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Division I
State of Washington

No. 734491-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 1

JOHN ARCHER, as Legal Guardian of
JOHN B. ARCHER, a minor child,

Appellant(s),

v.

MARYSVILLE SCHOOL DISTRICT,

Respondent(s).

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES	3
	1. Does RCW 4.24.210 provide immunity to the District against Archer’s claims for personal injuries which occurred on land held open to the public for recreational purposes without charge and where no exception applies?	3
	2. Does RCW 4.24.210 entitle public landowners, such as the District, to Recreational Use Immunity when the statute expressly includes public landowners?.....	3
	3. Does RCW 4.24.210 apply to the District whose land which is open to the public for recreational purposes, even when the District adopted safety policies and occasionally has additional uses for the land?	3
	4. Does the term “any lands” as used in RCW 4.24.210 include outdoor playground athletic equipment?	3
	5. Does the term “outdoor recreation” as used in RCW include basketball?	3
	6. Is this appeal devoid of merit and frivolous such that attorneys fees should be awarded to the District pursuant to RAP 18.9?	3
III.	STATEMENT OF THE CASE.....	4
	A. Statement of Facts.....	4
	1. The District’s playground basketball courts were open to the public for recreation purposes free of charge when not in use by the school.....	4
	2. Archer’s injury	4
	3. The District had no knowledge of any dangerous condition regarding the basketball poles	5

4.	The District’s student-oriented uses and safety policies are directed towards its students during school sponsored activities	6
B.	Statement of Proceedings	6
IV.	ARGUMENT.....	8
A.	Standard of Review for Summary Judgment	8
B.	Archer’s claims against the District are barred by Recreational Use Immunity.....	9
1.	RCW 4.24.210 provides public landowners immunity against liability when allowing the public to use their land for outdoor recreation without charging fees.....	11
2.	The purpose of RCW 4.24.210 is to encourage landowners to open their lands to the public for recreational purposes by limiting their liability	13
3.	Recreational Use Immunity bars Archer’s claims against the District and summary judgment should be affirmed	15
C.	Public landowners, including the District, qualify for Recreational Use Immunity.....	17
1.	The plain language of RCW 4.24.200-210 shows the legislature’s intent to grant Recreational Use Immunity to public landowners.....	17
2.	Washington Courts have consistently granted Recreational Use Immunity to public landowners	19
3.	Applying Recreation Use Immunity to public and school district landowners does not reinstate sovereign immunity	22
D.	RCW 4.24.210 applies because the District opened its land to the public for the purpose of outdoor recreation	24
1.	The District opened its playground to the public for the purpose of outdoor recreation	24
2.	Primary purpose of playground being opened to public is for recreation even when District adopts polices to keep its students safe	26

3.	Primary purpose of playground being opened to public is for recreation even when District has additional uses when closed to the public.....	28
4.	This case distinguishable from <i>Camicia v. Howard S. Wright Const. Co.</i>	30
E.	RCW 4.24.210 applies to injuries on playground athletic equipment.....	31
F.	RCW 4.24.210's definition of "outdoor recreation" includes basketball	32
G.	Attorneys fees should be awarded to the District for defending against this frivolous appeal.....	36
V.	CONCLUSION	37

APPENDIX	APP. 1
RCW 4.24.200. Liability of owners or others in possession of land and water areas for injuries to recreation users — Purpose.	APP. 1
RCW 4.24.210. Liability of owners or others in possession of land and water areas for injuries to recreation users — Known dangerous artificial latent conditions — Other limitations.....	APP. 1
Regina Milteer, MD, et al., <i>The importance of Play in Promoting Healthy Child Development and Maintaining Strong Parent-Child Bond: Focus on Children in Poverty</i> , 129 PEDIATRICS 1 (Jan 2012)	APP. 3

TABLE OF AUTHORITIES

Cases

<i>Alexander v. County of Walla Walla</i> , 84 Wash.App. 687, 692, 929 P.2d 1182 (1997).....	9
<i>Bernstein v. State</i> , 53 Wash. App. 456, 767 P.2d 958 (1989).	15, 20
<i>Boyles v. Washington State Dep't of Ret. Sys.</i> , 105 Wash. 2d 499, 507, 716 P.2d 869, 873 (1986).....	37
<i>Camicia v. Howard S. Wright Const. Co.</i> , 179 Wash. 2d 684, 693, 317 P.3d 987, 991 (2014).....	passim
<i>Chamberlain v. Dep't of Transp.</i> , 79 Wash. App. 212, 901 P.2d 344 (1995).....	20
<i>Cregan v. Fourth Mem'l Church</i> , 175 Wash. 2d 279, 285, 285 P.3d 860, 864 (2012).....	25, 28
<i>Curran v. City of Marysville</i> , 53 Wash. App. 358, 766 P.2d 1141 (1989).....	passim
<i>Davis v. State</i> , 144 Wash. 2d 612, 616, 30 P.3d 460, 462 (2001) 12, 14, 20, 23	
<i>Gaeta v. Seattle City Light</i> , 54 Wash. App. 603, 774 P.2d 1255 (1989).....	20, 24
<i>Home v. N. Kitsap Sch. Dist.</i> , 92 Wash. App. 709, 965 P.2d 1112 (1998).....	passim
<i>In re Pers. Restraint of Quackenbush</i> , 142 Wash.2d 928, 936, 16 P.3d 638 (2001).....	18
<i>Jewels v. City of Bellingham</i> , 180 Wash. App. 605, 610, 324 P.3d 700, 702 <i>review granted</i> , 181 Wash. 2d 1001, 332 P.3d 985 (2014), <i>aff'd</i> , 183 Wash. 2d 388, 353 P.3d 204 (2015)..	14, 16, 20
<i>Jones v. United States</i> , 693 F.2d 1299 (9th Cir. 1982).....	20
<i>Mahoney v. Shinpoch</i> , 107 Wash. 2d 679, 692, 732 P.2d 510, 517 (1987).....	38
<i>Matthews v. Elk Pioneer Days</i> , 64 Wash. App. 433, 438, 824 P.2d 541, 543 (1992),	34, 35
<i>McCarver v. Manson Park & Recreation Dist.</i> , 92 Wash. 2d 370, 376, 597 P.2d 1362, 1365 (1979).....	18, 19, 36

<i>McKinnon v. Washington Fed. Sav. & Loan Ass'n</i> , 68 Wash. 2d 644, 648-49, 414 P.2d 773, 776 (1966).....	14
<i>Partridge v. City of Seattle</i> , 49 Wn.App. 211, 215, 714.P.2d 1039 (1987).....	13, 20
<i>Plano v. City of Renton</i> , 103 Wash. App. 910, 14 P.3d 871 (2000).....	21, 23
<i>Ravenscroft v. Washington Water Power Co.</i> , 136 Wash. 2d 911, 969 P.2d 75 (1998).....	21, 23
<i>Riksem v. City of Seattle</i> , 47 Wash. App. 506, 736 P.2d 275 (1987).....	20
<i>State v. Delgado</i> , 148 Wash. 2d 723, 727, 63 P.3d 792, 795 (2003).....	17
<i>State v. J.P.</i> , 149 Wash. 2d 444, 450, 69 P.3d 318, 320 (2003) ...	19
<i>State v. Roggenkamp</i> , 153 Wash. 2d 614, 624, 106 P.3d 196, 201 (2005).....	17, 18
<i>Stiles v. Kearney</i> , 168 Wash. App. 250, 267, 277 P.3d 9, 17 (2012).....	37
<i>Swinehart v. City of Spokane</i> , 145 Wash. App. 836, 843-44, 187 P.3d 345, 349-50 (2008).....	passim
<i>Van Dinter v. City of Kennewick</i> , 121 Wash. 2d 38, 42, 846 P.2d 522, 524 (1993).....	14, 15, 20
<i>Widman v. Johnson</i> , 81 Wash. App. 110, 114, 912 P.2d 1095, 1098 (1996).....	30

