

No. 67713-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ESTATE OF MAIA HAYKIN
and RICHARD HAYKIN,
individually and as personal representative of the
ESTATE of MAIA HAYKIN,

Appellant,

vs.

CITY OF BELLINGHAM,
a municipal corporation,

Respondent.

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Brief of Appellant

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A. INTRODUCTION

On May 28, 2008, 49 year-old Maia Haykin was killed by a train while riding her bike across railroad tracks owned and controlled by Burlington Northern Santa Fe Railroad [“BNSF”]. She entered the crossing from a recreational trail known as the South Bay Trail built by the Bellingham Parks Department. It runs from downtown Bellingham south to the waterfront at Boulevard Park, and then on to Fairhaven to the south. The fatal accident occurred where the trail enters the north end of Boulevard Park, and crosses BNSF’s tracks. The trial court granted the City of Bellingham’s summary judgment under RCW 4.24.210, the land use recreational immunity statute.

B. ASSIGNMENTS OF ERROR

(1) The trial court erred granting summary judgment extending recreational immunity to the City of Bellingham under RCW 4.24.210. The record before the trial court fails to establish Bellingham’s ownership or lawful possession and control of the South Bay Trail railroad crossing for purposes of RCW 4.24.210.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The pedestrian crossing at issue has no automated flashing lights,

gates, or cross bars. It is marked with a stop sign and railroad cross buck sign. Ms. Haykin's estate and surviving husband filed suit against the City of Bellingham alleging negligence for their failure to install flashing lights and bicycle dismount barriers at the pedestrian crossing. Bellingham and BNSF had previously acknowledged the need to install these safety features but never did it. Bellingham answered alleging fault on the part of BNSF for their involvement in the design of the crossing. Plaintiffs filed an Amended Complaint adding BNSF as a defendant. Both defendants moved for summary judgment asserting recreational immunity under RCW 4.24.210. The trial court did not reach issues of negligence, but granted summary judgment to both defendants finding both were entitled to recreational immunity. BNSF successfully argued that they were entitled to immunity under RCW 4.24.210 on a showing that they owned the crossing and made it available for recreational purposes without charge. No evidence exists establishing joint ownership or control between the two defendants. Petitioners appeal the summary judgment as to the City of Bellingham on the grounds that they failed to establish ownership or control over the crossing, a condition precedent to recreational immunity.

The pertinent portion of the statute provides:

RCW 4.24.210

Liability of owners or others in possession of land and water areas for injuries to recreation users -- Limitation.

(1) 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 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, 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.

(Underlining added)

The term, “. . . landowner or others in lawful possession and control” is used throughout the statute. See subsections (2), (3) and (4).

Appellants conceded on summary judgment that BNSF had standing to assert recreational immunity as the owner of the crossing where this accident occurred, but argued questions of fact existed as to latency of a hazardous condition. Bellingham did not assert or argue their own ownership or possession and control, yet the trial court extended immunity to both defendants and granted summary judgment to both. Without ownership,

immunity is only afforded to Bellingham upon a showing of “lawful possession and control”. RCW 4.24.210(1). These terms are expressed in the conjunctive requiring a showing of both possession and control. The trial court record is devoid of any such showing. Bellingham did not submit any evidence of either ownership or possession and control. In fact, all the evidence is to the contrary. Bellingham’s failure to make the requisite showing of either ownership or “lawful possession and control” of the crossing renders the immunity protections of RCW 4.24.210 inapplicable to them. The trial court erred in granting Bellingham summary judgment under RCW 4.24.210 ruling as a matter of law that Bellingham lawfully possessed and controlled BNSF’s property. In reviewing a summary judgment order, this court engages in the same inquiry as the trial court. Tollycraft Yachts Corp., v. McCoy, 122 Wn. 2d 426, 431, 858 P.2d 503 (1993).

D. STATEMENT OF THE CASE

As early as 1993, when the Bellingham Parks Department was in the formative stages of developing the South Bay Trail, Bellingham recognized the need for pedestrian signalization where the trail was planned to cross the BNSF train tracks at the north entry to Boulevard. CP 64. BNSF resisted a new pedestrian crossing on their property at this location citing serious safety concerns. CP 67-68. BNSF long treated anyone crossing these tracks as

trespassers. CP 61, 136. The trend in recent years has been for BNSF to eliminate vehicle and pedestrian crossings whenever possible as a meaningful way of reducing fatalities at railroad crossings. CP 90. Despite the serious concerns expressed by BNSF, Bellingham was determined and proceeded with their plans to direct pedestrians across BNSF's tracks. In early 1995, construction of this section of the South Bay Trail was scheduled to go out for bid until a city engineer noticed that Bellingham did not have BNSF's permission to cross their tracks at north Boulevard Park. Consequently, plans were altered and the trail was constructed up to the rail crossing right of way from the north, and then picked up again approximately 30' on the other side. CP 76-77, 268.

