

FILED

AUG 12 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 298043

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

JACQUELINE SMITH, individual

Plaintiff-Appellant,

v.

BRYAN STOCKDALE, JANE DOE STOCKDALE; STOCKDALE,
INC., D/B/A VANTAGE RIVERSTONE RESORTS; HAVILAH, INC.,
A/K/A STOCKDALE, INC., D/B/A VANTAGE RIVERSTONE
RESORTS; XYZ CORPORATIONS 1-10; AND JOHN AND JANE
DOES 1-10,

Defendants-Respondents.

BRIEF OF RESPONDENTS

Michael A. Patterson, WSBA No. 7976
Sarah E. Heineman, WSBA No. 33107
Attorneys for Defendants-Respondents

PATTERSON BUCHANAN FOBES
LEITCH & KALZER, INC., PS

2112 Third Avenue, Suite 500
Seattle, WA 98121
Tel. 206.462.6700

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I. Introduction

The superior court did not err in granting summary judgment to the Defendants-Respondents, Bryan Stockdale *et al.* (collectively “Vantage”), in this case. Plaintiff-Appellant, Jacqueline Smith (“Smith”), willingly and voluntarily jumped off a 65 foot cliff into the Columbia River. CP 90 (J. Smith Dep. 112:1-5). In doing so, Smith injured herself. CP 92 (J. Smith Dep. 114:20-24). Vantage did not own the cliff from which Smith jumped, nor did it have authority to stop Smith or others from jumping from the cliff. CP 271-72 (S. Dotson Dep. 44:23-45:6, 45:16-20). As such, Vantage owed Smith no duty when she jumped from the cliff. Further, even assuming, *arguendo*, that Vantage owed Smith some duty on the cliff, she assumed the risk of injury when she jumped off a 65 foot cliff into the Columbia River. For these, and the reasons stated below, the superior court’s summary judgment dismissal of this case should be affirmed.

II. Statement of the Case

A. Vantage Owns and Operates an Improved Stretch of Shoreline Along the Columbia River.

Vantage owns and operates an improved stretch of waterfront on the Columbia River that includes a campground, restroom facilities with showers, and boat moorage (the “Campground”). CP 23 (Stockdale Decl.

¶ 7). The Campground is located on Lot 23. *Id. See also* CP 34-35 (Stockdale Dep. 26:18-27:23), CP 40 (Diagram). Lot 22 is private (non-Campground) property also owned by Vantage. CP 35 (Stockdale Dep. 27:21-24). The cliff in question in this case is located on the shoreline of Lot 22, north of the Campground. CP 23 (Stockdale Decl. ¶ 6-9), CP 34-35 (Stockdale Dep. 26:18-27:23), CP 40 (Diagram), CP 267 (Dotson Dep. 25:22-24). The cliff itself, along with all of the shoreline in the area, is owned by Grant County PUD. CP 267 (Dotson Dep. 25:13-24).

B. Vantage Has a PUD Permit Allowing it to Improve the Shoreline and Charge a \$5 Day-Use Fee.

The Columbia River shoreline is part of the Priest Rapids Project. Vantage holds a Grant County Public Utility District (“PUD”) permit allowing it to make certain improvements to a portion of the shoreline adjacent to Lot 23 and property to the south, which is also owned by Vantage. CP 23 (Stockdale Decl. ¶ 8), CP 50-62 (PUD Permit). Among other things, the permit allows landscaping of the breakwaters, installment of a boardwalk, and moorage. CP 56. The cliff from which Smith jumped is to the north of the area described by the permit. CP 23 (Stockdale Decl. ¶ 9).

On April 15, 2003, the PUD granted Vantage permission to charge a \$5.00 day-use fee in a document entitled Additional Permit Terms and

Conditions for Use of Reservoir Freeboard Area (“Additional Permit”).¹ CP 23 (Stockdale Decl. ¶ 10), CP 64 (Additional Permit). Permission to charge a day use fee was granted to Vantage because of the large number of individuals who come to utilize the improved shoreline and swimming area at Vantage during summer concerts at the Gorge Amphitheater. CP 23 (Stockdale Decl. ¶ 11).