Statutes

RCW 28A.320.015(1)(a).....	26
RCW 4.24.210(1).....	passim
RCW 4.24.210(4).....	23
RCW 4.96.010(1).....	22

Rules

CR 56(c).....	9
RAP 18.9(a).....	36

Treatises

16A Wash. Prac., Tort Law And Practice § 18:18 (4th ed.)..... 1
Restatement (Second) of Torts § 895B(4) (1979)..... 24

Other Authorities

Regina Milteer, MD, et al., *The importance of Play in Promoting
Healthy Child Development and Maintaining Strong Parent-Child
Bond: Focus on Children in Poverty*, 129 PEDIATRICS 1 (Jan 2012)
available at
<http://pediatrics.aappublications.org/content/129/1/e204.full> 27

I. INTRODUCTION

Washington’s Recreational Use Immunity statutes, RCW 4.24.200-201, were enacted to encourage landowners to open their land to the public for recreation by establishing protections for landowners against liability.¹ RCW 4.24.210 states that any “public or private landowners” who allow members of the public to use their land for the purpose of outdoor recreation without charging fees “shall not be liable for unintentional injuries to such users.”² The plain purpose of Recreational Use Immunity is to limit the liability of landowners, not to expand it.³ The statute applies to both public and private landowners.⁴

The Marysville School District (“District”) permitted the public to use Sunnyside Elementary School’s (“Sunnyside”) outdoor playground basketball courts outside of school hours for the purpose of outdoor recreation.⁵ John Archer (“Archer”), a member of the general public, was injured while using Sunnyside’s outdoor basketball court outside of school hours for a clearly recreational purpose – playing basketball.⁶ The District charged no fees for Archer’s use, did not intend for Archer to get injured, and did not

¹ RCW 4.24.200.

² RCW 4.24.210(1). This immunity is subject to limited exceptions outlined in RCW 4.24.210(4), which Archer does not claim to apply in this case

³ RCW 4.24.200.

⁴ RCW 4.24.210; 16A Wash. Prac., Tort Law And Practice § 18:18 (4th ed.).

⁵ CP 357.

⁶ CP 422.

know of any defects to the basketball pole which caused Archer's injury.⁷

Archer filed the underlying personal injury suit against the District for negligence.⁸ The trial court granted summary judgment on reconsideration, dismissing Archer's claims based on Recreational Use Immunity.⁹ Archer claims on appeal that: (1) Recreational Use Immunity does not apply to public landowners such as the District; (2) the District did not open the playground to the public for the purpose of recreation; (3) the statute does not apply to injuries on playground athletic equipment; and (4) playing basketball does not constitute an outdoor recreational activity.

Summary judgment should be affirmed because Archer's accident, which occurred on District land opened to the public for purposes of outdoor recreation without fees, clearly falls within the scope of immunity provided by RCW 4.24.210. This claim is precisely the type of liability which Recreational Use Immunity was enacted to protect landowners against in the interest of encouraging landowners to open up their property for recreational use. Further, public landowners are specifically included in Washington's Recreational Use Immunity statute; the record shows that the only purpose for the District opening its land to the public

⁷ CP 357-58.

⁸ CP 421-24.

⁹ CP 45-47.

was for recreational purposes; Washington Courts have routinely held that the statute applies to playground athletic equipment; and basketball clearly falls within the statute's meaning of outdoor recreation. This Court should uphold the trial court's dismissal of Archer's claims, and award attorneys fees to the District for responding to this frivolous appeal.

II. STATEMENT OF ISSUES

1. Does RCW 4.24.210 provide immunity to the District against Archer's claims for personal injuries which occurred on land held open to the public for recreational purposes without charge and where no exception applies?
2. Does RCW 4.24.210 entitle public landowners, such as the District, to Recreational Use Immunity when the statute expressly includes public landowners?
3. Does RCW 4.24.210 apply to the District whose land which is open to the public for recreational purposes, even when the District adopted safety policies and occasionally has additional uses for the land?
4. Does the term "any lands" as used in RCW 4.24.210 include outdoor playground athletic equipment?
5. Does the term "outdoor recreation" as used in RCW include basketball?
6. Is this appeal devoid of merit and frivolous such that attorneys fees should be awarded to the District pursuant to RAP 18.9?

III. STATEMENT OF THE CASE

A. Statement of Facts

1. The District's playground basketball courts were open to the public for recreation purposes free of charge when not in use by the school

Sunnyside Elementary School has an outdoor playground which includes basketball hoops and courts.¹⁰ During school hours, when Sunnyside is in use by the school and its students, the playground is not open to the public.¹¹ Outside of school hours, although the District has the capacity to restrict access Sunnyside's outdoor playground and basketball facilities, it chooses to leave them open to the public for recreational use at no charge, as was the case at the time of Archer's injury.¹²

2. Archer's injury

Archer's accident occurred on Sunnyside's playground basketball court outside of school hours on Saturday, January 25, 2014.¹³ Archer was a member of the general public and not a student of Sunnyside.¹⁴ Archer was not charged any fees for his use.¹⁵ While Archer was playing basketball on the outdoor court, a pole holding up the backboard and hoop collapsed and caused

¹⁰ CP 422.

¹¹ CP 357.

¹² CP 296, 357.

¹³ CP 422, 357.

¹⁴ CP 326, 422.

¹⁵ CP 326, 422.

injuries to his face.¹⁶

3. The District had no knowledge of any dangerous condition regarding the basketball poles

The District was unaware of any defects with the basketball poles on the Sunnyside playground, including the pole involved in Archer's injury.¹⁷ The Sunnyside playground was subject to regular safety inspections conducted annually by the District¹⁸ and bi-annually by the Snohomish County Health District.¹⁹ Reports of these inspections for the eight years preceding Archer's injury did not identify any safety concerns related to any of Sunnyside's basketball poles, although other safety concerns were identified and addressed.²⁰

Notably, the Snohomish County Health District, a third party separate from the District, performed an inspection of Sunnyside's playground on January 24, 2014, *one day before* Archer's injury.²¹ The County's report to the District based on that inspection identified other safety concerns on the playground, but again found no concerns with the basketball poles.²² In the three years preceding Archer's accident, the District received no reports

¹⁶ CP 422.

¹⁷ CP 358.

¹⁸ CP 363-406.

¹⁹ CP 331-348.

²⁰ CP 331-348, 363-406.

²¹ CP 331-334. This inspection was conducted by the County, a third party, and not by the District as stated in Appellant's Brief p. 3

²² CP 331-334.

of injuries from the basketball poles on Sunnyside's playground.²³

4. The District's student-oriented uses and safety policies are directed towards its students during school sponsored activities

Aside from school recess, the District occasionally uses Sunnyside's playground for other school-sponsored and supervised student activities such as parking during student performances, annual "Field Day" carnivals for its students, and daily bussing of its students.²⁴ These are school activities conducted for the benefit of its students, not for the general public.²⁵

The District also maintains safety policies for its playground facilities, such as the "Safety, Operations and Maintenance of School Property" and "Safety" policies referenced by Appellant.²⁶ These policies were adopted for the safety of the District's students in compliance with applicable statutes, regulations, and School Board policies.²⁷

B. Statement of Proceedings

Archer filed suit against the District for negligence on June 26, 2014.²⁸ The District filed a Motion for Summary Judgment to

²³ CP 358.

