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No. 68156-7-1

COURT OF APPEALS

DIVISION I

OF THE STATE OF WASHINGTON

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Katti Hofstetter, Appellant

v.

City of Bellingham, Respondent

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# APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS APPEAL

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Jeffrey A. Thigpen
Attorney for Appellant
1811 "C" Street
Bellingham, WA 98225
(360) 676-9974
WSBA #11714

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## I. PLAINTIFF'S REPLY TO CITY OF BELLINGHAM'S RESPONSE

*A. Misleading and Inaccurate Statements of Fact.*

Notwithstanding the City's contention on appeal (C.Br[1]. at 6) that Whatcom Falls Park contained several "warning signs", no evidence whatsoever was presented at trial that any signs had been posted to warn the public of risks or dangers in utilizing the diagonal trail located within the whirlpool area.[2]

The whirlpool area remained closed for a continuous ten-year period, rather than a mere "period of time". RP at 167; Cr.B. at 8. Despite its repeated assertions that the whirlpool was "open for use" (C.Br. at 3) and that park users were allowed in the whirlpool area (C.Br. at 13, 22, 23, 25-27), in its memorandum in response to the Plaintiff's December 9, 2010 motion for partial summary judgment the City acknowledged that *physical entry* into the burn zone was *prohibited* at the time Plaintiff was injured (CP at 542, A26) and that "active use" in the whirlpool area was restricted. CP at 543, A27. In addition, numerous City employees admitted at trial that if a park user were to proceed into the whirlpool area, he or she would be violating the closure order. RP at 231-33, 255, 571-74, 601, PRP at 31-32; CP at 533.

In discussing the July 26, 2005 Harris e-mail, the City omitted the portion wherein Harris stated, "I think we need to keep up signs indicating . . . *people should stay out*" Ex.23 (A14). Harris acknowledged that his instruction was intended to keep people out of the burn zone. RP at 256.

[1] "Cr.B." refers to City of Bellingham's Cross-Appeal Response Brief.

[2] The City admits (Cr.B. at 1) that the whirlpool area is located within the burn zone.

B. *Is the trial court's ruling denying Plaintiff's motion for partial summary judgment entitled to review?*

Plaintiff's reply to the City's assertion (C.Br. at 19) that, with respect to her appeal, Plaintiff has presented an altogether different argument regarding the City's immunity defense than the argument she presented to the trial court, is that the record reflects otherwise. Plaintiff presented undisputed evidence that the area where she was injured was closed (CP at 453, 593) and unequivocally argued that, accordingly, the City should be precluded, as a matter of law, from presenting the immunity defense at trial. CP at 596. In addition, in her reply memorandum, the Plaintiff expressly argued that, as matter of law, RCW 4.24.210, being in derogation of common law, must be strictly construed (CP at 470) and that, therefore, it is inapplicable in this case because the City cannot close an area to the public and simultaneously "allow" outdoor recreation within that area. CP at 466.

In recognition of the obvious issue presented, in its responsive memorandum (CP at 539-53) the City framed it as follows: "*The key is whether recreational use was 'allowed' at the time of the accident being litigated.*" CP at 546; A28. The City also addressed the crucial issue as to what meaning should be attached to the word "allow"[3]. CP at 545-46. The Plaintiff also argued that resolution of the issue requires an interpretation of RCW 4.24.210 with respect to the word "allow" and discussed the meaning of the word that should be applied in recognition of the rule of statutory

[3] In its oral ruling denying the motion, the court made no comments whatsoever with respect to this issue nor referred in any manner to statutory construction with respect to the word "allow". RP Motion Hearings, at 21-23; A29.

construction that statutes in derogation of common law should be strictly construed and offered legal authority holding this principle of statutory construction had previously been applied with respect to RCW 4.24.210. CP at 468-70.

Citing *Johnson v. Rothstein*, 52 Wn.App.303, 306, 759 P.2d 471 (1988), the City alternatively argues (C.Br. at 18-19) that there is no inquiry to be conducted on appeal because the trial judge, in ruling upon the motion, stated that there were material issues of fact in dispute. This argument ignores the Plaintiff's analysis that, in this case, a judicially recognized exception applies to the general rule discussed in *Johnson, Id.* Under this exception, discussed in Plaintiff's opening brief (Pl.Br. at 23-26), the denial of a summary judgment may be reviewed on appeal after a trial on the merits if the denial was based upon a substantive legal issue.[4] With respect to this exception, a reviewing court is entitled to examine the entire record for the purpose of determining whether the trial court's belief that there exist disputed material facts is an erroneous belief. *Kaplan v. Northwester Mutual Life Insurance Company,* 115 Wn.App. 791, 65 P.3d 16 (2003); *review denied* 151 Wn.2d 1037 (2004).

*Kaplan, Id.*, concerned the interpretation of a disability insurance policy. After a jury trial and after fully reviewing the record of the summary judgment proceedings, which culminated in a denial of Kaplan's motion, the Court of Appeals held as follows: "In sum, the precise legal issue presented by this appeal was presented to the trial court at the summary judgment stage. We are not precluded from review by the fact that the

[4] *University Village LTD. Partners v. King County,* 106 Wn.App. 321, 324, 23 P.3d 1090 (2001).

trial court sent the issue of Kaplan's compliance with the "licensed physician" clauses to the jury in the *erroneous belief* [emphasis added] that there was a material factual issue for the jury to decide. *Although it is generally true that a denial of summary judgment based on a determination that material facts are in dispute cannot be appealed following a trial on the merits, this is not the case where the disputed issues of fact were not material - - that is, where the decision on summary judgment turned solely on a substantive issue of law.* [citations omitted] [emphasis added] Accordingly, we will proceed with our de novo review." *Kaplan, Id.*, at 803-04, cited approvingly in *City of Puyallup v. Hogan,* 168 Wn.App. 406, 416-17, 277 P.3d 49 (2012).

As in *Kaplan, Id.*, the question presented by the Plaintiff to the trial court in this case raised a clear question on a substantive legal issue: What is the proper interpretation of RCW 4.24.210 with respect to the word "allow"? Interpretation of a statute is an issue of law that is reviewed de novo. *Burns v. City of Seattle,* 161 Wn.2d 129, 140, 164 P.3d 475 (2007).

The facts to which the City has referred as disputed facts -- whether the red Do Not Enter sign was present on the day that the Plaintiff was injured and the City's intent in closing the whirlpool area - are immaterial with respect to the issue as to the meaning of the word "allow" in RCW 4.24.210. Thus, the trial court's erroneous belief (RP, Motion Hearings, at 22) that the City's intent was material to the issue whether, as a matter of law, the City is entitled to immunity, should not suffice to convert what is fundamentally an issue of law, i.e. statutory construction, into an issue of fact, particularly when it is clear from the record of the proceedings that the essential fact

that the public was prohibited from entering the whirlpool area is indisputable and was admitted by the City. CP at 542 (A26).

In accordance with *Kaplin, Id.,* and the Washington case law cited by Plaintiff, review of the court's denial of Plaintiff's motion for partial summary judgment is not foreclosed if the Plaintiff has shown that the court's purported determination that there were *material* facts in dispute was erroneous or if the issue, i.e. statutory construction, she presented is undeniably a substantive legal issue. Plaintiff respectfully submits that she has met this burden and that, therefore, she should be afforded a de novo review of her assignment of error pertaining to the court's denial of her motion for partial summary judgment.

C. *Interpretation of RCW 4.24.210*

As for the substantive legal issue presented, the City, has incorrectly stated: "Plaintiff's entire argument is based on the *premise* that the evidence was 'undisputed' by the parties that the park users were not *allowed* in the whirlpool area." [emphasis added] C.Br. at 22. Actually, the key underlying factual premise on which the Plaintiff bases her argument is, instead, as stated in her opening brief in appeal "In summary, the record reflects that there was no genuine dispute as to the critical single material fact that, as the City itself admitted, on the day Plaintiff was injured, 'physical entry [into the whirlpool area] was prohibited'." Pl.Br. at 32, citing CP at 542. While the City is correct that the Plaintiff contends that at the place and time she was injured the City did not "allow" the public to engage in recreational activities, this contention

is the *legal conclusion* reached in reliance upon the cited decisional authority that RCW 4.24.210 should be strictly construed and upon the premise stated above.

The City next has attempted to disparage Plaintiff's argument by stating: "This is an *incredible* argument to make based on the declarations submitted by the City that *users were allowed in the Park.*"[5] [emphasis added] C.Br. at 22. The City then proceeds to cite, what it refers to as *evidence refuting Plaintiff's argument*, a declaration from Marvin Harris stating that the intent of the "Do Not Enter" sign was not to prevent jumping or swimming or to keep park users from swimming *on a long term basis* [emphasis added] and further notes that, in his declaration, Harris also stated that on an annual basis there were thousands of visitors to the whirlpool from 2002-2005, that the city *allowed* swimming in the whirlpool and there was no rule prohibiting it.[6] C.Br. at 22. Apparently, the City does not consider the Parks and Recreation Department order prohibiting and criminalizing entry into the whirlpool area a "rule". On the other hand, the City may be attempting to establish the illogical proposition that because there was no rule specifically prohibiting swimming or specifically prohibiting cliff jumping, then, a fortiori, the City allowed swimming and cliff jumping in the whirlpool even though a person who engaged in such activities would be subject to arrest and incarceration.

[5] The plaintiff has never denied that users were allowed to enter the park on the day she was injured.

[6] It is unclear whether Harris is including among these thousands of "visitors to the whirlpool", those who merely "viewed" a portion of the whirlpool area from a location outside of it.

The City's reference (C.Br. at 23) to the testimony of Plaintiff's expert, Paul Green, and park employees who variously stated that park users were "allowed" in the whirlpool area is not helpful and certainly does not constitute evidence which disposes of the issue because such testimony begs the underlying question presented and argued by both parties: What is meant by "allow" as it is used in RCW 4.24.210?

With respect to this question, which the trial court failed to address, the City merely argues on appeal, as it did at the hearing on the motion for summary judgment, that "allow" should be given its "plain meaning". In its appellate brief the City has not offered any specific "plain meanings" of "allow" for purposes of interpreting RCW 4.24.210. The City has refused in its responsive brief to even acknowledge that the word "allow" has multiple definitions or "plain meanings".