Individuals are required to pay the day-use fee to the attendant at the front gate entrance. CP 44 (Stockdale Dep. 39:14-20). However, many people attempt to avoid paying the fee altogether. For that reason, wristbands are distributed to persons who pay the fee. CP 46-47 (Stockdale Dep. 44:19-45:15).

C. The PUD Requires Property Owners to Permit Public Access to the Shorelines and Required Vantage to Remove a Fence Impeding People from Cliff Jumping.

It is the policy of Grant County PUD that private property owners of land adjacent to the Priest Rapids Project reservoir shoreline may not prohibit public access of the shoreline between the private property and the reservoir. Grant County Public Utility District Natural Resources, *Land Usage*, [http:// www.gcpud.org/ naturalResources/](http://www.gcpud.org/naturalResources/)

¹ Under the Additional Permit, the PUD required the Defendants post signs identifying the area as a Priest Rapids Hydroelectric Project Use Fee Area for Public Recreation. CP 23 (Stockdale Decl. ¶ 12.) The signs state: “THESE RECREATION FACILITIES ARE OPEN TO ALL MEMBERS OF THE PUBLIC WITHOUT DISCRIMINATION.” CP 23 (Stockdale Decl. ¶ 12), CP 65.

shorelineManagement/landUsage.html#faq7 (follow “As a property owner of land adjacent to the Priest Rapids Project reservoir shoreline, do I have a right to prohibit public access of the shoreline between my land and the reservoir?” hyperlink) (last visited Aug. 10, 2011). In fact, the PUD enforced that policy, requiring Vantage to remove a fence it had installed along the shoreline of the cliff to prevent people from jumping. CP 49 (Stockdale Dep. 48: 11-17), CP 265, 271 (Dotson Dep. 19:21-20:2; 43:15-18).

D. Smith and her Siblings Decided to Go Swimming at the Campground.

On July 27, 2006, Smith was attending a Christian music festival at the Gorge Amphitheatre with several members of her family. CP 119 (J. Smith Decl.). It was a warm day and Smith and several of her siblings decided to go swimming at the campground in a “spur of the moment” decision. CP 68 (J. Smith Dep. 37:2-9).

After they arrived at the Campground, an employee drove toward Smith and her siblings in a golf cart to collect the \$5.00 day-use fee. CP 110 (K. Smith Dep. 13:4-19). Two of Smith’s siblings ran into the water to avoid paying the \$5.00 day-use fee. CP 105-06 (C. Lane Dep. 9:11-10:3), CP 96-97 (B. Smith Dep. 15:6-16:13). One of Smith’s sisters was scared by a “Weiner dog,” causing her and Smith to run in a different

direction than their siblings – but also away from the Campground’s employee coming towards them in a golf cart. CP 69 (J. Smith Dep. 39:2-23), CP 110 (K. Smith Dep. 13:4-19). Smith and her sister ran towards a small grassy hill in the Campground where they were approached by one or two employees.²

Smith spoke to the employee(s) as she put her personal items down on the grassy hill. CP 69-70 (J. Smith Dep. 39:21-40:20). Smith testified that the employee “told [her] that there’s a \$5 charge per person that swam.” Smith asserts that she said she wanted to jump, and was told that she still had to pay. (*Id.*) Smith and her sister paid a total of \$10 and each received a wristband. CP 71 (J. Smith Dep. 41:1-41:3).

E. Smith Stepped on the Fence to Access the Cliffs.

After paying the day-use fee, Smith left her personal items on the grassy hill, which is part of Vantage’s Campground, and walked to the cliff. CP 76 (J. Smith Dep. 45:8-12). On her way to the cliff, Smith

² Smith and her siblings cannot identify the employee(s). Their testimony varies widely:

- Smith identifies the employees as a man and a woman. CP 70 (J. Smith Dep. 40:1-40:8).
- Smith’s sister, Katie Smith, refers to the people in the golf cart in the plural, but has no recollection of who it was, or their gender. CP 111 (K. Smith Dep. 18:9-15).
- Smith’s brother, Beau Smith, refers to only one person on the golf cart. He cannot identify the person, but later remembers a “lady” yelling at them from a golf cart. CP 96, 98 (B. Smith Dep. 15:18 & 17:11-16).
- Smith’s sister, Cyndi Lane, recalls an “old guy coming to charge them,” but has no recollection of what he looked like. CP 105 (C. Lane Dep. 9:14-22).

crossed the fence line separating the Campground from the private property to the north, although she found the fence pushed down at the point of her crossing:

Q. So I just want to make sure I understand. There was [a] fence up on either side but at the point of the path the fence was on the ground; is that correct?