²⁴ CP 327.

²⁵ CP 327. Archer's father, who submitted a declaration regarding these uses of the Sunnyside playground, was apparently aware of these activities because Archer is a former student of Sunnyside. CP 326.

²⁶ CP 318-320.

²⁷ See CP 319 and 320 for references to specific board policies, statutes, and regulations.

²⁸ CP 421-24.

dismiss Archer's claims based on Recreational Use Immunity.²⁹

This Motion was heard before Honorable Judge Bruce Weiss.³⁰

Judge Weiss initially denied the District's Motion and made an oral ruling stating:

I'm going to deny the motion for summary judgment. The last argument from [Archer's attorney] Mr. Budlong is persuasive to me in relation to the [District's safety] policy where it references that they want to have safe equipment. That's contrary to the immunity. I determine, based on that, there's a question of fact whether the immunity actually applies. I deny the motion for summary judgment.³¹

On April 15, 2015, upon the District's Motion for Reconsideration, Judge Weiss dismissed Archer's claims, holding that the evidence supported granting the District's Motion for Summary Judgment and substantial justice had not been done.³²

Judge Weiss's ruling states in pertinent part:

The REASONS for the Court's order are:

1. Pursuant to CR 59(a)(7), the evidence supports granting Defendant Marysville School District's Motion for Summary Judgment applying recreation land use immunity under RCW 4.20.210 to dismiss Plaintiff Archer's claims because:

²⁹ CP 407-13.

³⁰ CP 278-79.

³¹ CP 274-75, 278-79. Judge Weiss did not deny the motion because the District "had assumed a duty of reasonable care to select, install and maintain safe equipment" as stated in Appellant's brief. See Appellant's brief p. 1.

³² CP 46-47.

- (a) The District's playground where Mr. Archer's injury occurred was open to the general public for the purpose of outdoor recreation;
- (b) The District's safety policy does not establish an intended use for the playground used by Mr. Archer at the time he was injured, but instead establishes the District's maintenance procedures for its outdoor recreational facilities;
- (c) The injury was suffered by Mr. Archer unintentionally as a member of the public using the District's land for the purpose of outdoor recreation without any fees;
- (d) No exception applies; and

2. Pursuant to CR 59(a)(9), substantial justice was not done by declining to apply recreation land use immunity under RCW 4.20.210 to the District's playgrounds open to the general public outside of school hours because:

- (a) The purpose of RCW 4.24.210 is to encourage landowners to permit the public to use its land for outdoor recreation free of charge;
- (b) Denying the District's motion disincentivizes public entities from developing safety policies...

Archer filed his Notice of Appeal on May 13, 2015.³³

IV. ARGUMENT

A. Standard of Review for Summary Judgment

³³ CP 1-3.

Summary judgment rulings are reviewed de novo.³⁴ When reviewing an order granting summary judgment, appellate courts engage in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party.³⁵ Because recreational use immunity is an affirmative defense, the landowner asserting it carries the burden of proving entitlement to immunity under the statute.³⁶ Summary judgment is proper if the record shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.³⁷ Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion.³⁸ When there are no genuine issues of material fact, immunity is a question of law for the court.³⁹

B. Archer’s claims against the District are barred by Recreational Use Immunity

“Washington enacted RCW 4.24.210 in 1967 to immunize landowners who allow members of the public to use certain lands ‘for the purpose of outdoor recreation’ from liability for most

³⁴ *Swinehart v. City of Spokane*, 145 Wash. App. 836, 843-44, 187 P.3d 345, 349-50 (2008) (citing *Seybold v. Neu*, 105 Wash.App. 666, 675, 19 P.3d 1068 (2001)).

³⁵ *Id.*

³⁶ *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 693, 317 P.3d 987, 991 (2014).

³⁷ CR 56(c).

³⁸ *Alexander v. County of Walla Walla*, 84 Wash.App. 687, 692, 929 P.2d 1182 (1997).

³⁹ *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 693, 317 P.3d 987, 991 (2014).

injuries.”⁴⁰ In doing so, “the legislature expressly intended that the statute would ‘encourage owners or others in lawful possession and control of land... to make them available to the public for recreational purposes by limiting their liability towards persons entering thereon.’”⁴¹ In this case, Archer was injured while playing on a District playground that was open to him for free as a member of the public for recreational purposes. Archer’s claims are precisely the type of liability that the legislature adopted Recreational Use Immunity under RCW 4.24.210 to protect landowners against, in the interest of encouraging allowing landowners to keep their land open to the public for free recreational use.

RCW 4.24.210 specifically states that both public and private landowners “shall not be liable for unintentional injuries to [recreational] users.”⁴² On the face of it, Archer’s position would yield an extraordinary result: a public landowner would be liable to a free recreational user who was unintentionally injured on the property, merely because an injury occurred. Holding the District liable for such injuries would discourage the District from keeping its land open, and would instead encourage the District to close its property off to the public – contrary to the express intent of

⁴⁰ *Id.* at 695.

⁴¹ *Id.* (citing RCW 4.24.200).

⁴² RCW 4.24.210.

Recreational Use Immunity.⁴³ Denying the District Recreational Use Immunity against Archer’s claims is contrary to both the plain language and the policy purpose of RCW 4.24.210. The trial court’s ruling dismissing Archer’s claims against the District should be affirmed.

1. RCW 4.24.210 provides public landowners immunity against liability when allowing the public to use their land for outdoor recreation without charging fees

Recreational Use Immunity was enacted to encourage landowners, including public landowners like the District, to open their land to the public for recreational use without charging fees by limiting their liability.⁴⁴ RCW 4.24.210 expressly includes “any public or private landowners” in the application of Recreational Use Immunity. The statute states in pertinent part:

(1) Except as otherwise provided in subsection (3) or (4) of this section, **any public or private landowners**, hydroelectric project owners, or others **in lawful possession and control of any lands** whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, **who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to,** the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking,

⁴³ RCW 4.24.200.

⁴⁴ RCW 4.24.200.

bicycling, skateboarding or other nonmotorized wheel-based activities, aviation activities including, but not limited to, the operation of airplanes, ultra-light airplanes, hanggliders, parachutes, and paragliders, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, rafting, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, **without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.**⁴⁵

Public and private landowners are immune against liability for unintentional injuries on their land if: (1) the land is open to members of the public; (2) for the purpose of outdoor recreation; and (3) no fees are charged.⁴⁶ At the time of Archer's injury, the District's playground basketball courts were held open to the members of the public (such as Archer) for the purpose of outdoor recreation (such as playing basketball) without charging any fees.

This statute gives landowners immunity from liability unless (1) a fee is charged, (2) the injury inflicted was intentional, or (3) the injury was caused by a known dangerous artificial latent condition and no warning signs were posted.⁴⁷ These exceptions to Recreational Use Immunity are not claimed by Archer and do not apply to this case. Thus, the District is immune from Archer's claims pursuant to RCW 4.24.210.

⁴⁵ RCW 4.24.210(1) (eff. June 7, 2012) (emphasis added).