Like the summary judgment proceedings, the City has offered virtually no response on appeal to the Plaintiff's argument, based on *Matthews v. Elk Pioneer Days*, 64 Wn.App. 443, 824 P.2d 541 (1992) that the recreational use statute must be strictly construed. Although the City, citing CP at 553, (C.Br. at 21) claims that, with respect to plaintiff's summary judgment motion, it addressed what it refers to as the "*Matthews* argument", Plaintiff is hard pressed to discern in the City's response (CP at 539-553) to her summary judgment motion any discussion as to whether RCW 4.24.210 must be strictly construed.

Instead of directly responding to Plaintiff's argument, the City has merely engaged in repeatedly making the conclusory assertion that *users were allowed in the park.* C.Br. at 22-23. By continuing to advance the theory that, pursuant to the

recreational use statute, it "allowed" the public into the prohibited whirlpool area, the City, at most, has raised the issue as to whether the statute is ambiguous.

If a statute is unambiguous, it is unnecessary to engage in an analysis utilizing rules of statutory construction to interpret it. *Fraternal Order of Eagles, Tenino Aerie, No. 564 v. Grand Aerie of Fraternal Order of Eagles,* 148 Wn.2d 224, 238, 59 P.3d 655 (2002). If it is determined that RCW 4.24.210, by virtue of the use of the arguably protean word, "allow", is amenable to different interpretations, then, as matter of law, it is ambiguous. *Shoreline v. Comm'y College Dist. 7 v. Employment Sec. Dep't, 120 Wn.2d 394, 405, 842 P.2d 938 (1992).*

The proper approach in interpreting and applying a statute when it is deemed "ambiguous" and, therefore, susceptible to different and inconsistent meanings, is to resort to aids of construction, including any legislative history indicative of the statute's intent. *Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.* 125 Wn.2d 305, 312 884 P.2d 920 (1994). Any consideration of the statute's legislative intent, as specifically expressed in RCW 4.24.200 (A1), leads to the conclusion that a municipality's action in criminalizing entry on to a portion of its land is wholly inconsistent with "encouraging" or "allowing" outdoor recreation on that portion of land. In *Gibson v. Keith,* 492 A.2d 241 244 (1985) the Delaware Supreme Court, applying a strict construction to the Delaware recreational use statute, held that a landowner who "undertakes affirmatively to warn or bar the public from entry cannot assert the statute as a bar to a tort claim. " *Gibson, Id.*, at 244. CP at 128, A30).

To summarize, the court's denial of Plaintiff's motion for partial summary judgment is entitled to review on appeal because the motion addressed a substantive legal issue and also because the court's belief that the City's intent in closing the area where Plaintiff was injured was a disputed *material* fact was erroneous. *Kaplan, Id.* As for the merits of the Plaintiff's argument, *Cultee v. City of Tacoma*, 95 Wn.App. 505, 977 P.2d 15 (1999), as well as *Gibson, Id.*, lead to the conclusion that, as a matter of law, recreational use immunity is not available to the City and should have been stricken as an affirmative defense prior to trial.

D. *Denial of Plaintiff's Motion for Directed Verdict.*[7]

Essentially, the City's response to the Plaintiff's assignment of error with respect to the court's denial of her motion for a directed verdict consists of little more than further repetitions of the assertion that the City "allowed" park users into the whirlpool area. C.Br. 25-26. When juxtaposed with the City's admission that the same park users were physically excluded from entering the whirlpool (CP at 542; A26), this assertion can only be considered true if "allow" is defined as "permit by failing to prevent" as in, "he allowed the garden to become overgrown with weeds." [8]

[7] At the outset, it must be noted that the City's comment that Plaintiff's argument [for a directed verdict] ". . is premised on the fact that the City employees who testified at trial agreed that the red 'Do Not Enter' sign was present at the whirlpool" (C.Br. at 25) is inaccurate both with respect to plaintiff's argument and with respect to the evidence at trial. To the contrary, the record shows that no witness testified that the sign was present at that time. The City has also stated (C.Br. at 27) that "The sum of the testimony from the City witnesses, was that the sign [Do not Enter sign above the whirlpool] was in place.." As indicated, no witness recalled seeing the sign on the day the plaintiff was injured.

[8] A31 sets forth Webster's Third New International Dictionary definition of "allow".

Once again, the City's argument on appeal fails to squarely address the issue of statutory construction raised by Plaintiff. Respectfully, the City's argument (C.Br. at 24-28) that because a number of City employees frequently saw park users in the whirlpool area, the City therefore "allowed" recreational use is circular and, as a matter of logic, amounts to nothing more than a mere unenlightening tautology.

The City has referred to the testimony of employees to the effect that there was no policy to exclude people from the whirlpool and referred to the declaration testimony of another park employee that ". . . he was not familiar with any rule or policy to exclude users from the whirlpool." C. Br. at 26. Plaintiff's reply is that, as matter of logic, whether there was a rule or *policy* excluding users from entering the whirlpool specifically was presumably unnecessary in that the City had prohibited entry into the burn zone and, as we know, the whirlpool is in the burn zone. Moreover, to suggest that criminalizing certain conduct is not indicative of a *practice* or *policy* of some kind is untenable. C. Br. at 27. Marvin Harris reaffirmed the policy that the area was closed by instructing Rothenbuhler in the July 26, 2005 e-mail that "people should stay out" [of the burn zone]. Ex. 23(A14).

Citing *Gaeta v. Seattle City Light,* 603 Wn.App. 608-609, 774 P.2d 1255 (1989), the City broadly contends that the owner's intent controls the inquiry and argues that because there was evidence presented that the sign was initially posted to prevent environmental damage, there is nothing further to be decided. C.Br. at 27. However, because the evidence at trial clearly established that the whirlpool was closed, as indicated by the Do Not Enter sign, the only conclusion that can be reached is that park

users were not "allowed" to engage in outdoor recreation in that area. *Gaeta, Id.*, is factually distinguishable because it was not disputed that the land in question was open to the public.

At most, the fact that many other park users, in addition to Plaintiff, entered the whirlpool area/burn zone during the period the closure was in effect, serves only to illustrate that some park employees rarely, if ever, attempted to enforce the prohibition by issuing citations. The fact that the City did not consistently enforce its own closure does not, from a legal perspective, require the conclusion that the City therefore "allowed" outdoor recreation in the whirlpool. Because the City failed to present substantial evidence at trial that, within the intent and meaning of RCW 4.24.210, it expressly permitted park users to enter the whirlpool, the court erred in denying Plaintiff's motion for a directed verdict that RCW 4.24.210 is inapplicable.

In regard to the City's argument that the Plaintiff should be denied review of the ruling on her directed verdict motion (C.Br. at 27-28) because she failed to cite authority in support of her argument, even a cursory review of the Plaintiff's written motion (CP at 122-35) dispels this remarkable contention. Furthermore, the oral argument on this motion does not indicate any confusion on the part of the court or the City as to the nature of the motion or the relief being requested nor did the City argue that the Plaintiff had somehow waived any right to present such a motion or had failed to cite procedural authority. RP at 1294-98.

The court erroneously based its denial on the grounds, as suggested by the City, that there was conflicting evidence whether the sign was present on the day of

Plaintiff's injuries. RP at 1296. In view of the uncontested testimony that the City attempted to keep the sign in place, at least through 2009 (RP 166-67; 567-70), whether the sign happened to be present or missing on the very day Plaintiff was injured is immaterial vis-à-vis the issue of whether the city "allowed" outdoor recreation in the whirlpool area.

The court was correct in stating, ". . . the question becomes how do we define allow" but then erred in stating "and that's a jury instruction issue." RP at 1298. However, the court subsequently rejected Plaintiff's proposed instruction No. 35 (CP at 97) offering a definition for "allow" and ultimately left it to the jury to decide the meaning of allow.

As a final note on this issue, Plaintiff is compelled to draw attention to the court's mistaken recollection of the content of the Harris-Rothenbuhler e-mail communication. Ex. 23; A14. In reference to the e-mail, the court stated, "Harris informed the staff that he believed the people should be allowed in the area". RP at 1296-97. However, a review of the e-mail (A14) shows that Harris made no such statement. Further, the court failed to address the Plaintiff's argument that the statute must be strictly construed with respect to the word "allow". RP at 1291-93.

E. *Failure to give Plaintiff's proposed Instruction No. 38.*[9]

With respect to the issue whether the court abused its discretion in denying Plaintiff's proposed imputed knowledge instruction, the record demonstrates that the argument she has made on appeal with respect to the necessity for this instruction is

[9] See CP at 100 (A9). This instruction will be referred to as the "imputed knowledge" instruction.

essentially the same as the rationale presented to the trial judge. Nevertheless, the Plaintiff is required to reply to the City's claim that this assignment of error, i.e. refusal by the court to give this instruction, should not be reviewed because, according to the City (C.Br. at 35-36), the reasons offered for this instruction on appeal are different than those offered to the trial judge. The City is incorrect.

First of all, the record demonstrates that Plaintiff's reference at trial to "known latent artificial condition" when the proposed instruction was discussed (RP, November 8, 2011, at 103-114) was a reference to one of the issues, not the only issue, for which the instruction was necessary. Counsel mentioned that "*an* issue in the case is whether the City knew of the known artificial latent condition." RP, November 8, 2011, at 104. Secondly, not only does the record reveal that the colloquy that ensued with respect to this instruction, a modified version of WPI 50.01, was focused on whether the instruction was a correct statement of the law but, in addition, when asked by the court if the purpose of the instruction was to determine whether Mr. Harris is the speaking agent of the City, Plaintiff's counsel responded, "No, . . .knowledge of the Defendant's employees is knowledge of the City with respect to the seepage condition on the, on a trail." (RP, November 8, 2011, at 104).

A discussion of this issue that is more detailed and instructive than those found in the cases cited by the City, is found in *Crossen v. Skagit County,* 100 Wn.2d 355, 358-59, 669 P.2d 1244 (1983). The proposed jury instructions at issue in *Crossen, Id.* were based upon the Manual on Uniform Traffic Devices for Streets and Highways. The Court of Appeals had denied review of the issue, holding that because the only

authority offered by the Plaintiff was a citation to statutory authority, there had been a failure to comply with CR 51(f) and, accordingly, the Plaintiff had failed to preserve the issue for review.[10] In reversing the Court of Appeals, and accepting review of the issue presented, the Supreme Court, in discussing the text and purpose of CR 51(f), held, "the standard suggested by the Court of Appeals is too strict." and stated, " . .we are unable to share the Court of Appeals' view that failure to give a rationale necessarily precludes appellate review. Here, it was apparent, given the extended discussions concerning jury instructions, that the trial judge understood the basis of counsel's objection." *Crossen, Id.*, at 359. Having determined that the exception taken was sufficient, the Supreme Court proceeded to review the assigned error. Essentially, *Crossen, Id.* stands for the proposition that substantial compliance with CR 51(f) is sufficient to preserve for appellate review a claim of error denying a proposed jury instruction.