A. Yeah. And I'm not sure how far it extended where it was up, but it was completely bowed to the point where I didn't have to climb over it in any sense.

Q. But you did step on the fence as you were walking across?

A. I stepped on the fence when I walked across, I believe.

CP 87-88 (J. Smith Dep. 73:22–74:7). In addition, signs were – at a minimum – near the fence. Smith's mother testified that when she went to the cliff the following day, she saw signs on the ground near the fence stating "either private property or don't trespass or something." CP 115 (C. Smith Dep. 35:20-36:10).

F. Smith Knew How to Enter the Water Safely and Jumped for the Thrill of It.

Before she jumped, Smith testified that she watched at least three people jump off the cliff. It took her "[a] little bit of time" to decide to jump. CP 77 (J. Smith Dep. 46:9-10). She thought "it was going to be a

thrill,” and she asked her sister to take her picture.³ CP 77-78 (J. Smith Dep. 46:18-47:1). Smith knew that people typically jumped in the water feet first, hands to their side. She believed that was the safest way to jump, and it was how she intended to enter the water. CP 78-79 (J. Smith Dep. 47:2-4 & 49:7-9).

Smith’s decision to jump off the cliff was consistent with her characterization of herself as a thrill-seeker. *See e.g.* CP 90-91 (J. Smith Dep. 112:15-113:13). Specifically, Smith testified that: “Me and my other older brother, J.D., have more of a tendency to like travel to different countries, eat foreign foods. A different thrill. Get butterflies in a sense.” CP 90 (J. Smith Dep. 112:19-23). Upon further questioning, Smith elaborated:

Q. What do you think causes the butterflies that you were talking about?

A. For me numerous things. From walking into a room giving a speech to – for that instance that day had been jumping off the cliff.

Q. You mentioned earlier that your brother Beau would not have jumped off the cliff because he’s not a thrill-seeker. And you would – I think I understood in part because you are a thrill-seeker. What is it about jumping off the cliff that you find thrilling?

³ Smith’s sister did not manage to get a picture of her jumping. CP 77 (J. Smith Dep. 46:21-47:1).

A. It was the adrenaline rush, I suppose.

CP 91 (J. Smith Dep. at 113:3–13). Further, while Smith denies that she thought she could injure herself jumping off the cliff, she acknowledges that others likely would have found it too dangerous to attempt:

Q. When you were standing at the top of the cliff did you know that there were some people who would never jump off that cliff because they would think it was too dangerous?

A. I hadn't thought of it at the time. I'm sure that it is definitely the reasoning for numerous people why they wouldn't. But I hadn't thought of that.

CP 91-92 (J. Smith Dep. at 113:22–114:3).

Despite the risks – or perhaps because of them – Smith jumped off of the cliff, which she estimates to be 65 feet high. CP 90 (J. Smith Dep. 112:1-3). After jumping, she “swam to shore” where her siblings met her at the base of the cliff. CP 79 (J. Smith Dep. 49:20-21). When she and her siblings returned to the Gorge, Smith’s mother insisted on driving her to the hospital, even though Smith “didn’t think [her] injuries were that extensive.” CP 85 (J. Smith Dep. 54:4-7). Plaintiff now alleges that her injuries include: a fractured back and neck, and other aches and bruises. CP 92 (J. Smith Dep. 114:20-24).

III. Argument

A. Standard of Review.

The standard on review from a grant of summary judgment is *de novo*. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). On appeal, the reviewing court considers the same evidence presented to the trial court. *Id.* The facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriately granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Because the reviewing court examines the case *de novo*, it reviews not only the decision of the trial court, but may also determine whether the trial court’s decision is properly affirmed on alternate grounds. *See State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); *Nast v. Michaels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *Borish v. Russell*, 155 Wn. App. 892, 905, 230 P.3d 646 (2010); *Mudarri v. State of Washington*, 147 Wn. App. 590, 600, 196 P.3d 153 (2008).