⁴⁶ *Id.*

⁴⁷ *Davis v. State*, 144 Wash. 2d 612, 616, 30 P.3d 460, 462 (2001).

2. The purpose of RCW 4.24.210 is to encourage landowners to open their lands to the public for recreational purposes by limiting their liability

The purpose of Washington's Recreational Use Immunity statute is codified in RCW 4.24.200, which states:

The purpose of RCW 4.24.200 and 4.24.210 is **to encourage owners** or others in lawful possession and control **of land** and water areas or channels **to make them available to the public for recreational purposes by limiting their liability** toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.⁴⁸

The express purpose of the statute is to incentivize landowners to permit free public recreational use of their land by limiting landowner liability.⁴⁹ RCW 4.24.200 does state any intent to discriminate between "public" or "private" land owners, and does not expressly or impliedly limit the application of Recreation Use Immunity regarding school district land owners.⁵⁰ Rather, the statute specifically applies to "public or private landowners;" and this immunity was intended to insulate landowners like the District from liability in circumstances such as Archer's accident where an unintentional injury occurs on land that was made available to the public for recreational use without fees.

Washington's Recreation Use Immunity statute was "intended to modify the common law duty owed to public invitees so

⁴⁸ RCW 4.24.200 (emphasis added).

⁴⁹ *Id.*; *Partridge v. City of Seattle*, 49 Wn.App. 211, 215, 714.P.2d 1039 (1987).

⁵⁰ *Id.*

as to encourage landowners to open their lands to the public for recreational purposes.”⁵¹ Traditionally, Washington landowners owed invitees a duty of ordinary care to keep the premises in a reasonably safe condition only if their presence had a potential economic benefit to the landowner.⁵² Because of the harsh results this narrow classification of invitees could cause, Washington courts broadened the definition of invitee in *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wash. 2d 644, 648-49, 414 P.2d 773, 776 (1966), which increased the potential liability of landowners.⁵³ Washington’s legislature adopted RCW 4.24.200-210 in response to this expansion of landowner liability “by enacting recreational use laws, which were intended to inspire landowners to make their lands available to the public by reducing their potential liability.”⁵⁴

RCW 4.24.200-210 superseded common law by changing an entrant’s status from that of trespasser, licensee, or invitee to a new statutory classification of recreational user barred from bringing claims except for in limited circumstances.⁵⁵ The statute was

⁵¹ *Davis v. State*, 144 Wash. 2d 612, 616, 30 P.3d 460, 462 (2001).

⁵² *McKinnon v. Washington Fed. Sav. & Loan Ass'n*, 68 Wash. 2d 644, 648-49, 414 P.2d 773, 776 (1966).

⁵³ *Id.* at 651.

⁵⁴ *Van Dinter v. City of Kennewick*, 121 Wash. 2d 38, 42, 846 P.2d 522, 524 (1993).

⁵⁵ *Jewels v. City of Bellingham*, 180 Wash. App. 605, 610, 324 P.3d 700, 702 review granted, 181 Wash. 2d 1001, 332 P.3d 985 (2014), *aff'd*, 183 Wash. 2d 388, 353 P.3d 204 (2015).

enacted to “limit landowner liability where public recreational interests were at stake.”⁵⁶ Denying the District the right to Recreational Use Immunity in this case exposes the District to potential liability, and disincentivizes the District from opening its playground to the public for recreational use contrary to the stated policy purpose of the statute.

3. Recreational Use Immunity bars Archer’s claims against the District and summary judgment should be affirmed

Recreational Use Immunity bars Archer’s personal injury claims against the District because his injuries occurred on Sunnyside’s outdoor playground basketball courts which were open to him as a member of the public for recreational purposes without charge, and no exception applies. Washington Courts have frequently affirmed dismissal based on Recreational Use Immunity in circumstances similar to this case.⁵⁷ For example, in *Jewels v. City of Bellingham*, 180 Wash. App. 605, 324 P.3d 700 *rev.*

⁵⁶ *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 695, 317 P.3d 987, 992 (2014).

⁵⁷ See e.g. *Curran v. City of Marysville*, 53 Wash. App. 358, 766 P.2d 1141 (1989) (affirming dismissal of claim for injuries while playing on park playground equipment based on Recreational Use Immunity); *Bernstein v. State*, 53 Wash. App. 456, 767 P.2d 958 (1989) (affirming dismissal of claim for injuries while swimming in state park based on Recreational Use Immunity); *Van Dinter v. City of Kennewick*, 64 Wash. App. 930, 827 P.2d 329 (1992) *aff’d*, 121 Wash. 2d 38, 846 P.2d 522 (1993) (affirming dismissal of claim for injuries on park playground equipment based on Recreational Use Immunity); *Swinehart v. City of Spokane*, 145 Wash. App. 836, 187 P.3d 345 (2008) (affirming dismissal of claim for injuries on slide in park playground based on Recreational Use Immunity).

granted, 181 Wash. 2d 1001, 332 P.3d 985 (2014), *aff'd*, 183 Wash. 2d 388, 353 P.3d 204 (2015), the Court of Appeals affirmed summary judgment based on RCW 4.24.210 in a negligence claim brought by a cyclist who was injured riding his bicycle on a road located in a city park.⁵⁸ The Court held that RCW 4.24.210 controlled because the plaintiff “bicycled as a recreational user through Cornwall Park, a public park that charges no fee.”⁵⁹ The Court ultimately concluded that “[b]ecause the recreational land use statute applies to this case and Jewels fails to demonstrate the City’s actual knowledge of any dangerous, latent condition, we affirm.”⁶⁰

Like the City in *Jewels*, the District in this case held Sunnyside’s playground basketball courts open to the public for recreational use without charge outside of school hours.⁶¹ Archer was in fact using Sunnyside’s playground as a member of the public for recreational purposes outside of school hours.⁶² Archer paid no fees to use the facilities, his injuries were unintentional, and the District was unaware of any dangerous artificial latent condition contributing to his injury.⁶³ The District is immune from Archer’s

⁵⁸ *Jewels v. City of Bellingham*, 180 Wash. App. 605, 324 P.3d 700 *rev. granted*, 181 Wash. 2d 1001, 332 P.3d 985 (2014), *aff'd*, 183 Wash. 2d 388, 353 P.3d 204 (2015).

⁵⁹ *Id.* at 609.

⁶⁰ *Id.* at 612.

⁶¹ CP 296, 357.

⁶² CP 326, 357, 422

⁶³ *Id.*; CP 358.

claims pursuant to RCW 4.24.210, and Archer's claims were appropriately dismissed.

C. Public landowners, including the District, qualify for Recreational Use Immunity

1. The plain language of RCW 4.24.200-210 shows the legislature's intent to grant Recreational Use Immunity to public landowners

Plain language that is not ambiguous does not require statutory construction.⁶⁴ RCW 4.24.210 plainly and unambiguously applies to “**any public or private landowners**” without restrictions against public or school district landowners.⁶⁵ When statutory language is unambiguous, courts should only look to that language to determine the legislative intent without considering outside sources.⁶⁶ It is clear from the plain language of the statute that Recreational Use Immunity applies to the District as a public landowner. The legislature modified RCW 4.24.210 in 1972 to expressly include “any **public** or private landowners.”⁶⁷ Each word of a statute is to be accorded meaning because drafters of legislation are presumed to have used no superfluous words, and Courts may not delete language from an unambiguous statute.⁶⁸ RCW 4.24.210 should not be interpreted to remove or otherwise

⁶⁴ *Id.*

⁶⁵ RCW 4.24.210(1) (emphasis added).