It is also been held that, with respect to the application of CR 51(f), "Clarity of argument is not determinative." *Trueax v. Ernst Home Center, Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994), discussing *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980) and *Walker v. State*, 121 Wn., 2d 214, 217, 848 P.2d 721 (1993). The gist of *Crossen, Id.* and subsequent cases which have addressed the issue of compliance with CR 51(f) is that hypertechnical compliance is not required and that the issue should be addressed on a case-by-case basis.

[10] *Crossen v. Skagit County*, 33 Wn.App. 243, 246, 653 P.2d 1365 (1982).

Based on the Supreme Court's decision in *Crossen, Id.*, a full examination of the entire discussion that occurred in regard to this instruction must be undertaken.[11] The record of the proceedings reflects, among other things, that the court suggested that Plaintiff could merely argue this point, i.e. imputed knowledge, to the jury and that the instruction was unnecessary:

> [Plaintiff's] Counsel: . . . particularly Mr. Rothenbuhler had knowledge of the seepage issue which we claim is part and parcel of the known, artificial. - -
>
> Court: What prevents you from arguing that?
>
> Counsel: Pardon me?
>
> Court: What prevents you from arguing just that? The City employees knew about it. They knew there was seepage up there. They knew people were jumping, and people were climbing up that - - and the City, therefore, knew.
>
> Counsel: Again, the jury needs to be charged that the, or instructed that the knowledge of the employees is the knowledge of the City.
>
> (Later in the proceedings the following exchange occurred:)
>
> Court: I understand that that's a def - - that that's where the trial court in those cases or the appellate court is saying this is what agency means. It means that the knowledge is imputed, but that's not something that we have an instruction for, because I don't think there's a need for an instruction for that.
>
> Counsel: Then how does the jury know that the knowledge of the employee is the knowledge of the City? How do they know that?

[11] See RP, November 8, 2011, at 103-114.

> Court: They have to decide that based upon - - you're going to argue them [sic] that the City knew, their employees knew, the people in the park knew.
>
> Counsel: That's, that's true, but, that's, but the City is the defendant. The employee is not the defendant.
>
> Court: No, but I guess I understand what you're saying, but I don't think it's the sort of thing that there's a provision or instruction for.
>
> RP, November 8, 2011, at 106-07.

When the court expressed some doubt whether it was the law that an employee's knowledge is imputed to his employer,[12] (RP, November 8, 2011 at 110), Plaintiff's counsel proceeded to discuss the judicial opinions which were cited with the instruction itself and which have affirmed this well settled common law principle. CP at 100; RP, November 8, 2011, at 110.

With respect to the City's argument on appeal that "Because the precise issue of imputed knowledge was not a contested issue in the trial and therefore unnecessary," (C.Br. at 37) and that ". . the failure to give proposed instruction 38 did not prevent Plaintiff from presenting her theory of the case to the jury that the City knew or should have known about any alleged dangers based on the evidence presented." (C.Br. at 39), the Supreme Court opinion in the case of *In re: Detention of Pouncy,* 168 Wn.2d 382, 229 P.3d 678 (2010) provides insight and analytical assistance.

[12] The City appears to have conceded that the proposed instruction is not a correct statement of the law. At no time during the discussion on the instruction did the City make this argument nor has it attempted to do so in its response to the Plaintiff's opening brief.

The issue in *Pouncy, Id.*, was the court's refusal to give an instruction defining "personality disorder". In holding that the refusal was an abuse of discretion, the Supreme Court observed: "It is not sufficient that counsel were able to argue to the jury their respective understandings of the term, based on expert testimony; lawyers have a hard enough time convincing jurors of the facts, without also having to convince them what the applicable law is." *Pouncy, Id.*, at 392, quoting *State v. Aumick*, 126 Wn.2d 422, 431, 894 P.3d 1325 (1995) as follows: "A jury should not have to obtain its instructions on the law from arguments of counsel." *Pouncy, Id.*, at 392.

To the extent, as noted in *Joyce v. Dep't of Corrections,* 155 Wn.2d 306, 323, 119 P.2d 825 (2005) that jury instructions must, when read as a whole, "properly inform the trier of fact of the applicable law.", *Id., at 860,* the instructions in the present case were insufficient. *Id.*, at 860. By virtue of the court's refusal to give Plaintiff's proposed Instruction No. 38, the jury had no way of knowing that the City, as the defendant, is charged with possessing the pre-incident knowledge of various City employees regarding such matters as the serious risks attendant with utilizing the diagonal trail, the frequent use of the trail, the lack of warnings, etc.

Respectfully, the City's argument that this issue was not contested at trial is a vacuous argument because, being a legal issue, it would not arise at trial. It is fundamental that testimony from a witness as to what the law is or should be is inadmissible under ER 701. Thus, the City's observation that the issue, i.e. whether knowledge of City employees should be imputed to the City, was uncontested is only

true because the issue did not arise. It did not arise because it is within the exclusive province of the court to address issues of law.

That the court's refusal to give the instruction was an abuse of discretion is further reflected by the fact that there was no suggestion of any kind that the instruction could have had a prejudicial effect upon the City nor has the City made this argument on appeal. It is submitted that one of the factors that should be weighed in determining whether the refusal to give a proposed instruction is an abuse of discretion is whether the excepting party has demonstrated any potential of unfairness or prejudicial effect.

In an effort to support its argument on appeal that the instruction was unnecessary, the City has cited *The Boeing Company v. Harker-Lott,* 93 Wn.App. 181, 186 968 P.2d 14 (1998). However, *Harker-Lott* is inapposite in that the instruction at issue in *Harker-Lott* was not an instruction informing the jury of a common law principle but, rather, was one to the effect that the jury should give "special attention" to the testimony of an attending physician.

Although, as Plaintiff recognizes, the refusal to give a proposed instruction is often held not to be error on the grounds that the point of law contained in the rejected instruction is sufficiently encompassed by other instructions, that the instructions, as a whole, enable the proponent to argue his theory of the case[13] or that the instruction is cumulative[14], in the instant case, there was no other instruction which remotely related to the rule that "an employer [the City] is charged with, and bound by, the knowledge

[13] *Braxton v. Rotec Industries, Inc.* 30 Wn.App. 221, 633 P.2d 897 (1981).

[14] *Havens v. C & D Plastics,* 124 Wn.2d 158 876 P.2d 435 (1994).

of or notice its employees received while they were acting within the scope of their employment" as set forth in the proposed instruction.

The City's treatment of *Braden v. Reese,* 5 Wn.App. 106, 485 P.2d 995 (1971) is misguided in that the appellate court upheld a trial court's order granting a new trial on the grounds that it had been prejudicial error to refuse a jury instruction that had been proposed. Relying on its misapprehension of *Braden,* the City has declined (C.Br. at 36) to engage in any meaningful discussion of Plaintiff's argument, citing *State v. Lucky,* 138 Wn.2d 727, 731, 912 P.2d 483 (1996), that if it is determined that the refusal by the trial court in this case to give proposed Instruction No. 38 was predicated upon a ruling as to the law, such refusal should be reviewed de novo. A review of the entire colloquy (RP, November 8, 2011, 103-14) establishes that the court's refusal to give the instruction was ultimately a ruling based upon the law in that the discussion which ensued was directed to the issue whether the instruction correctly stated the law and, additionally, Plaintiff's counsel made multiple references to decisional law. RP, November 8, 2011 at 110. Regardless of whether the court's rejection of the instruction is determined to be predicated on the law rather than the facts of the case, it was, nevertheless, an abuse of discretion.

F. *None of the Court's Errors were not harmless errors.*

For the court's error in refusing the imputed knowledge instruction to be considered harmless, it must be clear that the error was trivial and in no way affected the verdict. *State v. Britton,* 27 Wn.2d 336, 341, 178 .P.2d 341 (1947). If we cannot conclude with any reasonable degree of certainty that failing to fully inform the jury of

a well settled common law principle, important in the context of this case, but, instead, leaving it to counsel to do so through argument, had no effect on the verdict, then the error must be considered prejudicial and a new trial is warranted.

Any analysis of whether an error is harmless must take into consideration a party's theory of the case and the nature of her burden of proof. In order to prove her negligence theory, described in the court's Instruction No. 2 (CP 55), the Plaintiff, if she were determined by the jury to be a licensee, had the burden of proving, inter alia, that she was injured as a proximate result of a dangerous condition and that the City, as the defendant and "possessor [of] land" "knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger."[15]

To meet this burden the Plaintiff elicited testimony from various park employees that before she was injured, these employees, collectively, knew that: (a) Prior injury accidents due to falls and requiring the assistance of EMT's had occurred in the whirlpool area; (b) There was often a slick wet spot near the top of the trail and the trail had other dangerous characteristics, which, at least in combination, arguably presented a risk of grave harm; (c) There was no easy way out of the lower portion of the whirlpool area; (d) Various park employees knew that the diagonal trail is frequently used by park visitors especially young people. (Accordingly, these users either fail to realize the danger or to protect themselves against it.); (e) The employees knew that

[15] See Instructions 8 (CP at 61) and 23(CP at 76). (Plaintiff's copy of CP 76 appears to contain a typographical error in that it begins with the phrase "A possessor *or* [sic] land. . . ").

the City failed to post any signs warning of the dangers of the trail or otherwise take even minimal remedial action of any kind. Due to the court's refusal to give the proposed imputed knowledge instruction, the Plaintiff was prejudicially curtailed in arguing her theory that the City is charged with and bound by the collective knowledge of the employees.

In addition, because the jury was not properly, i.e. fully, informed of the applicable law, there is considerable uncertainty as to what assumptions the jury made or did not make in reaching a verdict. For example, there is no way of knowing whether the jury, due to the lack of an imputed knowledge instruction, assumed that the City was charged with the knowledge of Richard Rothenbuhler who knew and testified that the diagonal trail was often wet, especially at the top due to underground seepage. We are left to guess whether the jury, in attempting to decide what knowledge the City possessed, considered the testimony of ordinary park employees, as opposed to Marvin Harris, who was in a managerial position and who, the records shows, appeared less knowledgeable about the whirlpool than some of the employees who had spent a great deal more time in the park both before and after Plaintiff was injured.

