

# WASHINGTON CASE UPDATE

## Does a Landowner Retain Recreational Use Immunity When Charging Fees to Use Portions of the Land?

**From the Desk of Kyle D. Riley:** Is a landowner entitled to recreation use immunity where part of its land generates fees? Will a hidden condition on the land negate this immunity? Read on to see how the Washington Appeals Court recently answered these questions.

**Claims Pointer:** The Washington Court of Appeals held that the landowner maintained recreational use immunity in a negligence lawsuit when the injury occurred on an asphalt pathway that was not a “necessary and integral part” of the fee-generating area. Furthermore, the court held that the plaintiff will not avoid dismissal where no evidence is presented that the subject condition, was submerged, covered, hidden or not readily apparent to the general class of recreational users.

Hively v. Port of Skamania County, No. 46875-1-II, Washington Appeals Court, Div. II (Feb. 23, 2016).

John A. Hively (“Hively”) fell and was injured while walking on an asphalt path in Teo Park, a property owned by the Port of Skamania County (“the Port”). Located on the Columbia River waterfront, the property is physically connected by the asphalt path to two other Port properties; Bob’s Beach and Stevenson Landing. While walking to a restroom Hively tripped and fell onto the path. Hively was looking straight ahead when he fell and did not see a pothole in the path, as it was obscured by a shadow.

The Port does not charge a fee to enter Teo Park, Bob’s Beach, or Stevenson Landing, all of which are open to the public. The restrooms are also open to the public. Occasionally, the Port rents Teo Park to private parties for a fee or charges fees to cruise ships that dock at Stevenson Landing, but the path along the waterfront and the restroom remain open to the public.

Hively filed suit against the Port alleging negligence. The trial court granted summary judgment and dismissed Hively’s claim. The Washington Court of Appeals affirmed the trial court’s order. The court determined that the Port was entitled to recreational use immunity where the path was not a “necessary and integral part” of the Port’s fee-generating area. Furthermore, Hively failed to provide

evidence that the pothole was physically submerged, covered, hidden or not apparent to recreational users.

The court rejected Hively’s argument that the Port was not immune from suit. According to the recreational use immunity statute, landowners allowing the public to use their land for recreational purposes without charging a fee are immune from suit for unintentional injuries that occur on the land. To be entitled to immunity, the landowner must prove that the land is (1) open to the public; (2) for recreational purposes; and (3) for which no fee of any kind is charged. Hively argued that the Port failed to meet the third element because it charged docking and rental fees. However, the court noted that a landowner may charge a fee to use part of its land and still maintain immunity for recreational use of the remainder. To maintain immunity, a landowner need only show that it does not charge a fee for use of the land where the injury occurred and that the land where the injury occurred is not a “necessary and integral part” of the fee-generating area. The Port did not charge a fee for use of the pathway where Hively fell and the evidence did not suggest that the path was constructed specifically for the purpose of providing access to the fee-generating areas. For example, there were alternate paths to access the restroom. Therefore, the Port was entitled to recreational use immunity.

The court also rejected Hively’s argument that the condition of the path where Hively fell was

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## Can a Defendant's Negligent Conduct Undermine an Assumption of Risk Argument?

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a "latent condition." According to the court, recreational use immunity will not prevent a landowner's liability where the landowner does not warn of latent conditions on the land, with latent condition defined as one that is not readily apparent. While the condition may not have been apparent to Hively, who was looking forward while walking on the shaded pathway, his subjective observation was irrelevant to this analysis. In addition, the filing of Hively's lawsuit was the first time the Port had any knowledge of a person tripping on the path.

Because no evidence was presented as to whether the pothole was readily apparent to the general class of recreational users, Hively failed to raise disputed facts to avoid summary judgment.

The trial court's order granting summary judgment and dismissing Hively's negligence lawsuit was affirmed.

NOTE: This opinion has not been published. It is provided to demonstrate how the court approaches the issues involved in the case.

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