⁶⁶ *State v. Delgado*, 148 Wash. 2d 723, 727, 63 P.3d 792, 795 (2003).

⁶⁷ RCW 4.24.210(1) (emphasis added); Appellant's Appendix 9.

⁶⁸ *State v. Roggenkamp*, 153 Wash. 2d 614, 624, 106 P.3d 196, 201 (2005).

render meaningless the inclusion of “public landowners” by limiting its application with regard to public landowners such as the District.

After the amendments to RCW 4.24.210 in 1972, the Washington Supreme Court specifically interpreted the statute to apply to public landowners in *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, 376, 597 P.2d 1362, 1365 (1979), holding that “[c]learly, the statute, as amended, includes public landowners and occupiers within the recreational use immunity from liability.”⁶⁹ “It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.”⁷⁰ Thus, the Washington Supreme Court’s interpretation that RCW 4.24.210 was intended to applying to public landowners in *McCarver* is controlling as the intent of the statute.

When amending a statute, the legislature is presumed to know how the courts have construed and applied the statute.⁷¹ Since the *McCarver* decision in 1979, the legislature has amended and modified the RCW 4.24.210 on numerous occasions.⁷² In over

⁶⁹ *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, 376, 597 P.2d 1362, 1365 (1979).

⁷⁰ *State v. Roggenkamp*, 153 Wash. 2d 614, 629, 106 P.3d 196, 203 (2005) (quoting *Johnson v. Morris*, 87 Wash.2d 922, 927, 557 P.2d 1299 (1976)).

⁷¹ *In re Pers. Restraint of Quackenbush*, 142 Wash.2d 928, 936, 16 P.3d 638 (2001).

⁷² See RCW 4.24.210; 2012 c 15 § 1, eff. June 7, 2012. Prior: 2011 c 320 § 11, eff. July 1, 2011; 2011 c 171 § 2, eff. July 1, 2011; 2011 c 53 § 1, eff. July 22, 2011; 2006 c 212 § 6, eff. June 7, 2006; prior: 2003 c 39 § 2, eff. July 27, 2003;

three decades since *McCarver*, each amendment to the statute has continued to include the language “public or private landowners.”⁷³ With each post-*McCarver* amendment, the legislature is presumed to know that the Washington Supreme Court interpreted the statute to apply to public landowners and legislature has adopted *McCarver*’s interpretation by keeping public landowners in the statute. “A reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results.”⁷⁴ Holding that Recreational Use Immunity does not apply to the District because it is public landowners when such landowners are plainly included in the statute would lead to an absurd result which must be avoided.

2. Washington Courts have consistently granted Recreational Use Immunity to public landowners

Since RCW 4.24.210 was amended in 1972 to include “any public and private landowner,” Washington Courts have consistently dismissed claims against public landowners based on Recreational Use Immunity, affirming the dismissals of claims against public landowners based pursuant to RCW 4.24.210 in a dozen reported cases.⁷⁵ After the Supreme Court’s ruling in

2003 c 16 § 2, eff. July 27, 2003; 1997 c 26 § 1; 1992 c 52 § 1; prior: 1991 c 69 § 1; 1991 c 50 § 1; 1980 c 111 § 1; 1979 c 53 § 1

⁷³ *Id.*

⁷⁴ *State v. J.P.*, 149 Wash. 2d 444, 450, 69 P.3d 318, 320 (2003).

⁷⁵ See *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, 597 P.2d 1362 (1979) (affirming dismissal of claim for injuries while swimming near dock in park based on Recreational Use Immunity); *Jones v. United States*, 693 F.2d

McCarver, as discussed above, several subsequent cases have specifically addressed the issue of whether Recreational Use Immunity applies to public landowners, each time holding in the affirmative.⁷⁶

For example, *Curran v. City of Marysville*, 53 Wash. App. 358, 766 P.2d 1141 (1989), held that since RCW 4.24.210 was adopted:

1299 (9th Cir. 1982) (affirming dismissal of claim for injuries while snowgliding in national park based on Recreational Use Immunity); *Riksem v. City of Seattle*, 47 Wash. App. 506, 736 P.2d 275 (1987) (affirming dismissal of claim for injuries while biking on public trail based on Recreational Use Immunity); *Partridge v. City of Seattle*, 49 Wash. App. 211, 741 P.2d 1039 (1987) (affirming dismissal of claim for injuries while diving outside city park based on Recreational Use Immunity); *Curran v. City of Marysville*, 53 Wash. App. 358, 766 P.2d 1141 (1989) (affirming dismissal of claim for injuries while playing on park playground equipment based on Recreational Use Immunity); *Bernstein v. State*, 53 Wash. App. 456, 767 P.2d 958 (1989) (affirming dismissal of claim for injuries while swimming in state park based on Recreational Use Immunity); *Gaeta v. Seattle City Light*, 54 Wash. App. 603, 774 P.2d 1255 (1989) (*abrogated on other grounds in Jewels v. City of Bellingham*, 183 Wash. 2d 388, 353 P.3d 204 (2015)) (affirming dismissal of claim for injuries while riding motorcycle on road over damn based on Recreational Use Immunity); *Van Dinter v. City of Kennewick*, 64 Wash. App. 930, 827 P.2d 329 (1992) *aff'd*, 121 Wash. 2d 38, 846 P.2d 522 (1993) (affirming dismissal of claim for injuries on park playground equipment based on Recreational Use Immunity); *Chamberlain v. Dep't of Transp.*, 79 Wash. App. 212, 901 P.2d 344 (1995) (affirming dismissal of claim for injuries on Deception Pass overlook based on Recreational Use Immunity); *Davis v. State*, 102 Wash. App. 177, 6 P.3d 1191 (2000) *aff'd*, 144 Wash. 2d 612, 30 P.3d 460 (2001) (affirming dismissal of claim for injuries from riding motorcycle on sand dunes based on Recreational Use Immunity); *Swinehart v. City of Spokane*, 145 Wash. App. 836, 187 P.3d 345 (2008) (affirming dismissal of claim for injuries on slide in park playground based on Recreational Use Immunity); *Jewels v. City of Bellingham*, 183 Wash. 2d 388, 353 P.3d 204 (2015) (affirming dismissal of claim for injuries while bicycling through park based on Recreational Use Immunity).

⁷⁶ *Curran v. City of Marysville*, 53 Wash. App. 358, 766 P.2d 1141 (1989); *Swinehart v. City of Spokane*, 145 Wash. App. 836, 187 P.3d 345 (2008).

Subsequent amendments... significantly broadened the statute's original scope, both as to affected lands, and as to activities encompassed within the term “outdoor recreation.” In 1972, **the statute was amended to expressly include both public and private landowners.**⁷⁷

In addition, *Swinehart v. City of Spokane*, 145 Wash. App. 836, 187

P.3d 345 (2008) held:

The statute expressly includes publicly owned lands, both urban and rural, and has been interpreted to apply to municipal parks and their playground and exercise areas.⁷⁸

There have been no reported cases since RCW 4.24.210 was amended to specifically include “public or private landowners” where a landowner was denied Recreational Use Immunity because it was a public entity or a school district.⁷⁹ There is no

⁷⁷ *Id.* at 361 (emphasis added).

⁷⁸ *Swinehart v. City of Spokane*, 145 Wash. App. 836, 845, 187 P.3d 345, 350 (2008) (citing *Curran v. City of Marysville*, 53 Wash. App. 358, 362, 766 P.2d 1141 (1989)) (emphasis added).