The City's argues (C.Br. at 38) that the court's refusal to give the instruction had no effect on the verdict because "Plaintiff wanted the instruction to prove actual knowledge, which is necessary under the recreational land use immunity case law." This claim is only partially correct. What is also correct, but not mentioned by the City, is that the Plaintiff sought this instruction so that she would be assured a fair opportunity to sensibly argue that the City breached its common law duties to the

Plaintiff, whether she were found to be a licensee or an invitee, and that, therefore, the City was negligent.[16] Based on *Pouncy, Id*, Plaintiff was prejudicially hindered in arguing her theory of the case in that the burden of informing the jury of the imputed knowledge rule was also imposed upon her.

With respect to the Plaintiff's assignments of error that the court erred in denying her motion for partial summary judgment and her motion for a directed verdict, the City does not appear to disagree with the obvious conclusion that if the court had granted either of these motions there would have been no reason for the court to give the jury instructions relating to recreational use immunity. However, the City maintains that, even if the court erred in denying the motions, the error was harmless because the jury determined that the City did not allow outdoor recreation in the whirlpool.

The plaintiff maintains that the court's refusal to strike the immunity defense had such a corrosive effect on the trial that Plaintiff was deprived of her right to a fair trial. The validity of this conclusion can only be ascertained by a thorough review of not just the testimony elicited at trial, but also the questions that counsel presented to the witnesses. Due to the court's rulings, the Plaintiff was unfairly put in the position of disproving the recreational use immunity and, consequently, had no alternative, in order to achieve this objective, but to engage in repeated and lengthy questioning of City employees with respect to factual issues that otherwise would have been considered irrelevant and thereby eliminated the need for such questioning. In

[16] As for the City's argument that Plaintiff was "free to argue [imputed knowledge]", please see the discussion, *supra,* at 18 and *Pouncy, Id.*

addition, the City presented extensive evidence about such matters as the pipeline explosion, the City's response to the explosion, the "intent" of the sign, etc. Such evidence, all of which was elicited to prove that the City "allowed" outdoor recreation in the whirlpool, caused the trial itself to become inherently confusing, especially when it is considered that no definition of allowed was provided. Consequently, the trial became so permeated with testimony that otherwise would not have been presented. From the outset, the omnipresent immunity defense caused the trial to be severely distracted from the critical factual issues to be determined by the jury and quickly deteriorated into an exercise in semantics with respect to the issue as to what the City "allowed" or did not "allow" without the jury even understanding what meaning they were supposed to attach to "allow".

While it may be true that trial tactics are a matter of discretion for counsel, a party should not be forced to repeatedly question employees of the adverse party to elicit evidence relating to a defense which, as matter of law, should have been stricken before trial.

With respect to the issue whether Plaintiff had a fair opportunity to argue her theory of the case, it should be borne in mind that before argument commenced, the court had already approved Instruction No. 8 (CP 61; A11), which required Plaintiff to prove that the recreation use statute did not apply.[17]

[17] Instruction 8 (A11) erroneously placed the burden on the Plaintiff to prove that immunity did not apply. See *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 283, 285 P.3d 860 (2012) confirming that: "Because recreational use immunity is an affirmative defense, the landowner has the burden of proving it applies."

Most importantly, the court's errors in denying Plaintiff's respective motions for partial summary judgment and for a directed verdict led inevitably to the recreational use immunity jury instructions No.s 2, 8, 17 and 18. CP at 55, 61, 70, 71; A10 – A13. As for the City's argument (CR.B. at 32-33) that Plaintiff failed to preserve any issue challenging Instruction No. 18 (CP 71; A13) as a misstatement of the law by failing to present a sufficiently detailed exception, plaintiff's reply is twofold: (a) Plaintiff clearly opposed all instructions relating to recreational use immunity by virtue of her summary judgment and directed verdict motions; (b) Plaintiff has not specifically raised this issue as a separate Assignment of Error but, instead, to support her arguments that denials of the motions resulted in prejudicial error.

Plaintiff should not be required to state a detailed exception to a jury instruction which she obviously opposes as demonstrated through prior court proceedings seeking to dismiss the defense on which the instructions are based. To what extent is a party required to assist the court and opposing counsel in "fine tuning" jury instructions to better enable the adverse party to a theory of the case based on a defense that the party sought to have stricken?

The City also argues, in essence, that the jury could not have been confused by any of these instructions when determining whether the City was negligent because the revised verdict form directed the jury to Instruction No.'s 22 and 23 if the jury determined that Plaintiff was a licensee. However, neither the verdict form nor any other instruction cautioned or advised the jury in any manner that instruction 18 was to be considered inapplicable or should not be considered by they jury if they determined

that the City did not allow the public to use the Whirlpool Falls area for outdoor recreation at the time the plaintiff was injured. Instruction No. 18 makes no reference to recreational use immunity but it does broadly state that the City has no duty to post a warning sign, let alone a "conspicuous warning sign, unless the injury-causing condition is known, dangerous, artificial and latent. Instructions 22 and 23 make no reference of any kind to warning signs. The trial itself was largely taken up with testimony about the Do not Enter sign and, therefore, the jury would look to the instructions for guidance with respect to any duties pertaining to the sufficiency of warnings or in reference to signs.

As a matter of logic, the fact that the jury concluded that City did not allow the public to use the Whirlpool Falls area for outdoor recreation does establish that in considering whether the City breached any duties to the Plaintiff as a licensee the jury assumed there was no duty to post a warning sign because, as far as the jury was concerned, the Plaintiff had not met her burden of proving that the "injury-causing condition was known, dangerous, artificial and latent. In other words, the jury may very well have concluded that the circumstances described in Instruction No. 23 (CP at 76), subparts (a) and (c) had been proven, but the City had not breached its common law duty described in subpart (b) because the Jury also concluded that because one or more of the four "qualifiers", as described in Instruction No. 18, did not apply, the City had no duty to post a warning sign.

## II. RESPONSE TO CITY'S CROSS-CLAIM

A. *City's Summary Judgment Motion.*

With respect to the City's assignment of error on its cross-appeal that the court erred in denying its motions for summary judgment and its motion for judgment as a matter of law, the Plaintiff wishes to incorporate herein by reference the arguments and authorities set forth above in reply to the City's response to her assignment of error with respect to her motion for partial summary judgment. It is clear the respective assignments of error involve much of the same analysis involving recreational use immunity.

It should initially be noted that in response to the City's motion for summary judgment, the Plaintiff presented evidence, which included a photograph of the Do Not Enter sign, (CP 793, 796-97) that the City did not intend to hold the area where plaintiff was injured open for recreational use at the time plaintiff was injured. Based on this evidence and quoting the language in the sign informing the public that a closure was in effect and that violation of the closure was punishable by a fine up to $10,000 and/or 90 days in jail, (CP 801) the Plaintiff proceeded to argue that recreational use immunity was unavailable to the City in light of its expressed intent to keep the sign posted and accordingly, the City "did not intend to hold the waterfall cliff area open to the public for outdoor recreation." CP at 802.

The same arguments were presented by the Plaintiff through a supplemental memorandum (CP at 770-73) and in her response (CP at 746-540)

to the City's motion for reconsideration. The essence of Plaintiff's argument in response to the City's motion for summary judgment and the City's motion for reconsideration is fundamentally the same as she presented in support of her motion for partial summary judgment and here on appeal, which is that the City is not entitled to the immunity protection afforded by RCW 4.24.210 for an area which it prohibited the public from entering.

In considering a motion for summary judgment, the facts and all reasonable inferences therefrom must be construed in the light most favorable to the nonmoving party. *Degel v. Majestic Mobil Manor, Inc.*, 129 Wn.2d 43, 914 P.2d 728 (1196). Thus, in the event the court decides to review the City's assignment of error regarding the City's summary judgment motion, the facts and reasonable inferences therefrom are as follows: (a) On the day the Plaintiff was injured the City intended to have a sign posted stating that the area below the sign was closed to the public; (b) The closure, as apparent from the sign, provided no exceptions for recreational use; (c) Violation of the closure for any reason, including accessing the whirlpool area to engage in recreation, would be considered a crime subject to serious penalties; (d) On the day Plaintiff arrived at the perimeter of the whirlpool area the sign was missing; (e) Upon entering the area below the location where the missing sign was intended by the City to be posted, the Plaintiff was unaware that she had entered a prohibited area; (f) Plaintiff's injuries occurred as a result of her falling from a deceptively dangerous trail when, ascending the trail in a normal fashion, she slipped upon a

slick, muddy spot near the top of the trail; (g) The trail was not a natural trail in that it had come into existence through repeated human foot traffic; (h) Due to the steepness of the trail and the fact that she had stepped up and over a root the Plaintiff did not see the slick spot until her foot contacted it and she immediately lost her balance and fell; (i) The slick spot was not readily discernible to a person walking up the trail; (l) Water dipping from individuals who had been cliff jumping prior to plaintiff ascending the trail contributed to the slippery condition at the top of the trail.

The City has cited *Gaeta v. Seattle City Light,* 54 Wn.App. 603, 774 P.2d 1255 (1989) for the proposition that resolution of issues relating to the applicability of the recreational use statute requires that the court look at the intent of the landowner. The City then proceeds, with little supporting analysis, to the sweeping conclusion, citing *Gaeta, Id.*, at 609, that if the landowner opens land for recreational use without charging a fee, the landowner has brought himself within the protection of the recreational land use statute." C.Br. at 40.

While these broad statements have the appeal of simplicity, they only represent a portion of the equation to be utilized in addressing the issue of the applicability of RCW 4.24.210 in given circumstances. Moreover, they do not serve to resolve the initial question: Did the City "allow" recreational use in the whirlpool area?

In *Gaeta Id.,* it was undisputed the location where the injury occurred was open to the public. Therefore, for the purpose of guidance in addressing whether the City was entitled to summary judgment, *Gaeta* is of little or no value because, from the perspective of the relevant facts, *Gaeta* is fundamentally distinguishable from the instant case in that in this case, considering the facts and reasonable inferences therefrom in the light most favorable to the Plaintiff, the City did not "allow" recreational use in the area where Plaintiff was injured. Thus, the intent if the landowner is a moot issue. If the intent of the City has any bearing on resolution of the summary judgment issue, the City's argument still fails because, at a minimum, the declarations and pleadings reflect, as the court noted, that there existed a genuine dispute as to whether the City intended to allow outdoor recreation in the whirlpool area.

