 17 n.7. However, it is apparent from the text of the *Stevens* opinion that the plaintiff was not seeking recovery for the cost of the shoes, under the CPA or otherwise. 54 Wn.App. at 370 (noting plaintiff's attempt to satisfy CPA injury requirement "by classifying her personal injury damages into a pseudo-property structure, i.e., special damages such as hospital, physician, and rehabilitative expenses"). To this extent, *Stevens* is further distinguishable.

If the plaintiff in *Stevens* had limited her CPA claim to rescission of the sale of shoes and refund of the purchase price, it may well have satisfied the distinction between personal and CPA injuries made in *Ambach*. In discussing *Stevens*, the Court in *Ambach* expressly declined to reach the question of whether the cost of the shoes or the time it would

take to buy new ones would be cognizable injuries under the CPA. *Ambach*, at 176. Accordingly, *Stevens* does not support VRR's argument.

C. The Fact That VRR Does Not Own Or Have A Permit To Use The Property Where Jaci Smith Was Injured Does Not Eliminate VRR's Duty, Where VRR Invited Her Onto The Property And Charged Her \$5 To Use It.

VRR does not address the arguments in Jaci Smith's opening brief regarding the scope of invitation or the duty to prevent harm on adjacent property. App. Br., at 11-14. Instead, VRR argues that its duty is confined to its own property, relying on *Curtis v. Lein*, 150 Wn.App. 96, 103, 206 P.3d 1264 (2009), *rev'd*, 169 Wn.2d 884, 239 P.3d 1078 (2010). Resp. Br., at 10-11. *Curtis* is a *res ipsa loquitur* case that only incidentally involves premises liability. The page of the Court of Appeals decision in *Curtis* cited by VRR (p. 103) summarizes the elements of proof in a premises liability case, but does not exclude the fact that a business owner's duty to invitees extends throughout the area of invitation. *See Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 140, 875 P.2d 621 (1994) (stating "[t]he negligent failure to prevent an invitee from straying into prohibited areas *extends the area of invitation* ... If the Zoo were negligent in creating boundaries, the area of invitation would have extended to all places a zoo patron reasonably believed were held open to her"; emphasis in original). In this case, VRR essentially acted as the owner and occupier

of land it did not own by charging Jaci Smith a \$5 fee to use it. There is no reason why its duty should be any different under these circumstances than if it actually owned the land.³

D. There Is A Complete Lack Of Evidence Supporting The First Two Elements Of VRR's Affirmative Defense Of Implied Primary Assumption Of Risk.

The superior court did not grant summary judgment based on implied primary assumption of risk. CP 357-58; CP 359-61. VRR relies on the doctrine as an alternative ground to affirm summary judgment on Jaci Smith's premises liability/negligence claim. Resp. Br., at 12-15.

There are four varieties of assumption of risk, as explained most recently by the Washington Supreme Court in *Gregoire v. Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010):

(1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable assumption of risk. The first two types, express and implied primary assumption of risk, arise when a plaintiff has consented to relieve the defendant of a duty—owed by the defendant to the plaintiff—regarding specific known risks. The remaining two types apportion a degree of fault to the plaintiff and serve as damage-reducing factors.

³ Nor does *Curtis* exclude the fact that a landowner may have a duty to prevent harm on adjacent premises. See *Albin v. Nat'l Bank of Commerce*, 60 Wn.2d 745, 752, 375 P.2d 487 (1962) (finding no premises liability for tree that fell on adjacent public highway, but only in the absence of knowledge of hazard); App. Br., at 13.

(Citations & footnote omitted). VRR focuses on only one type of assumption of risk, implied primary, which requires proof of the following elements in order to negate the existence of a duty:

the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.

Gregoire, 170 Wn.2d at 636; *accord* WPI 13.03. These are the same elements of proof required for express assumption of risk. *Id.* The only difference between express and implied primary assumption of risk is “ceremonial and evidentiary.” *Kirk v. Washington St. Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987). Express assumption of risk usually involves a written agreement, whereas implied primary assumption of risk involves an agreement implied from the circumstances. *See id.*

In this case, there is no evidence to support the first two elements of implied primary assumption of risk. Jaci Smith did not have full subjective understanding of the presence or nature of the risk of jumping from a height. In her uncontested testimony, she states that she was not aware of the risk involved in jumping from a height as long as she landed in the water (as opposed to the rocks). CP 121. She did not have any prior

training or experience jumping into water from a height. CP 121-22.⁴
There is no contrary evidence in the record.⁵

Notwithstanding the lack of evidence that Jaci Smith had full subjective understanding of the risks assumed, VRR argues that she assumed risks inherent in the “sport of cliff jumping,” relying principally on *Scott v. Pacific West Mtn. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992). Resp. Br., at 12-15. As an initial matter, it is not apparent that “cliff jumping” is a sport akin to the alpine skiing involved in *Scott*. VRR provides no argument or authority that cliff jumping is a sport, or even comparable to “sport.”

In any event, *Scott* is entirely consistent with and supportive of the notion that the basis of implied primary assumption of risk is the plaintiff’s “*consent to the negation of defendant’s duty with regard to those risks assumed.*” 119 Wn.2d at 498 (discussing *Kirk*; emphasis in original). *Scott* cautions that “it is important to carefully define the *scope* of the assumption, *i.e.*, what risks were impliedly assumed and which remain as a potential basis for liability.” *Id.* at 497 (emphasis in original).