⁷⁹ The few reported Recreational Use Immunity cases against public landowners which have reversed summary judgment were reversed on grounds other than the landowner's status as a public entity. See *Home v. N. Kitsap Sch. Dist.*, 92 Wash. App. 709, 965 P.2d 1112 (1998) (immunity did not bar claim by coach on athletic field during a scheduled school football game which was not open for use by members of the public); *Ravenscroft v. Washington Water Power Co.*, 136 Wash. 2d 911, 969 P.2d 75 (1998) (question of fact as to whether submerged tree stumps near middle of water channel were latent condition subject to exceptions to Recreational Use Immunity pursuant to RCW 4.24.210(4)); *Plano v. City of Renton*, 103 Wash. App. 910, 14 P.3d 871 (2000) (city was not immune from liability on a moorage dock which it charged moorage fees to use); *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 317 P.3d 987 (2014) (question of fact regarding whether bicycle trail served recreational or transportation purpose and whether the city had authority to open and close the trail when the land was conveyed under a deed limiting its use to “road/street purposes only” and was a part of a multimodal transportation facility).

authority to deny the District Recreational Use Immunity because it is a public or school district landowner.

3. Applying Recreation Use Immunity to public and school district landowners does not reinstate sovereign immunity

Contrary to Appellant's assertions, applying Recreational Use Immunity to Archer's claims against the District would not have the effect of reinstating sovereign immunity. Washington abolished sovereign immunity by holding governmental entities liable for tortious conduct to the *same* extent as private entities – no more and no less. RCW 4.96.010 states in pertinent part:

All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.⁸⁰

The District is liable for torts “to the same extent” as private individuals or corporations. Denying the District Recreational Use Immunity which any other private entity would be entitled to based on the District's status as a public entity is inconsistent with RCW 4.96.919 because doing so would subject the District to *greater* liability than private defendants, rather than the *same* liability. Moreover, even if Recreational Use Immunity is interpreted to only

⁸⁰ RCW 4.96.010(1) (emphasis added).

apply to private landowners, as Archer claims, the District should still be entitled to this defense because under RCW 4.96.010, the District is subject to the same liability – and thereby allowed the same defenses – as private entities.

Recreational Use Immunity does not reinstate sovereign immunity because it is not an absolute bar to liability against public landowners or for injuries on school district playground athletic equipment.⁸¹ Public (and private) landowners are not entitled to Recreational Use Immunity if their lands are not held open to the public for recreational purposes⁸² or if fees are charged.⁸³ In addition, landowners who do open their property to the public for the purpose of outdoor recreation without charge cannot escape liability if the injuries were sustained by reason of a known dangerous artificial latent condition for which no warning signs were posted.⁸⁴ In this case, however, no such exceptions to Recreational Use Immunity apply. As a result, RCW 4.24.210 relieves the District of its duties to Archer as a recreational user and immunizes the District against liability for Archer’s injuries. While it

⁸¹ *Swinehart v. City of Spokane*, 145 Wash.App. 836, 845, 187 P.2d 345 (2008) (“Recreational use immunity, however, is not absolute.”).

⁸² RCW 4.24.210(1); see e.g. *See Home v. N. Kitsap Sch. Dist.*, 92 Wash. App. 709, 965 P.2d 1112 (1998); *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 317 P.3d 987 (2014).

⁸³ RCW 4.24.210(1); see e.g. *Plano v. City of Renton*, 103 Wash. App. 910, 14 P.3d 871 (2000).

⁸⁴ RCW 4.24.210(4); *Davis v. State*, 144 Wash. 2d 612, 616, 30 P.3d 460, 462 (2001); see e.g. *Ravenscroft v. Washington Water Power Co.*, 136 Wash. 2d 911, 969 P.2d 75 (1998).

is unfortunate that Archer was injured on District property, “[c]onsent to suit and repudiation of general tort immunity do not establish liability for an act or omission that is otherwise privileged or is not tortious.”⁸⁵

D. RCW 4.24.210 applies because the District opened its land to the public for the purpose of outdoor recreation

1. The District opened its playground to the public for the purpose of outdoor recreation

Recreation Use Immunity applies to any landowner who allows the public to use their land “**for the purpose of outdoor recreation.**”⁸⁶ “[T]he proper approach in deciding whether or not the recreational use act applies is to view it from the standpoint of the landowner or occupier.”⁸⁷ Washington Courts have held that “by opening up the lands for recreational use without a fee, [a landowner] has brought itself under the protection of the immunity statute.”⁸⁸ RCW 4.24.210 does not require that a landowner take any additional action or affirmative steps to avail itself to the protection Recreational Use Immunity.⁸⁹ The District had the

⁸⁵ Restatement (Second) of Torts § 895B(4) (1979).

⁸⁶ RCW 4.24.210(1) (emphasis added); *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 696, 317 P.3d 987, 993 (2014).

⁸⁷ *Gaeta v. Seattle City Light*, 54 Wash. App. 603, 609, 774 P.2d 1255, 1258 (1989) (abrogated on other grounds by *Jewels v. City of Bellingham*, 183 Wash. 2d 388, 353 P.3d 204 (2015)); see also *Home v. N. Kitsap Sch. Dist.*, 92 Wash. App. 709, 714, 965 P.2d 1112, 1116 (1998).

⁸⁸ *Gaeta v. Seattle City Light*, 54 Wash. App. 603, 609, 774 P.2d 1255, 1258 (1989) (abrogated on other grounds by *Jewels v. City of Bellingham*, 183 Wash. 2d 388, 353 P.3d 204 (2015)).

⁸⁹ *Id.*; RCW 4.24.210.

capacity to close Sunnyside's outdoor playground facilities when not in use by the school, but instead chose to keep them open to the public for recreational purposes when not in use, such as at the time of Archer's injury, and thereby brought itself under the protection of the statute.⁹⁰ Accordingly, Recreational Use Immunity under RCW 4.24.210 should apply to this claim.

Landowners who open their lands to the public may restrict some access, such as by allowing public access during only non-business times, and still qualify for Recreational Use Immunity.⁹¹ When a landowner uses land for different purposes at different times, "it is necessary to focus on the nature of the landowner's use at the time of the accident being litigated."⁹² At the time that the accident occurred, which was outside of school hours, the District's propose in opening its playground to the public was solely for recreational use.⁹³ To try and argue that the playground was not open to the public for recreational purposes, Archer relies on (1) the District's safety and maintenance policies directed towards its students and (2) additional uses of parts of the playground when closed to the public, such as for student carnivals, overflow parking

⁹⁰ *Id.*; CP 296, 357.

⁹¹ *Cregan v. Fourth Mem'l Church*, 175 Wash. 2d 279, 285, 285 P.3d 860, 864 (2012).

⁹² *Home v. N. Kitsap Sch. Dist.*, 92 Wash. App. 709, 714, 965 P.2d 1112, 1116 (1998).

⁹³ CP 357.

during student performances, and student drop-off/pick-up.⁹⁴ Neither creates a question of fact to dispute that the District opened its playground to the public for the purpose of recreation.