A thorough and helpful discussion of the analysis to be followed in addressing this issue is found in *Cultee v. City of Tacoma*, 95 Wn.App. 505, 977 P.2d 15 (1199), also cited by the City. C.Br. at 40. Holding that it was unclear whether the property where the injury occurred was open to the public for outdoor recreation, the court reversed a summary judgment in favor of the City of Tacoma in a case in which a death occurred when a five-year old girl drowned after falling off of her bicycle and over the edge of a road covered with muddy water. The court noted that there had been testimony from a witness that only persons allowed on the property were Indians during fishing season and that anyone wishing to walk across the property would have to obtain

permission. The court also noted, as part of the evidence supporting the conclusion that it was in dispute whether the public was allowed on the property, that there were "no trespassing" signs posted around the property.

The *Cultee* court, in discussing the *Gaeta, Id.* approach that the determination of the applicability of RCW 4.24.21 requires that the court view the circumstances from the standpoint of the owner, recognized that the landowner must first bring himself within the statute, i.e., must hold the property in question open for recreational use, i.e. "allow" outdoor recreation within the area where injuries occurred. *Cultee, Id., at 514.*

The City's has also cited *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285 P.3d 860 (2012) in support of its argument but a review of this case shows that it also is distinguishable and ultimately not helpful in resolving the issues presented by the instant case. In *Cregan,* the court held, in essence, that the church did not qualify for recreational use immunity because only certain groups were allowed on the property and that, therefore, it was not open to the public. Although it was noted by the court in *Cregan,*[18] as pointed out by the City (C.Br. at 42), that a landowner may restrict some access and still qualify for recreational use immunity, the opinion did not address or discuss the issue as to whether a landowner is entitled to recreational use when a member of the public is injured while upon or in an area that is restricted, i.e. not open to the public.

[18] *Id.*, at 285.

In conclusion, the City's motion for summary judgment was properly denied and should not be found to be error. A de novo review does not alter the fact that the City did not dispute that it intended to have the Do Not Enter sign in the area informing the public that entry into the area was prohibited. Because the sign is indicative of an intent to prohibit the public from entering the closed area for any purpose, including recreation, recreational use immunity is not available to the City because the City did not "allow;' nor did it intend to "allow" outdoor recreation in the closed area. The sign contained no exception of any kind for park users who wished to enter the whirlpool for recreational purposes. To resolve the issue, as suggested by the City, on the grounds that the City's stated intent in posting the sign was to prevent environmental damage in the burn zone would permit a landowner, regardless of the facts and circumstances, to qualify for immunity by merely claiming he had no intent to exclude recreation even though the property is closed to the public.

The City's argument on its cross-appeal also depends upon two assumptions: (a) That the Plaintiff, upon entering Whatcom Falls Park became, as a matter of law, a recreational user; and (b) Once she attains the status of recreational user, it is irrevocable, for purposes of determining the applicability of RCW 4.24.210, as long as she is located within the boundaries of the park and even if she enters an area which, unknown to her, is closed to the public.

The City has cited no particular case law establishing that upon entering a landowner's property, the entrant's status becomes fixed and cannot change

regardless of the entrant's movements and activities. A case in which the court recognized that the status of a person on property can change, depending on his activities, is *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 622 (1994), which involved a situation where there was an issue, and ultimately a jury question, whether, by departing from the established trail in a zoo, the entrant lost his status as an invitee.

In this case, Plaintiff did not have the status of recreational user when she was injured because, as discussed, the City did not qualify for immunity from the recreational use statute due to the fact that the area was closed. Moreover, because she had not seen a sign warning her that the Whirlpool area was closed, she cannot be considered a trespasser. Thus, at a minimum, the Plaintiff had the common law status of licensee at the time of her injuries and despite the City's argument, it is not inconsistent for the Plaintiff to be given the status of licensee or invitee despite the fact that she was in a closed area in which she was not allowed if she reasonable believed that she was entitled to go into the area.

B. *Nature of Injury-Causing Condition.*

*Cultee* is also helpful in its discussion of the exception to the recreational use statute whereby immunity is lost if injuries occur as a result of a known dangerous artificial and latent condition for which conspicuous warnings signs have not been posted. Citing *Ravenscroft II v. Washington Water Power Company*, 136 Wn.2d 911, 969 P.2d 75 (1998), the court observed that the issue as to whether a condition is known dangerous artificial and latent is

ordinarily fact specific and, therefore not appropriate for summary judgment. The City of Tacoma argued that the muddy water covering the road on which the decedent had ridden her bicycle was neither dangerous, latent or artificial.

Any analysis of whether, under RCW 4.24.210 the exception requiing conspicuous warning signs must begin with a determination of what constitutes the injury-causing condition. In deciding whether the exception applied, the court in *Cultee, Id.* relied on *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993) for its opinion that for purposes of RCW 4.24.210(3) the "condition" is the "injury-causing instrumentality itself and its relatedness to the external circumstances in which the instrumentality is situated." *Cultee*, Id., at 516.

In C*ultee, Id.* at 517, what constituted the injury causing condition was in dispute. Likewise in *Ravenscroft*, *Id.*, a case involving a submerged tree stump which was struck by a boater, the Supreme Court, held that the "injury-causing condition" was not just the stump itself but the stump in combination with various other factors.

The City suggests that, for purposes of analysis in this case, it is unimportant how we characterize or define the injury-causing condition. Plaintiff disagrees. Based upon the facts and circumstances surrounding Plaintiff's injuries, the injury-causing condition, as suggested in *Ravenscroft, Id.*, consists of the trail in combination with other factors. It is significant that the muddy, slick spot which Plaintiff's foot contacted must be considered in

combination with the specific characteristics of the trail and that there was evidence that it was due, in part, to water dripping from persons who had just exited the pool and were returning to the top. Moreover, there was evidence that the slick spot was located behind a root over which the plaintiff stepped. Thus, while the slick spot may have been "obvious" (Cr.B at 47) to someone at the top of the trail looking down or observed and noticed by an investigator sent to the park to study the trail for purposes of litigation, it was neither obvious nor noticed by the Plaintiff until she physically contacted it.

In addition, the injury-causing condition, depending on how it is defined in this case, might well be determined by a jury to be artificial due the combination of the fact that the trail was not natural and the fact that water dripping from returning cliff-jumpers contributed to the slippery condition.

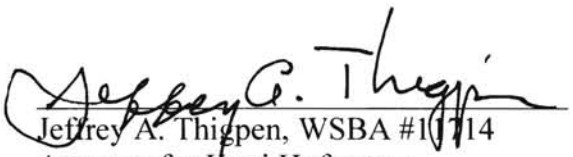
It must also be noted that addressing this issue assumes that the City is entitled to present its affirmative defense of recreational use immunity at trial. Otherwise, the issue whether the condition is known, dangerous, artificial and latent and thereby triggers the City's duty under RCW 4.24.210 to post conspicuous warning signs becomes a moot issue.

C. *Instruction No. 29.*

The issue raised by the City that the court should have given its proposed instruction no. 29 was harmless error in that a jury found that the City was not negligent. The plaintiff cannot be considered a trespasser unless she was fully

aware that the Whirlpool area was closed to the public and she chose to enter the area anyway.

Dated this 17th day of January, 2013.



Jeffrey A. Thigpen, WSBA #11714
Attorney for Katti Hofstetter

unknown public risks presented by the explosion and burn area. It was recognized that damaged trees could endanger people. Later, restrictions in the burn zone were based in large part to allow for habitat restoration. (Fogelsong Decl. at ¶4; Harris Decl. at ¶6.) The City also recognized that damaged trees posed an ongoing public safety risk. Initially, there were also concerns regarding potential petroleum contamination which varied depending upon locations in the Park. Within months, risks associated with petroleum contamination of the Whirlpool water abated. (Harris Decl. at ¶3; Fogelsong Decl. at ¶9.)

Although the Whirlpool area had not been burned in the explosion (and thus some of the safety concerns did not apply), it was a potential access point for entering the burn zone and was a logical location for notifying the public of the close proximity of the burn area. Also, in the months following the pipeline rupture, it was not known whether the Whirlpool Area water contained petroleum. For these reasons, one of several red "Do Not Enter" signs, which marked the burn zone was placed above the Whirlpool Area. (Harris Decl. at ¶7.) A public document, issued shortly after the explosion, addressed questions regarding the extent of damage and the reasons for restricting active use in the burn zone. With respect to the Whirlpool, the document stated as follows:

> **Why Can't I swim in the Whirlpool?** The Whirlpool area was not burned; however it is located adjacent to the remediation project along Hannah Creek and provides access to the fragile burn area. To protect the environment and allow the best chance for recovery, the Whirlpool will not be open yet.

(Exhibit E to Harris Decl.) The burn zone restriction and red "Do Not Enter" sign were never intended to keep parks users from swimming in the Whirlpool area on a long term basis. (Fogelsong Decl. at ¶7; Harris Decl. at ¶7; Luce Decl. at ¶3.)

Even while physical entry was prohibited, the burn zone and the Whirlpool remained open for public viewing and observation of the natural features, environmental



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Telephone (360) 778-8270

damage, and (as time progressed) environmental rehabilitation, uses which are explicitly referenced in RCW 4.24.210 as recreational uses.[1] Members of the public were interested to see the extent of the environmental damage to the natural features of Whatcom Falls Park. It was determined that the best balance between protecting the environment, protecting the public from latent tree hazards, and maintaining public access was to restrict active use but to continue to allow viewing the burn zone. The City even improved certain trails on the north side of the creek and installed three new view spots, for public viewing of the burn zone. The burn zone remained open for recreational viewing. (Harris Decl. at 8; Fogelsong Decl. at ¶8.)

During the months following the pipeline explosion, private guards patrolled the burn zone. (Harris Decl. at ¶9.) However, by fall of 1999 at the latest, the security guards were no longer utilized and public use in the Whirlpool area resumed. By the fall of 1999, the City had determined that there was no petroleum contamination of the water in the Whirlpool area itself. (Fogelsong Decl. at ¶9)

The Whirlpool area, along with the other natural areas of the park, has been the subject of some concern by Parks staff due to overuse and destruction of vegetation, so active use has been discouraged with various "stay on path" and "stay on trail" signs, a fence, and clearly delineated trails maintained by the Parks Department. But the City allowed swimming in the Whirlpool area for many years prior to Plaintiff's injury. On an annual basis there have been thousands of visits by members of the public to the Whirlpool Area in the years preceding Plaintiff's accident. (Luce Decl. at ¶3.) There is no rule or law prohibiting visitors from jumping from the rocks in the Whirlpool area and

[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, . . . 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 (emphasis added).