B. Smith’s Negligence Claim was Properly Dismissed on Summary Judgment.

A cause of action for negligence requires the plaintiff establish (1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury,

and (4) proximate cause between the breach and the injury. *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). The threshold determination of whether a landowner owes a duty to a person is a question of law. *Id.* at 128. In Washington, a landowner's duty of care is governed by an entrant's common law status: invitee, licensee, or trespasser. *Curtis v. Lein*, 150 Wn. App. 96, 103, 206 P.3d 1264 (2009) rev'd on other grounds, 169 Wn.2d 884, 239 P.3d 1078 (2010). The greatest duty is owed by a landowner to an invitee; the least duty is owed to a trespasser. Smith asserts that she was an "invitee" of Vantage – more specifically a business visitor⁴ – and is therefore owed the highest duty of care. (Appellant's Br. at 12.) However, regardless of Smith's status on the land, Vantage owed her no duty because (1) it does not own the property from which she jumped; and (2) Smith assumed the risk of injuring herself when jumping off the cliff.

1. Vantage Owed No Duty to Smith Because it Does Not Own the Property from which She Jumped.

In Washington, it a *landowner* who owes a duty of care to the entrants on its land. *See e.g. Curtis*, 150 Wn. App. at 103. Vantage did not own or have any control over the land from which Smith jumped. CP

⁴ A "business visitor" is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

271-72 (Dotson Dep. 44:23-45:6, 45:16-20). As such, it had no duty to her at the time she jumped. As stated by the superior court:

It is axiomatic that a landowner has a duty of care to those who are physically present on the landowner's property. While plaintiff's actions on the day of her injury did involve defendant's property and the permitted PUD property, plaintiff's injuries bore no relation to defendant's property or the permitted PUD property: plaintiff jumped off of PUD property and injured herself in or while impacting the Columbia River. Defendants had no duty to prevent plaintiff from jumping nor did defendants have a duty to warn plaintiff that jumping off of defendant's neighbor's property could be dangerous and thus they cannot be held liable for any injuries she received while on the PUD property.

CP 365.

While Smith argues that Vantage should be liable for her injuries despite the fact that it does not own the property from which she jumped, she provides no case law to support her claim. Smith states in conclusory fashion that Vantage should be liable because it charged \$5 to jump off the cliff. (Appellant's Br. at 12.) Even accepting Smith's version of the facts, however, it is uncontested that she was on Vantage's property when she was asked to pay \$5 and that she utilized Vantage's property by leaving her personal items in the Campground when she jumped off the cliff. As such, the \$5 fee was properly assessed regardless of whether Smith chose

to swim, walk around the Campground, or leave the property to jump off a cliff.

2. Alternatively, Vantage Owed No Duty to Smith Because She Assumed the Risk of Harm in Jumping from the Cliffs into the Columbia River.

Smith voluntarily assumed the risk of cliff jumping, thereby immunizing Defendants from any potential liability for her injuries. By engaging in the sport of cliff jumping, Smith assumed the risks inherent in that sport. An individual “who participates in sports ‘assumes the risks’ *which are inherent in the sport*. To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence.” *Scott v. Pacific West Mtn. Resort*, 119 Wn.2d 484, 498, 834 P.2d 6 (1992) (emphasis added).

There are four recognized categories of the assumption of the risk doctrine: “(1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable.” *Scott*, 119 Wn.2d at 496. The third and fourth categories are now considered to be nothing more than alternative names for contributory negligence. *Alston v. Blythe*, 88 Wn. App. 26, 32, 943 P.2d 692 (1997). However, when the first and second categories apply, the plaintiff has assumed the duty and the defendant is relieved of a duty to the plaintiff. In other words, both express and implied assumption of

the risk act as a complete bar to recovery. *Id.* at 32-33; *Scott*, 119 Wn.2d at 497-98.