2. Primary purpose of playground being opened to public is for recreation even when District adopts policies to keep its students safe

Under statutory regulations governing Washington schools, school districts exercise:

The broad discretionary power to determine and adopt written policies not in conflict with other law that will provide for the development and implementation of programs, activities, services, or practices that the board determines will:

- (i) **Promote the education and daily physical activity of kindergarten through twelfth grade students** in the public schools; or
- (ii) Promote the effective, efficient, or safe management and operation of the school district...⁹⁵

This regulation recognizes that education and physical activity serve distinct purposes, but are both goals promoted by school districts to serve its students. School Districts have the authority to adopt policies to promote such activities for its students.

A playground facilitates physical activity through recreational play, which is “essential to the social, emotional, cognitive, and

⁹⁴ See Appellant’s brief p. 33-34.

⁹⁵ RCW 28A.320.015(1)(a).

physical well-being of children beginning in early childhood.”⁹⁶ To ensure the safety and maintenance of its playground facilities, the District has two safety policies: (1) Policy No. 6800 titled “Safety, Operations and Maintenance of School Property” which states: “The Superintendent will provide for a program to maintain the district physical plant and grounds by way of a continuous program for repair, maintenance and reconditioning;” and (2) Policy No. 6510 titled “Safety” which states: “The Superintendent shall ensure that each principal supervises the operation of his/her school so as to assure compliance with state and federal safety and health requirements.”⁹⁷ As the plain text of these policies demonstrate, these are not *use* policies, but rather *safety and maintenance* policies. In fact, the District complied with these policies by conducting regular inspections; including a safety inspection by a third party that occurred the *day before* Archer was injured.

The playground’s primary purpose for play by all users (students and recreational users alike) should not be confused with the District’s interest in maintaining safe facilities for its students. Both safety policies state that “playground equipment is an essential part of a complete school facility” and that “[c]onsideration

⁹⁶ Regina Milteer, MD, et al., *The importance of Play in Promoting Healthy Child Development and Maintaining Strong Parent-Child Bond: Focus on Children in Poverty*, 129 PEDIATRICS 1 (Jan 2012) available at <http://pediatrics.aappublications.org/content/129/1/e204.full>.

⁹⁷ CP 318-320.

will also be given to potential hazards when the playground is unsupervised during non-school hours.” These policies merely reflect that the District had an interest in maintaining the safety of its students while they are using the playground for the purpose of recreational play. One cannot reasonably infer that these policies indicate that the District did not open its playground to the public for recreational purposes. Holding that RCW 4.24.210 does not apply based upon these policies would essentially punish the District for formalizing its efforts to maintain safe facilities for the benefit of its students. It would be contrary to purpose of Recreational Use Immunity and to the interest of justice to deprive a landowner of Recreational Use Immunity simply because it had the prudence to take precautions intended to keep users safe.

3. Primary purpose of playground being opened to public is for recreation even when District has additional uses when closed to the public

Recreational Use Immunity is not precluded because the playground may have also served additional uses for the District’s students when closed to the public.⁹⁸ A landowner may use land for another purpose and still be immune under RCW 4.24.210⁹⁹ so long as the reason the land is opened to the public is *primarily* for

⁹⁸ See *Cregan v. Fourth Mem'l Church*, 175 Wash. 2d 279, 285, 285 P.3d 860, 864 (2012), *Home v. N. Kitsap Sch. Dist.*, 92 Wash.App. 709, 712, 965 P.2d 1112 (1998).

⁹⁹ *Id.*

recreation.¹⁰⁰ In *Widman v. Johnson*, 81 Wash. App. 110, 912 P.2d 1095 (1996), a plaintiff who was injured on a logging road that was open to the public for recreational purposes disputed whether the road was in fact open for recreational purposes because the road served other purposes, such as being used as a shortcut by commercial loggers. The Court of Appeals affirmed summary judgment dismissing plaintiff's claims based on RCW 4.24.210, holding that "[e]very reasonable person would... believe that [the landowner] opened [the road] for recreational use" and "the fact that the [road] may have served other purposes (e.g. as a shortcut by non-recreating members of the public) lacks legal significance."

Likewise, the District's occasional student oriented uses of parts of the playground surface for parking during student performances, student carnivals, and student transportation "lack legal significance" and do not create a question of fact. These additional uses of the playground directed towards the District's students when the facility is closed to the general public. The primary purpose of a playground is still for recreation. There is no evidence that these facilities served any other primary purpose, or were open to the public for any purpose other than recreation when not in use by the school or its students. The only evidence

¹⁰⁰ See *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 697, 317 P.3d 987, 993 (2014) (holding that RCW 4.24.210 did not apply to the I-90 trail because the primary use of the trail was for transportation).

regarding the District's purpose in opening its playground to the public is the District's un rebutted stated intent of keeping the Sunnyside Elementary playground "open to the public *for recreational use* at no charge."¹⁰¹ A reasonable person could only conclude that Sunnyside's outdoor playground was open to the public for recreational purposes when Archer was injured.¹⁰²

4. This case distinguishable from *Camicia v. Howard S. Wright Const. Co.*

This case is distinguishable from *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 697, 317 P.3d 987, 993 (2014). RCW 4.24.210 and *Camicia* do not require land to be open for the purpose of recreation to the exclusion of all other purposes, so long as the *primary* purpose is for recreation.¹⁰³ *Camicia* dealt with the I-90 bike trail, holding that "[a] factfinder could reasonably infer that the I-90 trail would be open to public bicycling for transportation purposes regardless of any recreational use or function, and that the public invitation was therefore not 'for the purposes of outdoor recreation.'"¹⁰⁴ *Camicia* declined to extend immunity because there was no distinction between when the I-90 trail is open for recreation verses when it was open for

¹⁰¹ CP 357 (emphasis added).

¹⁰² See e.g. *Widman v. Johnson*, 81 Wash. App. 110, 114, 912 P.2d 1095, 1098 (1996).

¹⁰³ RCW 4.24.210; *Camicia v. Howard S. Wright Const. Co.*, 179 Wash. 2d 684, 697, 317 P.3d 987, 993 (2014).

¹⁰⁴ *Id.* at 700-01.

transportation – it is always open to the public simultaneously for both purposes. Unlike the I-90 trail which would be open to the general public for use as transportation even in the absence of recreation, there is no other public use for the playground other than recreation. The obvious primary purpose of any playground facility is for recreation. This includes the District’s playground and basketball courts while being used by its students under supervision during school recess, and when used by the general public outside of school hours. Indeed, Archer himself was using the District playground to play recreational basketball at the time of his injury.

E. RCW 4.24.210 applies to injuries on playground athletic equipment

RCW 4.24.210 applies to “**any lands** whether designated resource, rural, or **urban**, or water areas or channels and lands adjacent to such areas or channels.”¹⁰⁵ This statute expressly applies to “any lands” without limitations against playground athletic equipment, such as the District’s playground basketball court where Archer was injured. Washington Courts have specifically held that Recreational Use Immunity applies to “playground and exercise apparatus.”¹⁰⁶ This was first addressed in *Curran v. City of Marysville*, 53 Wash. App. 358, 365, 766 P.2d 1141, 1144 (1989),

¹⁰⁵ RCW 4.24.210(1) (emphasis added).