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plain, the court discerns legislative intent from the ordinary meaning of the words. *Id.*

The key is whether recreational use was "allowed" at the time of the accident being litigated. *See Partridge v. City of Seattle*, 49 Wn. App. 211, 214, (1987). Included within the meaning of the term "allow" is "to permit by way of concession", "to permit by neglecting to restrain or prevent", and "to make a possibility: provide opportunity or basis." *Webster's Third New International Dictionary*, Merriam-Webster, 58 (1981). There is no doubt, when considering these plain meaning definitions, that Plaintiff, as a member of the public, was allowed to jump from the rock at Whatcom Falls Park and climb her route of choice to the top. In fact, Plaintiff's theory of liability is that her recreational use was allowed at the time of her accident.

It is undisputed that the red "Do Not Enter" sign was never meant, beyond the initial concern over petroleum contamination of the water, to prohibit swimming, jumping, or climbing in the Whirlpool area. It is undisputed that thousands of visits to the Whirlpool area occurred in the years immediately prior to Plaintiff's injury. It is undisputed that the burn zone remained open to the recreational activities of viewing scenic and environmentally damaged sites throughout the time period in which the burn zone was cordoned off. It is undisputed that as of July 2005, prior to Plaintiff's injury, City parks staff acknowledged the entire burn zone was part of a public park and that the red "Do Not Enter" signs would be maintained only as a warning, not to bar entry. It is undisputed that the character of Whatcom Falls Park never changed from its designation as a Bellingham community park.

Plaintiff's own expert recognizes that use in the area was allowed. (Declaration of Peter M. Ruffatto In Support of Defendant City of Bellingham's Motion to Bifurcate Trial, Exhibit B, 131-32.) Accordingly, the plain meaning of the statutory term "allow" results in application of the statute and the immunity afforded by the statute. At the very



**City of Bellingham**
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (360) 778-8270

In that case, the City of Tacoma owned this ranch called the Nalley Ranch, and it flooded, and so they decided to -- the east end of it flooded.

So they decided that they were going to put some, a gate up on the west side to keep people out so to protect the public and protect the environment, just like occurred in this case, and this kid rode his bicycle over there and drowned.

And the court ruled that there was no recreational immunity, and the only difference in that case is that the plaintiff didn't go on to the next step which is what we're doing bringing their own summary judgment on this issue.

The sign says what it says. We're not frozen in time. It was there. It was intended to be there the evening of Katti Hofstetter's injury. It was intended to be there, thereafter, and Marvin Harris's declaration, email said we're going to take the fence down, but we're going to keep the sign up, and people should *stay out*.

Now, you can view things. I agree that's a recreational use, but you're on this side viewing. You're not on the other side of the fence. That's the difference here.

THE COURT: Well, it seems to me that there's a question about, first of all, what area is closed. The

sign doesn't tell us, and there's no indication from any of the evidence I've seen that you all have cited that there is any sort of demarcation other than the cable that ran right along the forested section that I read about in one of the depositions, but I just went back, and I put up the order that the Court entered the first time on summary judgment, and the Court said, the order says, "The Court finds that the record demonstrates a genuine issue of material fact concerning whether the Defendant intended to hold the area where Plaintiff was injured open to the public for recreational use," and it says that, "The Court said that the record demonstrates that a genuine issue of material fact exists concerning the Plaintiff's status upon the City's land."

Now, this sign was argued to the Court. The issues of who got to go in there and whether it was open or closed were argued to the Court the first time. I really don't think we've progressed, even through your recent discovery, past the point that I think we were at the last time when we had the first summary judgment, which I think that these are still issues of fact on both sides.

The jury is going to have to decide was it closed? To what extent was it closed? And what area was closed? And if that's the case, then what is Ms. Hofstetter's status on this property?

If the jury decides it's closed and the Recreational Use Statute doesn't apply, then they've got to decide the other issues as to what is her status on the land, and whether or not there is a duty and an obligation.

If they decide that it was open, then they have to look at other issues such as whether or not there's a latent and undiscovered danger here, a man-made danger.

So I think the same issues are still in play as they were the first time. I really don't think that summary judgment here can be granted, because I think it is exactly the same set of issues.

This is all stuff that the jury is going to have to decide. They are going to have to sort this out and pars through what the status of this land is, and what Ms. Hofstetter's status is and make their decision.

So I think for that reason, I am going to have to deny the summary judgment motion on that, and the City may present that defense.

As I think I mentioned to you last time, there may be an issue once we get through the evidence as to what instructions are going to be given, but we will have to see what the evidence tells us to see what can be supported in the way of instructions.

So I'm not going to grant that motion at this time.

So bifurcation, do you want to take that one up?

**492 A.2d 241 (Del. 1985)**

**John E. GIBSON, individually and trading as John E. Gibson-Victor G. Trapasso Limited Partnership, Victor G. Trapasso, individually and trading as John E. Gibson-Victor G. Trapasso Limited Partnership, Gerald Wilgus, individually and trading as John E. Gibson-Victor G. Trapasso Limited Partnership, Defendants-Appellants,**

**v.**

**Richard KEITH, Sr., Margaret Keith and Richard Keith, Jr., Plaintiffs-Appellees,**

**and**

**Melvin L. Joseph Construction Co., a Delaware corporation, Defendant-Appellee.**

**Supreme Court of Delaware.**

**April 26, 1985**

Submitted: Nov. 20, 1984.



[Copyrighted Material Omitted]



Upon appeal from Superior Court. Affirmed.

F. Alton Tybout (argued) of Tybout, Redfearn, Casarino & Pell, Wilmington, for defendants-appellants.

Bruce M. Stargatt (argued), Arthur Inden, Richard A. Zappa, and James L. Patton, Jr. of Young, Conaway, Stargatt & Taylor, Wilmington, for plaintiffs-appellees.

Before HORSEY, MOORE and CHRISTIE, JJ., and HARTNETT and WALSH, Vice Chancellors.

HORSEY, Justice:

This interlocutory appeal of a personal injury suit pending before trial in Superior Court was accepted to determine a limited issue of statutory construction: What property owners are entitled to invoke the provisions of 7 Del.C., chapter 59 in defense of tort claims asserted by strangers injured on private property in the course of recreational pursuits?

The suit arises from a swimming accident in the summer of 1980 at a water hole in a gravel pit in an isolated area of Sussex County. Plaintiff, Richard Keith, Jr., then a 17-year old minor, suffered paralytic injuries when he dove into shallow water from a rope swing affixed to a nearby tree. Defendants-appellants, John E. Gibson, Victor G. Trapasso, and Gerald Wilgus, doing business as a limited partnership, are the owners of the commercial borrow pit, the general control of which was contracted out to defendant Melvin L. Joseph Construction Co., a Delaware corporation ["Joseph"]. Joseph is not a party to the appeal. [1]

After extensive discovery, the defendant-owners moved the Superior Court for summary judgment on three grounds: one, that the claim was barred by 7 Del.C., ch. 59, titled, "Public Recreation on Private Lands"; two, that plaintiff Keith was a trespasser to whom defendants breached no duty as a matter of law; and three, that Keith was contributorily negligent as a matter of law. The Court found that factual issues precluded summary judgment on any of the three grounds. However, the Court interpreted 7 Del.C., ch. 59 as applicable to only those landowners "who directly or indirectly invite or permit without charge any person to use the property for recreational purposes." (emphasis added). 7 Del.C. § 5904. The Court then ruled that since defendants had denied giving Keith permission to enter and swim in the borrow pit, the statute was not available to defendants, as a matter of law. Defendants sought to appeal this ruling; but in view of the unresolved factual issues found by the Trial Court, we limited our acceptance of the interlocutory appeal "solely to the questions involving the Superior Court's interpretation of 7 Del.C., ch. 59."

Limiting ourselves to the narrow question certified for appeal, we affirm Superior Court's construction of 7 Del.C., ch. 59:


that the statute may only be invoked to limit the liability of real property owners "who directly or indirectly invite or permit without charge" the public at large to use their property for recreational

purposes. We thereby reject defendants' contentions to the contrary: (1) that 7 Del.C., ch. 59 does not require an "invitation" or "permission" in order to apply; (2) that the statute's protection extends to any lands that are "available" for putting to recreational use without regard to the intent of the owner that they be so used; and (3) that the statute's protection extends to claims of trespassers, i.e., the uninvited as well as the invited.

In our view, an invitation or permission (direct or indirect) extended by a landowner to the public to enter without charge for recreational purposes is a sine qua non for invoking the statute's protective benefits. But, to secure the statute's benefits, an owner is not required to make an explicit "offer" of land or water areas for recreational use. We base this result upon what we find to be the statute's underlying purpose: to encourage landowners to permit their private lands to be made available for public use for recreational purposes. In return, the statute grants such owners broad immunity against suit by a gratuitous public invitee injured while pursuing recreational activities. Thus, we hold that a landowner who undertakes affirmatively either to warn or bar the public from entry cannot assert the statute as a bar to a tort claim brought by a person who has entered the premises either with knowledge or in disregard of the owner's efforts to keep the public out.

In essence, a land or water area's particular conduciveness to recreational use and the owner's positive efforts to make such areas available without charge to the public for recreational use determine a landowner's right to invoke the statute. However, we limit application of the statute to the recreational use of essentially undeveloped land and water areas (primarily rural or semi-rural land, water or marsh) and we find it not applicable to urban or residential areas improved with swimming pools, tennis courts and the like.

We reach this result notwithstanding the purported anomaly of, in effect, depriving a property owner of the benefits of the statute by his having taken affirmative steps to warn and/or to bar the public from entering his property for recreational pursuits. Such an owner may, of course, assert any common law defense to liability. The logic of the contrary result is outweighed by the legislative mandate that the statute's protective benefits be confined to those landowners whose lands are opened for recreational use by the public. That is the Legislature's choice, and we are bound by it.

I

The statute raised by defendants as a bar to this suit, 7 Del.C., chapter 59, was enacted in 1966 as 55 Del.Laws, chapter 449. The construction of this statute is a question of first impression which, in view of the statute's age, may seem surprising. Indeed, defendants did not raise the statute, known as the Recreational Use Act, as a bar to plaintiffs' claim until the briefing of their motion for summary judgment, some 18 1/2 months after the Complaint was filed. [2] We set out all pertinent provisions of the statute below. [3]

The parties are in fundamental disagreement over whether the statute should be given a broad or a narrow application. And the crux of their differences lies in whether a property owner must extend an invitation or grant permission to the public to enter for recreational purposes in order to invoke the statute's limitations against liability.