Participants impliedly assume the risks of the sports/activities in which they choose to participate: ““Those who participate in sports or amusement subjectively assume known risks of being hurt.’ In doing so, each participant impliedly ‘assumes the dangers that are *inherent in and necessary to* the particular sport or activity.’” *Brown v. Stevens Pass, Inc.*, 97 Wn. App. 519, 522-23, 984 P.2d 448 (1999) (quoting *Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 401, 725 P.2d 1008 (1986) and *Scott*, 119 Wn.2d at 501). As explained by the Washington Supreme Court,

A classic example of primary assumption of risk occurs in sports cases. One who participates in sports “assumes the risks” which are inherent in the sport. To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence. Therefore, that type of assumption acts as a complete bar to recovery. The doctrine of primary implied assumption of the risk can perhaps more accurately be described as a way to define a defendant’s duty. ***A defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport.***

Scott, 119 Wn.2d at 498 (emphasis added).⁵ Accordingly, Smith assumed the risk of those injuries inherent in cliff jumping.

In *Scott*, for example, the plaintiff sustained severe head injuries when he missed a slalom gate and crashed into an unpadded post supporting a shed on the ski hill. *Id.* at 487-88. The court found that the plaintiff assumed the risks inherent in the sport of skiing. *Id.* at 501, 503. However, the court found that there was a question of fact regarding whether the operator provided reasonably safe facilities in allowing the course to be placed close to an unfenced, unpadded, abandoned shed. *Id.* at 502-03.

Here, unlike in *Scott*, Smith makes no allegations that her injuries arose from anything other than participation in the sport of cliff jumping. Smith admits that she voluntarily jumped off the cliff for the thrill of it. CP 77-78 (J. Smith Dep. 46:9-10, 46:18-47:1), CP 91 (J. Smith Dep. at 113:3-13). She also admits that she attempted to jump feet first with her hands at her side because she knew it was the safest way to enter the water. CP 78-79 (J. Smith Dep. 47:2-4 & 49:7-9). Smith does not allege that Vantage did anything to cause her injury (such as place an obstruction

⁵ While sports are the classic example of assumption of the risk, it is not necessary that an activity be a “sport” for the doctrine to apply. *See Brown*, 97 Wn. App. at 522-23, quoting *Codd*, 45 Wn. App. at 401 (discussing those who participate in “sports or amusement” and noting that they assume the risks inherent in “the particular sport or activity”).

in the water); she simply asserts that she hit the water wrong and injured herself.

Logically, it is difficult to conceive of a risk more inherent in cliff jumping than injuring oneself by not entering the water correctly. Improperly entering the water is thus a risk inherent to cliff jumping, and as the *Scott* court emphasized, Vantage did not have a duty to protect Smith from such an injury. Because Smith assumed the risk of cliff-jumping, her claims were properly dismissed as a matter of law and the superior court's dismissal on summary judgment should be affirmed.

C. Plaintiff's Consumer Protection Act Claim was Properly Dismissed on Summary Judgment.

The Consumer Protection Act ("CPA") provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020. In order to state a CPA claim, the citizen suit provision of the CPA requires Smith prove each of the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Panag v. Farmers Ins. Co. of Wa.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009).

Smith contends that the superior court erred in granting Vantage summary judgment on her CPA claim because she asserts there is a question of fact regarding the first element of this test. (Appellant's Br. at 9-11.) In a footnote, however, Smith acknowledges that Vantage's summary judgment motion was based on the fourth element of the test. (Appellant's Br. at 9 n.3.) Further, Smith fails to discuss any of the other elements that a plaintiff must prove to establish a CPA violation. (*Id.*)

To avoid dismissal, Smith attempts to argue that the \$5 day-use fee she paid to Defendants for use of their property was an injury to her business or property that she incurred because of an unfair act committed by Defendants. However, this is nothing more than an attempt to circumvent Washington case law on this issue. Plaintiff's argument fails for two reasons: (1) her attempts to reclassify personal injury damages into a pseudo-property structure are not permitted under Washington law; and (2) she utilized Defendants' property, meaning the \$5.00 fee was properly charged, and there was no unfair act under the CPA. Accordingly, dismissal of Smith's CPA claim should be affirmed.