BNSF became increasingly concerned with the number of people trespassing across their tracks as a link between where the trail stopped and started and expressed these concerns to Bellingham. CP 60-61, 162. In early 2001, BNSF enforced their ownership rights by blocking the trail with concrete barriers along each side of their tracks to prohibit trail users from trespassing across the tracks. CP 110, 158, 268. Several months after BNSF's blockade went up, the 15-year storied history of conflict concluded when Bellingham and BNSF reached an agreement by which the barriers would be removed, and BNSF would construct an at-grade crossing provided

Bellingham made certain bicycle and pedestrian safety improvements.¹

The agreement, entitled Permit for The Construction of A Pedestrian Crossing (MP94.42) Bellingham, Washington, granted Bellingham permission to allow the public to cross BNSF's tracks at north Boulevard Park. CP 103-110. The brief historical reference is provided to reveal the unequivocal ownership BNSF has always claimed of the crossing, and Bellingham's acknowledgment of BNSF's ownership and control. The trial court erred by finding as a matter of law, that Bellingham owned or controlled the railroad crossing at issue.

For purposes of summary judgment, it is beyond reproach that the court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). A motion for summary judgment can only be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hubbard v. Spokane County, 146 Wn.2d 699, 707, 50 P.3d 602 (2002) (quoting Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000)). The moving party bears the initial burden of showing the absence of a material fact.

¹ Bellingham never did make these safety improvements which gave rise to the plaintiffs' negligence claim. CP 87-88. That claim was not addressed by the trial court and is therefore not before this court on appeal.

Young v. Key Pharms, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A material fact is one that affects the outcome of the litigation." Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). Bellingham had the burden on summary judgment to prove ownership or lawful possession and control of the railroad crossing, a burden they did not meet.

E. ARGUMENT

The record lacks any evidence or argument by Bellingham that they possessed ownership or possession and control of the railroad crossing for purposes of RCW 4.24.210(a). The only evidence is to the contrary. Bellingham conclusively admitted the lack of any ownership or control. The Amended Complaint alleges at Paragraph 7 that BNSF owns and operates the railroad crossing, CP 324, which Bellingham admitted in their Answer. CP 316. Facts admitted in pleadings are withdrawn from contest and may be taken as established. Neilson v. Vashon Island Sch. Dist., 87 Wn.2d 955, 958, 558 P.2d 167 (1976). Bellingham should be judicially estopped from asserting ownership or control.

Interim Director of Bellingham's Park Department, Leslie Bryson, reaffirmed Bellingham's lack of ownership and control when she stated in a sworn declaration, "Boulevard Park is bisected by a set of Railroad Train

Tracks. These are owned and operated by BNSF.” CP 221. The contentious history between BNSF and Bellingham over opening their tracks for a pedestrian crossing can leave no doubt the city has never had any right of ownership or control of the crossing. Illustrative is the fact that for several months in 2001, BNSF blocked access to their tracks by stacking concrete blocks at all access points. Ms. Bryson confirmed Bellingham’s lack of any right to possess or control the crossing. She testified in 2011:

Q: (by Chance) To your knowledge does the City plan to make any future improvements to this crossing?

A: I don’t know . . .

Q: If additional improvements were made it would fall under your jurisdiction, your agency’s jurisdiction?

A: To the trail?

Q: To the crossing?

A: No, that’s property owned by Burlington Northern.

CP 172

Bellingham park planner, Tim Wahl, concurred. “[I]t’s not our property”.

CP 175. When discussing the design of the crossing, he testified:

A: As far as I can remember, I think what came out that this design was basically sort of a permit driven thing by BNSF saying here’s what we think will work then you can use our property. And I really don’t know what they used, but it goes back to it was not our property.

Q: (by Chance) The crossing itself was not the City's property?

...

A: It was not, yes.