Apart from a preliminary observation that the statute "is intended for application to large open spaces and not to urban or residential circumstances", defendants urge the Court to construe the statute as, first, having general application to all landowners "of large open spaces" and, second, as affording protection against all persons entering upon such areas for recreational purposes without regard for the status of such persons, i.e., whether they are trespassers, licensees or invitees (subject only to limitations on exemption from liability found in § 5906).

Defendants thereby place predominant reliance upon the language of § 5903 as defining the scope of the limited immunity conferred by the statute. Because § 5903 does not qualify the owners to whom it applies, i.e., confine its application to owners who invite or permit entry by the public for recreational use, defendants reason that all owners (of such lands) may invoke the statute in defense of an injury suit such as this. Defendants also reason that because § 5903 does not qualify the "persons entering" upon the owners' lands as invitees or licensees, § 5903 "clearly covers all persons on the land for recreational purposes regardless of their status as trespassers, licensees or invitees...."

To rebut the contention that such a construction of § 5903 is inconsistent with the provisions of § 5904, defendants down-play the significance of § 5904. Under defendants' view of the Act, § 5904 serves only to "make clear" that the immunity conferred



by § 5903 applies not only to landowners faced with trespassers but "even" to landowners who have invited or permitted third parties to use their lands for recreational purposes. In defendants' words, "the purpose of § 5904 is to make clear that even if there is an invitation or permission, the limited immunity conveyed by § 5903 endures." Thus, defendants construe the statute as intended to limit the liability of all landowners (of areas within the Act's coverage) including those who have attempted to prevent entry by the public and not simply those landowners who have invited or permitted entry by the public for recreational use. Finally, defendants argue that this result is consistent with the underlying purpose of the statute as stated in § 5901: since defendants' water hole was "available" for plaintiff's use (and was made use of by Keith despite defendants' efforts), defendants should be permitted to invoke the liability benefits of Chapter 59. [4]

II

While defendants' arguments are plausible, indeed imaginative, we are not persuaded that the

Delaware statute relating to public recreation on private lands may be invoked by a property owner who takes affirmative steps to deny the public access to such lands for recreational use or any other purpose. We hold that the statute must be construed as intended only for the benefit of owners of private property who evidence intent to permit the public to enter for recreational use. Thus, the statute may not be invoked against one who enters as a trespasser and not as a statutory invitee of the owner. Our reasons are several.

First, we cannot agree that Chapter 59 was intended for general application to all landowners of land and water areas intended for coverage under the Act. We find this implicit in the statute's statement of purpose, § 5901. As stated therein, the purpose of the statute is to "encourage" owners of qualifying land and water areas (as defined under paragraph (1) of § 5902) to "make [them] available to the public for recreational purposes." The means for accomplishing this purpose--the opening of private lands for recreational use by the public at large--is a special statutory grant of qualified immunity from suit by such recreational users. That is the quid pro quo received by an owner for opening lands for recreational use by the public. Therefore, an owner who does not evidence an intent to permit the public to enter for recreational use may not invoke the statute's protective benefits against liability.

The inclusion within the title of the Act, 55 Del.Laws, ch. 449, of the Act's statement of purpose ["AN ACT TO ENCOURAGE LANDOWNERS TO MAKE LAND AND WATER AREAS AVAILABLE TO THE PUBLIC BY LIMITING LIABILITY IN CONNECTION THEREWITH"] reinforces the legislation's goal: that private land and water areas (albeit vaguely defined) be made "available" without charge to the public for recreational use. It necessarily follows that the benefits of the statute were not intended for private landowners who, contrary to the Act, attempt to deny the public access to their lands. [5] To say that lands of a forbidding owner are nevertheless "available"

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for use by a trespasser so as to qualify the owner for the statute's protective benefits would defeat its underlying purpose. In our view, for one's lands to be "available" for use requires an affirmative act of a landowner, as stated in § 5901, "to make land and water areas available." (underlining added.)

Second, defendants have misconstrued § 5903 in reading it as conferring an unlimited right of all owners to invoke the statute and against any entrant, trespasser as well as invitee. Such a construction of § 5903: (1) is inconsistent with the Act's underlying intent, as previously discussed; (2) mistakes its purpose; and (3) is inconsistent with both § 5901 and § 5904. In our view, § 5903 serves a more limited purpose: it limits the duties of a covered owner to those who enter for recreational use and clearly implies that it is referring to invitees. Section 5903 absolves such owners: (a) of any duty of care to keep the premises safe "for entry or use ... for recreational purposes"; and (b) of any duty to warn of a "dangerous condition, use, structure, or activity on such premises."

In contrast with § 5903, § 5904 limits the liability of a covered owner. It does so after defining such an owner as being one, "who either directly or indirectly invites or permits" any other person to use the owner's property for recreational purposes without charge. Section 5904 then limits a covered owner's liability: (a) by disclaiming an invitation to enter as being "any assurance" as to the safety of the premises; (b) by depriving such entering person of the "legal status of an invitee or licensee"; and (c) by declaring the invitation extended not to constitute an assumption of "responsibility" or "liability" for "act of [sic] omission" of the owner.

So construed, § 5903 does not conflict with § 5904 in the definition of a covered owner; and "owner", as there defined, is consistent with § 5901. The inherent conflict between those sections posed by defendants' literal construction of § 5903 must be rejected in favor of a construction that reconciles the two sections. *Nationwide Mutual Ins. Co. v. Krongold, Del.Supr.,* 318 A.2d 606 (1974); *Halifax Chick Express v. Young, Del.Supr.,* 137 A.2d 743 (1958). As the Superior Court noted, no reason exists to assume that the Legislature intended to "differentiate the landowners in § 5903 from those in § 5904." Moreover, strict, rather than liberal, construction of legislation in derogation of the common law is the rule. See *Carper v. Board of Education, Del.Supr.,* 432 A.2d 1202 (1981); *State v. Brown, Del.Supr.,* 195 A.2d 379 (1963). Compare Stratford Apts., Inc. v. Fleming, Del.Supr., 305 A.2d 624 (1973). Thus, Chapter 59's exoneration of owners must be confined to the statute's intended beneficiaries--the invited public--and not an uninvited trespasser.

We think it clear that the immunity granted by Chapter 59 is to be invoked only against those who, but for the statute, would otherwise constitute common law invitees or licensees of an inviting owner. The immunity conferred may not be invoked by an uninviting owner against a trespasser.

Third, while the Delaware Act lacks any legislative history, apart from the Act's title and statement of purpose in § 5901, it seems fairly clear that the Act is derived from a model act of "Suggested Legislation" proposed by The Council of State Governments in 1965. The Council of State Governments, Suggested State Legislation, Vol. XXIV, p. 150 (1965). The Delaware statute is identical to the model act. This being so, the preamble or introductory statement of the reasons for the model act is entitled to consideration. [6] The

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preamble's reference to an "accommodating owner" clearly suggests the antithesis of an owner who takes measures to post property against entry or otherwise impedes access to property by strangers.

III

An extensive body of decisional law exists in other jurisdictions applying recreational use statutes in various forms. Forty-six other states have enacted recreational use statutes. While the statutes take a variety of forms, they may be said to fall into roughly four variations on the model act. [7]

Those four variations may be characterized as follows: one, the model act with coverage enlarged; two, the model act with coverage narrowed; three, the model act with statement of purpose deleted and other changes; and four, the model act essentially unchanged.

Variation one, adopted by nine states--Arizona, California, Indiana, Louisiana, Michigan, Mississippi, Ohio, South Dakota and West Virginia--departs significantly from the model act by extending coverage to bar claims of trespassers as well as gratuitous invitees. [8] Variation two, adopted by six states--Montana, Rhode Island, Texas, Vermont, Washington and South Carolina--also departs from the model act by narrowing coverage to claims of persons actually having permission, explicit or implied, to enter for specific recreational pursuits. Variation three, adopted by ten states--Maine, Missouri, Nevada, New Hampshire, New Jersey, New York, North Dakota, Virginia, Wisconsin and Wyoming--significantly omits the model act's statement of purpose that is also found in § 5901 of the Delaware statute. Variation four, adopted by sixteen states, including Delaware--Arkansas, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, Nebraska, Oregon, Pennsylvania, South Carolina and Utah--represents the model act essentially unchanged. [9] The recreational use statutes of all of the states within variation four contain nearly identical statements of purpose as found in Delaware's § 5901 and include provisions similar to §§ 5903 and 5904.

Defendants have made a similar effort to classify the recreational use statute law in other jurisdictions. Finding the Delaware "pattern" statute to have been adopted by a score or so of other jurisdictions, defendants argue that it is unreasonable to suppose that legislatures in such numbers would have erred in enacting both §§ 5903 and 5904 if § 5903 were to be deemed "superfluous." But, as demonstrated above, our construction of chapter 59 does not render § 5903 redundant.

A.

However, classifying the variations on the model act in other jurisdictions is helpful

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in sifting through the body of foreign law in search of analogous legislative intent. Defendants assert that there is pertinent decisional law to be found in nine jurisdictions: California, Georgia, Illinois, Michigan, Nebraska, Nevada, New Jersey, Pennsylvania and Wyoming. Applying our screening technique based on the foregoing classification of recreational use statutes, we confine our consideration of that body of case law to category four jurisdictions: Georgia, Illinois, Nebraska, and Pennsylvania. [10]

In *Georgia Power Co. v. McGruder, Ga.Supr.,* 229 Ga. 811, 194 S.E.2d 440 (1972), a ten-year old trespassing child drowned in a pool beneath defendant's dam and power generating plant. The Georgia recreational use statute, Ga.Code Ann. §§ 51-3-20 to 51-3-26 (1982), was held not to apply as a bar to suit where the use of the land was expressly denied by the posting of "keep out"

signs in the area. The Georgia Supreme Court stated:

The evidence presented upon the motion for summary judgment shows the defendant's employees did not know of the boy's presence but knew that in the past persons had been swimming and fishing in its waters. Photographs in evidence showed that there were located on the power plant and dam above the place where the boy drowned two large warning signs which stated: "Danger. For your own safety please keep out. Rough waters. Gates at dam operate automatically." The Act of 1965 (Ga.L.1965, p. 476; Code Ann. § 105-403) limits the liability of an owner of land who "directly or indirectly invites or permits without charge any person to use such property for recreational purposes." In our opinion the statute is not applicable where, as here, the use of the land was expressly denied to the deceased boy by the posting of "keep out" signs in the area. Accordingly, the decision of the Court of Appeals is reversed and the case returned to that Court for further consideration.

194 S.E.2d at 440-441.

The Georgia statute is identical to 7 Del.C., ch. 59. See also *North v. Toco Hills, Inc., Ga.Ct.App.,* 160 Ga.App. 116, 286 S.E.2d 346 (1981), applying but distinguishing McGruder, stating that an owner's express denial of the use of his land for recreational purposes clearly indicates that the property is not available for recreational use.