1. Personal Injury Claims do not Fall within the Purview of the CPA.

The requirement of "injury to one's business or property" is a precondition to a plaintiff's private right of action under the CPA. *See*

Bob Cohen, Annotation, *Right to Private Action under State Consumer Protection Act-Preconditions to Action*, 117 A.L.R. 5th 155 (2004) (collecting cases that discuss injury requirement as a precondition to CPA claim). Indeed, “[t]he legislature’s use of the phrase ‘business or property’ in the CPA is restrictive of other categories of injury and is ‘used in the ordinary sense to denote a commercial venture or enterprise.’” *Ambach v. French*, 167 Wn.2d 167, 172, 216 P.3d 405 (2009), quoting *Stevens v. Hyde Athletic Ind., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989). In other words, personal injuries, unlike injuries to “business or property,” are not compensable and do not satisfy the injury requirement under the CPA.⁶ *Panag*, 166 Wn.2d at 57. Thus, “personal injury claims do not fall within the purview of the CPA.” *Id.* at 41 n.5.

Under Washington law, Smith cannot recast her personal injury claim as a pseudo-property claim in order to bring it within the confines of a CPA claim. For example, in *Stevens*, the plaintiff purchased softball cleats⁷ from the defendant that allegedly caused her to later break her ankle. In affirming summary judgment in favor of the defendant on plaintiff’s CPA claim, the Court of Appeals rejected the plaintiff’s attempt

⁶ If the Washington legislature intended to include actions for personal injury under the CPA, “it would have used a less restrictive phrase than injured in his or her ‘business or property.’” *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993).

⁷ The plaintiff’s softball cleats in *Stevens* cost more than the \$5.00 fee Smith was charged in this case. *Stevens*, 54 Wn. App. at 367.

to characterize her damages as property and economic injuries when the case was really a personal-injury case. *Id.* at 370. The court clearly held “actions for personal injuries do not fall within the coverage of the CPA.” *Id.*

This decision is approved of and further elucidated in *Ambach*. In *Ambach*, the Washington Supreme Court explicitly states: “[w]here plaintiffs are both physically and economically injured by one act, courts generally refuse to find injury to ‘business or property’ as used in the consumer protection laws.” *Ambach*, 167 Wn.2d at 174. In support, *Ambach* favorably cited *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), in which reimbursement for lost wages and earning capacity, medical expenses, and **damages to a vehicle** arising from personal injury are commonly awarded in personal injury actions and are not recoverable under the CPA. *Ambach*, 167 Wn.2d at 173, 175.

Just as the plaintiffs in *Stevens*, *Ambach*, and *Hiner* could not use their personal injuries actions to support economic damages, Smith cannot be permitted to do so in this case. Accordingly, Smith’s CPA claim must be dismissed as a matter of law.

2. The Day Use Fee was not Unfairly or Deceptively Charged.

There is no dispute that Smith entered onto Vantage’s property, nor that she left her personal belongings on Vantage property while she

jumped off the cliffs. The fact that Smith subsequently left the permitted area to engage in other activities does not negate the fact that she was appropriately charged for her use of Vantage's property. It is not disputed that Smith accessed the PUD-permit area for which Vantage was entitled to charge a \$5.00 day-use fee. It is also not disputed that Smith accessed and utilized (by leaving her belongings there) Vantage's campground property, for which it could charge a fee without the need for a PUD permit. Accordingly, Smith obtained the benefit for which she paid and she cannot establish the elements of a CPA claim.

As articulated by the superior court:

Plaintiff's Consumer Protection Act claim fails because upon her initial entry onto the permitted PUD property area and/or defendant's property she was subject to the \$5.00 "day use" fee because she had already entered the property for which a fee was authorized. In other words, due to the fact that plaintiff was already physically located in an area for which a fee was collectible, even if the defendant's employee had stated that plaintiff 'still had to pay the fee, even just to jump' as described in plaintiff's declaration, page 3 line 3, this statement was not deceptive or misleading *because it was true* (she was then-present, during that conversation, on property for which defendants had a right to collect the \$5.00). Since the statement if actually made would have been true, such statement would not have been misleading or deceptive and

therefore cannot be the basis for a consumer protection act claim.

CP 365-66. Accordingly, charging Smith \$5.00 was not unfair or deceptive under the CPA, and Smith's claim was properly dismissed.

D. Alternatively, Respondents are Immune from Liability under the Recreational Land Use Act.

Vantage is immune from liability under Washington's Recreational Land Use Act ("RLUA"), RCW 4.24.200 *et seq.* Washington's RLUA provides immunity for any public or private landowners who allow members of the public to use the land for the purposes of outdoor recreation including, but not limited to: camping, picnicking, swimming, hiking, and rock climbing, and without charging a fee of any kind. RCW 4.24.210.