CP 179

This accident did not happen on the trail, it happened in the 30' at-grade crossing owned and controlled by BNSF. Bellingham takes the legally unsupported position that issues of ownership or control as called for in RCW 4.24.210 should be overlooked since their trail is contiguous across BNSF's property. As a statute in derivation of the common law, it is to be strictly construed. State v. Whatcom County, 92 Wn.2d 35, 593 P.2d 546 (1979). Immunity is disfavored in the law and statutory grants of immunity should be strictly construed. Tennyson v. Plum Creek Timber, 73 Wn. App. 550 (1994). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction." Snows' Mobile Homes, Ins., v Morgan, 80 Wn.2d 283, 288, 494 P.2d 216 (1972). RCW 4.24.200-.210 does not provide for a policy of liberal construction in favor of property owners. Mathews v. Elk Pioneer Days, 64 Wn. App. 433, 824 P.2d 541 (1992). To determine whether the statute applies, courts view the circumstances from the standpoint of the landowner. Cultee v. City of Tacoma, 95 Wn. App. 505, 514, 977 P.2d 15 (1999). Bellingham admits it is not the owner of the

crossing, and that they do not lawfully possess and control it.

Some states have broader definitions of owners or occupiers in their recreational immunity statutes. For example, the Idaho statute defines “owner” of land to include “. . . a tenant, lessee, occupant or person in control of the premises”. I.C. §36-1604(b)(2) (1977). Similarly, Arizona’s recreational immunity statute defines an immune property owner to include “owner, easement holder, lessee, tenant, manager or occupant of premises” A.R.S. §33-1551 (1983). See also, Michigan, M.C. L. Sec. 300; 201; M.S.A. Sec 13. 1485 (“owner, tenant, or lessee”). Washington’s statute is more restrictive requiring either actual ownership or lawful possession and control. Without ownership or control, no immunity attaches. The undisputed facts before the trial court establishes that Bellingham neither owns nor controls BNSF’s crossing. Accordingly, RCW 4.24.210 does not extend immunity to Bellingham.

Cases which have dealt with the issue of possession and control for purposes of recreational immunity have extended immunity only under well defined conditions which are usually controlled by contracts between the property owner and the possessor. Power v. Union Pac. RR., 655 F.2d 1380 (9th Cir. 1981), a diversity case applying Washington law, involved a young woman hit by a train while playing a dangerous and fatal game on the tracks

with her friends. The tracks were owned by Burlington Northern but after being sued the train operator, Union Pacific, asserted lawful possession and control for purposes of seeking recreational immunity under RCW 4.24.210. In finding possession and control, the Ninth Circuit looked at four provisions of the contract between Burlington Northern and Union Pacific. Section 3 of the contract granted both parties “equal and joint possession and use” of the tracks and the right of way at issue. The contract further provided that Union Pacific “shall have in every respect the same rights and privileges in the transaction of its business that the (owner) or any other user of the property has as to its business . . . ”. Power, at 1387. In addition, the contract contained a provision automatically converting employees into “joint employees” when engaging in activities for the common benefit of the two companies. Union Pacific also had the right to make necessary repairs to the tracks. Finally, Union Pacific could not be ousted from the property for failure to make payments to Burlington Northern until they were in default for six months. The Ninth Circuit held that these contractual provisions placed Union Pacific in lawful possession and control for purposes of RCW 4.24.210. None of these criterias exist as between Bellingham and BNSF. Interim Director of Bellingham Parks, Leslie Bryson made clear that the city had no right to make any improvements to the crossing because it was owned

by BNSF. CP172.

The agreement between Bellingham and BNSF allowing for the construction of a pedestrian crossing reaffirms the lack of any ownership or control by Bellingham. Any plans or specification for the project must be approved by BNSF before construction, (pg. 2, para. 1) CP 104, and all work was required to be performed to the satisfaction of BNSF. (pg. 4, para. 1) CP 106. No work could be performed on the railroad's property without first signing "The Right-of Entry Agreement" prepared by BNSF. (pg. 3, para. 9(b)) CP 105. Bellingham is prohibited from performing any maintenance on the crossing without obtaining BNSF's prior authorization. (pg. 4, para. 8) CP 106. Once the at-grade crossing was constructed, Bellingham was vested with responsibility for maintaining the safety of the approaches and signage for the crossing. (pg. 5, para. 13(a)). CP 107. The final paragraph of the agreement makes clear Bellingham's use of the crossing "is not exclusive and is without warranty of title or for quite enjoyment." Bellingham is prohibited from permitting others "to use the Railway's property for any other purposes." CP 108.