In *Johnson v. Stryker Corp., Ill.Ct.App.,* 70 Ill.App.3d 717, 26 Ill.Dec. 931, 388 N.E.2d 932 (1979), a trespassing teenager suffered fatal injuries after diving into a shallow pond on defendant-owner's property. The owner had also permitted his lands to be used for recreational purposes on a casual basis by some, but not all, of the general public. The Illinois act's statement of purpose and equivalent section to Delaware's § 5903 are identical. The court held that the Illinois recreational use statute, Ill.Rev.Stat.1971, ch. 70, p 31, et seq., barred the suit, reasoning, in part:

It is true that the purpose of the statute is to encourage landowners to open up their property to members of the public.

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That does not mean the legislature intended to limit the application of the statute only to the landowners who open their lands to all members of the public. Many of these landowners are farmers who could hardly afford to open the land to everyone at all times of the year.... No landowner would allow all persons to use the property at all times. ... It is more reasonable to believe that the legislature, being aware of the growth of the doctrine of attractive nuisance ... wish to protect landowners whose property is used gratutitously, with or without their permission for recreational purposes. [11]

In *Watson v. City of Omaha,* 209 Neb. 835, 312 N.W.2d 256 (1981), the Nebraska statute, Neb.Rev.Stat. §§ 37-1001 to 1008 (Reissue 1978), which departs in only minor respects from the

model act, was applied to bar a personal injury claim occurring in a municipally-owned park open to the public.

In *Hahn v. United States, M.D.Pa.*, 493 F.Supp. 57 (1980), the plaintiff was injured when he fell into a hole while fishing on property owned by the federal government. The land was found to be unposted, not patrolled and ostensibly open to the public. The Pennsylvania recreational use statute, 68 P.S. §§ 447-1, et seq. (identical to 7 Del.C., ch. 59), was applied to bar recovery.

B.

The conclusions we draw from our analysis of the statutes and case law on recreational torts in forty-six other jurisdictions are:

(1) that decisional law barring claims of trespassers as well as invitees and applying to posted as well as unposted lands is confined--almost exclusively--to jurisdictions, unlike Delaware, that have adopted variations one or three of the model act;

(2) that the legislatures of those jurisdictions have elected to shift the model act's emphasis from that of a limited measure to "encourage" the opening of private lands for recreational use to a "protectionist" oriented broad-form measure designed to immunize all owners of covered lands from tort liability to strangers injured in the course of recreational pursuits;

(3) that there are few decisions applying variation four statutes--like 7 Del.C., ch. 59--to a given set of facts bearing any resemblance to the instant case; and

(4) that the existence of an apparent split of authority within those jurisdictions--Georgia and Illinois--leaves us with no reason to conclude that our construction of the Delaware statute is not correct.

However, for the reasons previously stated, we expressly decline to decide whether 7 Del.C., chapter 59 will ultimately prove a bar to recovery and leave that question to the Superior Court to determine.

* * *

Affirmed.

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Notes:

[1] A default judgment was obtained against Joseph for failure to timely appear; a motion to vacate the judgment was denied; and this Court refused Joseph's interlocutory appeal.

[2] By reason of the late assertion of the statute, plaintiffs argued below that defendants waived the assertion of the defense--assuming the statute were applicable. However, Superior Court, by finding the statute to be inapplicable, did not reach the issue of waiver. Thus, that issue remains open.

[3] 7 *Del.C.*, ch. 59, titled "Public Recreation on Private Lands", provides in pertinent part:

**5901. Purpose.**

The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

**5902. Definitions.**

As used in this chapter:

(1) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

(2) "Owner" means the possessor of a fee interest, tenant, lessee, occupant or person in control of the premises.

(3) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic or scientific sites.

(4) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

**5903. Limitation on duty of owner.**

Except as specifically recognized by or provided in 5906 of this title, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on such premises to persons entering for such purposes.

**5904. Use of land without charge; limits of liability.**

Except as specifically recognized by or provided in 5906 of this title, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

(1) Extend any assurance that the premises are safe for any purpose;

(2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed;

(3) Assume responsibility, or incur liability, for any injury to person or property caused by an act of omission of such persons.

**5905. Written waivers.** [omitted]

**5906. Limitations on exemption from liability.**

Nothing in this chapter limits in any way any liability which otherwise exists:

(1) For willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity;

(2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

**5907. Exemptions.**

Nothing in this chapter shall be construed to:

(1) Create a duty of care, or ground of liability, for injury to persons or property;

(2) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this chapter to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care.

[4] Defendants also make several additional arguments. Given: (1) the extent to which lands in rural areas are trespassed upon for recreational pursuits; (2) the ever-expanding scope of tort liability of landowners to the uninvited as well as the invited, and (3) the difficulty, if not impossibility, of landowners to know what measures to take to protect themselves; the Legislature must have intended Chapter 59 to be available for use against trespassers as well as invitees. Nor does it make sense to limit the statute's benefits to these few owners who might invite entry and to deny its benefits to those many owners who undertake efforts to warn or dissuade strangers from entering for recreational use.

[5] Chapter 59 is to be contrasted with recreational use statutes in other jurisdictions which are either cast in broad terms of protecting all landowners from recreational suits or as extending to lands whether or not posted against trespassing. See part III below.

[6] We quote in part from that preamble:

"Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreages of private land could add to the outdoor recreation resources available.

* * *

... [I]n those circumstances where private owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them.

In something less than one-third of the states, legislation has been enacted limiting the liability of private owners who make their premises available for one or more public recreational uses. This is done on the theory that it is not reasonable to expect such owners to undergo the risks of liability for injury to persons and property attendant upon the use of their land by strangers from whom the accommodating owner receives no compensation or other favor in return.

The suggested act which follows is designed to encourage availability of private lands...."

*The Council of State Governments, Suggested State Legislation,* Vol. XXIV, p. 150 (1965).

[7] The Council of State Governments' monogram accompanying the model act indicates that the

statutes of one-third of the states predate the model act.

[8] In California, it appears that the broader application of the statute results from judicial legislation. *See Parish v. Lloyd,* Cal.Ct.App., 82 Cal.App.3d 785, 147 Cal.Rptr. 431 (1978).

[9] Alabama, Colorado, Florida, Oklahoma and Oregon would also fall within variation *four* but for further variations, including the following: Alabama has amended its equivalent of Delaware's 5903 to apply to an owner who "permits" entry. Colorado omits the equivalent of Delaware's 5903 but retains the equivalent of Delaware's 5904. Florida and Oklahoma make special reference to an owner who "provides the public with a park area."

[10] Michigan and New Jersey decisional law is based on recreational use statutes that fall under variations *one* and *three* described above. The Michigan statute is simply described as an act "restricting suits by persons coming upon the property of another for [outdoor recreational use without payment--for injuries sustained]. Compare with the title to 7*Del.C.,* ch. 59. See part II above. There is no statement of purpose equivalent to Delaware's 5901 nor any section equivalent to Delaware's 5904. The New Jersey statute, titled, "Landowners' Liability", N.J.S.A. 2A: 42A-2 et seq., not only omits the model act's statement of purpose but expressly applies to "premises whether or not posted." (2A: 42A-3) Thus, the New Jersey courts have determined that the purpose of the New Jersey statute is to put trespassers and licensees on an equal footing. *Krevics v. Ayars,* N.J.Super.App.Div., 141 N.J.Super. 511, 358 A.2d 844 (1976). *See Harrison v. Middlesex Water Co.,* N.J.Super.App.Div., 158 N.J.Super. 368, 386 A.2d 405 (1978),*rev'd on other grounds,* 80 N.J. 391, 403 A.2d 910 (1979). Similarly, the Michigan statute has been construed as not differentiating between trespassers, licensees or invitees. *Graham v. County of Gratiot,* Mich.Ct.App., 126 Mich.App. 385, 337 N.W.2d 73 (1983); *Taylor v. Mathews,* Mich.Ct.App., 40 Mich.App.74, 198 N.W.2d 843 (1972).

[11] The Illinois court's line of reasoning is similar to that employed by the California courts referred to in footnote 8 above.

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# Webster's Third New International Dictionary

UNABRIDGED

**al·low** \ə'laú\ *vb* -ED/-ING/-S [ME *allowen*, fr. MF *alouer* to place, use, grant (fr. ML *allocare*) & *allouer* prove, fr. L *adlaudare* to extol, fr. *ad-* + *laudare* to pra more at ALLOCATE, LAUD] *vt* **1** *archaic* **a** : PRAISE I PROVE, SANCTION, ACCEPT ⟨truly ye bear witness that ye deeds of your fathers —Lk 11:48 (AV)⟩ **2 a** *obs* : to g recognize as a right **b** (1) : to give or assign as a sh suitable amount (as of time or money) to a particular p or for a particular purpose ⟨~ an hour for lunch⟩ ⟨~*e* child one dollar a week as spending money⟩ (2) : to al assign as a deduction or an addition ⟨~ a gallon for lea **3** : to accept as true or as represented : ADMIT, CO ACKNOWLEDGE ⟨a people of whom this is true must be ~ be musical —Wyn Griffith⟩ ⟨he will not ~ that we have nated these evils⟩ ⟨played a more important part in h than his biographer ~*s*⟩ **4** : PERMIT ⟨a pipe to ~ the l air to escape⟩ ⟨occasional gaps ~ passage through the tains⟩ ⟨pulled to the side to ~ us to pass⟩: **a** : to per way of concession ⟨no smoking ~*ed*⟩ ⟨he ~*s* himself luxuries⟩ ⟨children too young to be ~*ed* out at night⟩ permit by negiecting to restrain or prevent ⟨~ a garc become overgrown with weeds⟩ ⟨conditions which s never have been ~*ed* to develop⟩ ⟨she had ~*ed* herself come very fat⟩ **5** *dial* **a** : to be of the opinion : SUPPOSE ⟨we ~*ed* it was too late to start⟩ **b** : INTEND — usu. used with an infinitive ⟨I ~ to go fishing tomo ~ *vi* **1** : to make a possibility : provide opportunity or : ADMIT, PERMIT — used with *of* ⟨evidence that ~*s* of onl conclusion⟩ ⟨underbrush too dense to ~ of shooting⟩ give consideration : make allowance — used with *for* ⟨ tance, ~*ing* for detours, of about 10 miles⟩ **3** *dial* : SU CONSIDER **syn** see LET