However, "[a] landowner can also charge a fee for public use of its recreational land without losing immunity for public use of the remainder." *Plano v. City of Renton*, 103 Wn. App. 910, 914, 14 P.3d 871 (2000). In order for immunity to apply, a landowner needs only to show that it charges no fee for using the land or water area where the injury occurred. *Id.* at 915. This principle is explained in *Plano* and the case law it relies upon.

In *Plano*, the plaintiff sued the city for injuries she suffered when she slipped and fell on a metal ramp leading to a moorage dock. *Id.* at

911. The city argued that the RLUA should apply because it charged for moorage but did not charge a fee for park users to walk on the floats and gangways. *Id.* at 913. The court disagreed, finding that the ramp was a “necessary and integral part of the moorage” for which the fee was charged. *Id.* at 915. The court further explained that the two ramps and the connecting gangways specifically exist to provide access to the floating dock, a fee-generating portion of the park. *Id.* The *Plano* court relied heavily on a Florida case, *Kleer v. United States*, 761 F.2d 1492 (11th Cir. 1985), for its rationale. *Plano*, 103 Wn. App. at 915.

In *Kleer*, the plaintiff dove off a bridge in an undeveloped portion of national forest and was injured. *Kleer*, 761 F.2d at 1493. The government charged fees for use of the developed areas of the forest, but did not charge a fee for use of the undeveloped portion where the bridge was located. *Kleer*, 761 F.2d at 1493. Because no fee was charged for use of the area in which the plaintiff was injured, the court found the public landowners immune from liability. *Kleer*, 761 F.2d at 1495.

Here, as in *Kleer*, no fee was charged to access the cliffs from which Smith jumped. In fact, neither the cliffs nor the private property Smith crossed to access the cliffs are even part of the property governed by the PUD permit permitting Vantage to charge the \$5.00 day-use fee. CP 23 (Stockdale Decl. ¶ 10), 51-62 (Permit). In addition, the cliffs are

separated from the Campground by a fence line, which Smith admits to stepping on as she accessed the cliff. CP 87-88 (J. Smith Dep. 73:22–74:7). The fence separates the fee-generating portion of the Campground from the public shoreline. CP 38-39 (Stockdale Dep. 32:23-33-1).

Moreover, the cliffs are always open to public use as part of the Priest Rapids Project requirements. CP 267 (Dotson Dep. 25:13-24). In fact, when Vantage had – years earlier – erected a fence along the boundary that precluded individuals from accessing the cliffs, the PUD required Vantage to remove that fence. CP 49 (Stockdale Dep. 48:11-17), CP 265, 271 (Dotson Dep. 19:21-20:2; 43:15-18). Grant County PUD prohibits private property owners of land adjacent to the Priest Rapids Project reservoir shoreline from preventing public access of the shoreline between the private property and the reservoir. Grant County Public Utility District Natural Resources, *Land Usage*, <http://www.gcpud.org/naturalResources/shorelineManagement/landUsage.html#faq7> (follow “As a property owner of land adjacent to the Priest Rapids Project reservoir shoreline, do I have a right to prohibit public access of the shoreline between my land and the reservoir?” hyperlink) (last visited Aug. 17, 2010). Accordingly, while the cliffs can only be legally accessed by water – not by trespassing over Vantage’s private property – they are open to

recreational use without a fee. As such, Vantage is entitled to immunity under the RLUA, and Smith's claims fail as a matter of law.

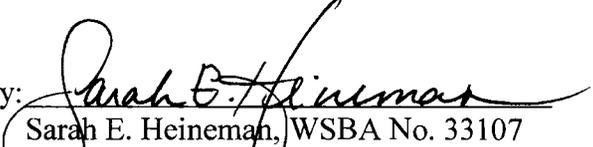
IV. Conclusion

For the reasons stated above, summary judgment in favor of Vantage was proper and should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of August, 2011.

PATTERSON BUCHANAN FOBES
LEITCH & KALZER, INC., P.S.

By: 
Michael A. Patterson, WSBA No. 7976
Of Attorneys for Respondents

By: 
Sarah E. Heineman, WSBA No. 33107
Of Attorneys for Respondents