Recreational immunity in the State of Illinois is also premised on ownership or control over property. There, a motorcyclist was killed when he struck a cable the city had strung across an access road owned by the

railroad and over which the city of was granted a nonexclusive easement to install and maintain a power line. Reversing the trial court, the Court of Appeals held that a limited nonexclusive right to use railroad property did not create a sufficient possessory interest in, or dominion and control over the land, to extend recreational immunity. Steinbach v. Csx Transp., Inc., 913 N.E.2d 554, 393 Ill. App. 3d 490 (Ill. App., 2009).

An order granting summary judgment is reviewed de novo. Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). The Court is free to review Bellingham's summary judgment submission. It will find no facts or argument supporting Bellingham's ownership or control over BNSF's crossing. Intuitively, a grant of recreational use immunity to a property owner does not extend to an adjacent property owner.

Recreational use immunity is an affirmative defense which Bellingham had the burden to establish on summary judgment. See Robinson v. City of Seattle, 119 Wn.2d 34, 65, 830 P.2d 318 (1992) (characterizing qualified immunity as an affirmative defense). Bellingham presented no evidence of ownership or control and cited no cases granting immunity to a defendant with no ownership or control over the property where an accident occurred. See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (where no authorities are cited in support of a proposition, the court may

assume that, after a diligent search, counsel has found none.).

The recreational immunity statute must be strictly construed. Tennyson v. Plum Creek Timber, 73 Wn. App. 550 (1994). Without ownership, immunity is only afforded to Bellingham upon a showing of “lawful possession and control” of BNSF’s property. Bellingham has neither. At best, they had permission to use BNSF’s property. Immunity cannot attach to a party with mere permission to use someone else’s property.

The South Bay Trail crosses roughly 30' of BNSF’s property, but the recreational immunity statute does not allow any consideration to the length of the link between adjoining property. To do so would be contrary to the mandate for strict construction and would lead to uncertainty in the law. Courts would be left to apply the immunity statute subjectively to areas linking recreational property depending on the size of the linking property. To hold otherwise would serve to extend recreational immunity to property adjacent to recreational property.

The BNSF crossing where Ms. Haykin was killed is not an essential link to the South Bay Trail. An overhead pedestrian crossing which avoids any exposure to the tracks has existed for many years and is only 140' south of the site of Ms. Haykin’s accident. CP 268, 270, 305. Despite an existing safe passage over the tracks, Bellingham negotiated access across the tracks

with full knowledge that it presented an exceptional safety hazard to trail users. Bellingham then neglected to install necessary train activated lights and mandatory bicycle dismount barriers both the city and BNSF knew were necessary. CP 64, 087-88.

Unlike numerous other states where immunity is statutorily afforded for mere occupiers of land opened for recreational purposes, Washington's statute unequivocally applies only to landowners, or those having lawful possession and control. The Legislature could have incorporated the broader language extending immunity to all occupiers of land, but chose not to do so.

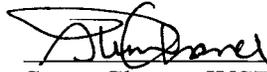
F. CONCLUSION

The City of Bellingham admitted in its answer that BNSF owned and controlled the railroad crossing at issue. That admission alone takes the issue out of controversy. This admission was later confirmed in depositions by the two city employees most directly involved in obtaining BNSF's permission to allow access across their railroad tracks. Interim Parks Director, Leslie Bryson, and Park Planner, Tom Wahl, both testified the crossing is owned and controlled exclusively by BNSF. Having failed to establish the condition precedent of lawful possession and control of the crossing, the recreational immunity statute is not available to the City of Bellingham and it was error for the trial court to have granted the city's motion for summary judgment.

Appellants seek reversal of the August 26, 2011, Order Granting Defendant City of Bellingham's Motion for Summary Judgment on a finding that the City of Bellingham failed to establish ownership or lawful control and possession of the north Boulevard Park pedestrian railroad crossing. The case should be remanded back for trial of the negligence claims.

DATED this 10th day of November, 2011.

Respectfully submitted,



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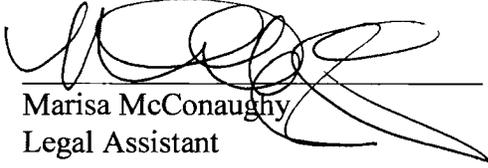
I hereby certify under penalty of perjury under the laws of the State of Washington that on this date an original and/or copy of the **Brief of Appellant** was sent via first class mail, postage prepaid for filing with the courts identified below and delivered to the following attorneys:

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