⁴ The lack of subjective understanding of the presence or nature of the risk is confirmed by the Moses Lake High School diving coach, who testified that, while some people understand the danger, others lacking training or experience do not. CP 275. In her experience, her own students do not always appreciate the danger, even with the benefit of training. *Id.*

⁵ In this regard, it is worth noting that implied primary assumption of risk is an affirmative defense on which VRR has the burden of proof. *Gregoire*, at 636 n.4 (referring to jury instruction on implied primary assumption of risk, including burden of proof); WPI 21.12 (stating burden of proof on implied primary assumption of risk).

In this sense, it is apparent that there is no free-standing “sport” exception to the normal elements of proof required to support the affirmative defense of implied primary assumption of risk. Defendants’ reliance on *Scott* is too facile because it equates cliff jumping with sport, and then assumes that implied primary assumption of risk bars all sports-related injuries, without applying, discussing, or even listing the elements of proof.

For Jaci Smith, cliff jumping was not a sport. For her, it was more akin to an amusement park ride. *See* CP 122 (equating the thrill of jumping with making a speech in front of a class); Resp. Br., at 7-8 (quoting Ms. Smith’s testimony equating thrill with travel and eating foreign foods). Even if cliff jumping can be considered a sport, it was not one with which Ms. Smith was familiar. Because she lacked the requisite knowledge of the dangers inherent in the sport, she should not, therefore, be subject to a defense of implied primary assumption of risk.

In contrast, VRR was well aware of the danger of cliff jumping, and had experience with at least half a dozen injuries and one fatality. CP 251; CP 228; CP 269; CP 334-47. VRR’s superior knowledge and experience, in the face of Jaci Smith’s complete lack of knowledge and experience, should prevent VRR from relying on implied primary assumption of risk.

E. The Recreational Use Statute Does Not Immunize VRR Because It Charged Jaci Smith A \$5 Fee To Use The Same Premises And Engage In The Same Activity That Caused Her Injuries.

The superior court did not grant summary judgment based on the Recreational Use Statute, RCW 4.24.200 *et seq.* CP 357-58; CP 359-61. VRR relies on the statute as an alternative ground to affirm summary judgment, presumably on both Jaci Smith's CPA claim and her premises liability/negligence claim. Resp. Br., at 20-23.

The Recreational Use Statute provides, in pertinent part:

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, hanggliding, paragliding, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, 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.

RCW 4.24.210(1) (emphasis added). This statute is inapplicable for at least two independently sufficient factual reasons, corresponding to the italicized language quoted above. First, VRR was not “in lawful possession and control” of the cliff jumping area where Jaci Smith was injured. Instead, the cliff jumping area was on the freeboard of Wanapum Reservoir, owned by the PUD, rather than VRR. VRR did not have the necessary permit (with attendant obligations⁶) to exercise lawful possession and control of this area. Instead, VRR exercised *un-lawful* possession and control of the freeboard area when it charged Jaci Smith \$5 to jump from the cliff.

Second, as a matter of fact, VRR charged a fee to use the cliff jumping area. While acknowledging that it charged a fee, VRR argues that it did not charge a fee to use the cliff jumping area or to engage in cliff jumping. VRR correctly notes that recreational use immunity applies to land or portions of land for which no fee is charged. Resp. Br., at 20-21 (citing *Plano v. Renton*, 103 Wn.App. 910, 14 P.3d 871 (2000), and *Kleer v. United States*, 761 F.2d 1492 (11th Cir. 1985)). However, the testimony of Jaci Smith, which has never been disputed or denied, and which must

⁶ As noted in Ms. Smith’s opening brief, as a condition of obtaining a permit, VRR must maintain its facilities in a safe condition, assume liability for injuries suffered by visitors on the property, and agree that the use of the property shall not endanger the health of any person. CP 278-79 & 281 (internal ¶¶ 8, 10, 12 & 33).

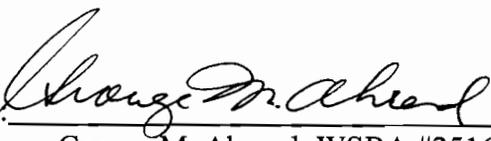
be evaluated in light of the relevant standard of review,⁷ establishes that she was charged a fee to use the cliff jumping area and to engage in the activity of cliff jumping in that area. Specifically, Ms. Smith testified that, based on the substance of her conversation with a VRR employee, and the surrounding circumstances, she was being charged for cliff jumping. CP 119-20.

CONCLUSION

Based on the foregoing argument and authorities, Jaci Smith respectfully asks the Court to reverse the decision of the superior court, vacate the summary judgment of dismissal against her, and remand her CPA and negligence claims for trial.

Submitted this 14th day of September, 2011.

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⁷ The facts, and all reasonable inferences therefrom, must be viewed in the light most favorable to Jaci Smith, as the non-moving party. *See Veit ex rel. Nelson v. BNSF*, 171 Wn.2d 88, 98-99, 249 P.3d 607 (2011).

CERTIFICATE OF SERVICE

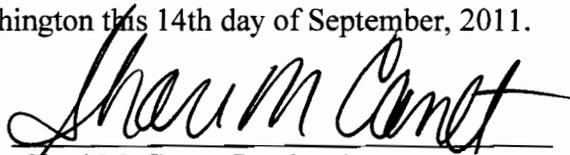
The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On September 14, 2011, I served the Respondent with the document to which this is annexed as follows:

By facsimile transmission to (206) 462-6701, email to seh@pattersonbuchanan.com and map@pattersonbuchanan.com, First Class Mail, and/or hand delivery, to:

Michael Patterson & Sarah Heineman
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Signed at Moses Lake, Washington this 14th day of September, 2011.



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