¹⁰⁶ *Curran v. City of Marysville*, 53 Wash. App. 358, 365, 766 P.2d 1141, 1144 (1989).

which involved an injury to a minor occurring on a “T-bar” used for stretching located in a park’s fitness and exercise court.¹⁰⁷ The Court of Appeals affirmed the trial court’s order of summary judgment dismissing plaintiff’s claims, holding that “RCW 4.24.210 applies to accidents on municipal park **playground and exercise apparatus.**”¹⁰⁸

The application of Recreation Use Immunity to playground athletic equipment was subsequently restated in *Swinehart v. City of Spokane*, 145 Wash. App. 836, 839, 187 P.3d 345, 347 (2008), involving an injury on a playground slide.¹⁰⁹ *Swinehart* held that RCW 4.24.210 “has been interpreted to apply to... **playground and exercise areas**” on municipal parks, and affirmed the trial court’s order granting summary judgment dismissal of plaintiff’s claims for injuries on a playground slide based on recreational use immunity.¹¹⁰ RCW 4.24.210 applies to the playground basketball court where Archer was injured because the facilities clearly constitute “playground exercise apparatus” covered by the statute’s inclusion of “any land” and as interpreted by *Curran* and *Swinehart*.

F. RCW 4.24.210’s definition of “outdoor recreation” includes basketball

¹⁰⁷ *Id.* at 359-60.

¹⁰⁸ *Id.* at 365 (emphasis added).

¹⁰⁹ *Swinehart v. City of Spokane*, 145 Wash. App. 836, 839, 187 P.3d 345, 347 (2008).

¹¹⁰ *Id.* at 845 (citing *Curran v. City of Marysville*, 53 Wash. App. 358, 365, 766 P.2d 1141, 1144 (1989)) (emphasis added).

Basketball falls within the intended scope of “outdoor recreation” pursuant to RCW 4.24.210. RCW 4.24.210 defines outdoor recreation with an illustrative and non-exclusive list of exemplar activities:

...outdoor recreation, which term **includes, but is not limited to**, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, aviation activities including, but not limited to, the operation of airplanes, ultra-light airplanes, hanggliders, parachutes, and paragliders, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, rafting, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites...¹¹¹

The examples of recreational activities listed in RCW 4.24.210(1) are not limiting, and do not preclude application of RCW 4.24.210(1) to playing outdoor basketball.¹¹² Over the years, the legislature’s amendments to RCW 4.24.210 “significantly broadened the statute’s original scope . . . as to activities encompassed within the term ‘outdoor recreation.’”¹¹³ RCW 4.24.210 makes plainly clear that statute “**is not limited to**” the

¹¹¹ RCW 4.24.210(1) (emphasis added).

¹¹² *Id.*

¹¹³ *Curran v. City of Marysville*, 53 Wash. App. 358, 361-62, 766 P.2d 1141, 1143 (1989).

activities listed.¹¹⁴ The fact that the statute does not expressly list basketball is not controlling.¹¹⁵

When determining whether an activity qualifies as outdoor recreation for purposes of Recreational Use Immunity, “the question is whether [the] activities are similar to the specific examples of outdoor recreation set forth in RCW 4.24.210.”¹¹⁶ “Outdoor recreation” pursuant to RCW 4.24.210 has been interpreted by Washington Courts to include “all recreational activities which commonly are conducted outdoors” and “those which “provide diversions or amusements.” Playing basketball is commonly done outdoors and provides diversion and amusement through physical activity, as was the case for Archer at the time of the accident. In *Curran v. City of Marysville*, 53 Wash. App. 358, 361-62, 766 P.2d 1141, 1143 (1989), the Court held that using a stretching bar which was a part of a park’s playground exercise equipment constituted a “recreational activity” within the meaning of the statute, even though such activity was not expressly included.¹¹⁷ Playing basketball on an outdoor playground court is

¹¹⁴ RCW 4.24.210(1).

¹¹⁵ *Curran v. City of Marysville*, 53 Wash. App. 358, 363, 766 P.2d 1141, 1144 (1989) (“Unlike some state statutes which limit applicability of recreational use legislation to certain specific activities, the Washington act applies broadly to all outdoor recreation.”).

¹¹⁶ *Matthews v. Elk Pioneer Days*, 64 Wash. App. 433, 438, 824 P.2d 541, 543 (1992), review denied 119 Wash.2d 1011, 833 P.2d 386 (1992).

¹¹⁷ *Curran v. City of Marysville*, 53 Wash. App. 358, 361-62, 766 P.2d 1141, 1143 (1989).

closely analogous to using the playground stretching bar in *Curran*, and should be included as a recreational activity pursuant to RCW 4.24.210. RCW 4.24.210 does not exclude activities that can also be done indoors.¹¹⁸

This case is distinguishable from *Matthews v. Elk Pioneer Days*, 64 Wash. App. 433, 438, 824 P.2d 541, 543 (1992), which held that watching entertainment on an outdoor stage at a community festival was not an activity covered under RCW 4.24.210.”¹¹⁹ *Matthews* notes that two “common features” of the exemplar activities listed in RCW 4.24.210: (1) that they are “the types of activities that require outdoors” and (2) that they are the “types of activities which are physical in nature and require active involvement” and held that watching a concert at an outdoor festival was not an activity covered by the statute because it required neither outdoors nor physical activity.¹²⁰ *Matthews* recognizes that these are simply “common features” rather than exclusive requirements, noting that some activities listed in the statute did not require active involvement, such as “viewing or enjoying historic, archeological, or scientific sites.”¹²¹ In addition, many of the activities listed, such as swimming, skateboarding, and rock

¹¹⁸ See RCW 4.24.210(1).

¹¹⁹ *Matthews v. Elk Pioneer Days*, 64 Wash. App. 433, 438, 824 P.2d 541, 543 (1992).

¹²⁰ *Id.* at 543.

¹²¹ *Id.*

climbing, can be (and commonly are) done both indoors and outdoors.¹²² For example, much like basketball, skateboarding can be done in indoor or outdoor facilities. Both also require physical activity and can be competitive and organized or recreational. Activities like basketball are intended to be included as a covered activity under the statute.¹²³ Moreover, unlike watching entertainment, playing basketball requires active involvement. Playing basketball on an outdoor playground court is substantially similar to the activities listed in RCW 4.24.210(1) and qualifies as “outdoor recreation” for purposes of Recreational Use Immunity.

G. Attorneys fees should be awarded to the District for defending against this frivolous appeal

Archer’s appeal is frivolous because the issues raised are well-settled matters of law which present no reasonable possibility of reversal. RAP 18.1 provides that the “appellate court on its own initiative or on motion of a party may order a party or counsel... [who] files a frivolous appeal.”¹²⁴ “An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking in merit that there is no possibility of

¹²² RCW 4.24.210(1).

¹²³ See e.g. *McCarver v. Manson Park & Recreation Dist.*, 92 Wash. 2d 370, 373-74, 597 P.2d 1362 (1979) (holding that swimming was a recreational activity under RCW 4.24.210 and affirming dismissal).

¹²⁴ RAP 18.9(a).

reversal.”¹²⁵ Archer’s arguments to exclude public landowners such as the District from Recreational Use Immunity must have a reasonable basis.¹²⁶ Yet, Archer presents no meritorious argument for the Court to ignore the plain language of the statute adopted and upheld by the legislature to include public landowners, or to overturn years of consistent legal precedent applying the law to public landowners. Further, no reasonable mind could conclude that an outdoor playground was open to the public for any purpose other than recreation, or that land on playgrounds facilities or the activity of basketball were excluded by RCW 4.24.210. The District thus requests reasonable attorneys’ fees incurred in responding to this frivolous appeal.

V. CONCLUSION

The trial court’s dismissal of Archer’s claims against the District should be affirmed based on Recreational Use Immunity, RCW 4.24.210, because his unintentional injuries occurred on an outdoor playground basketball court which was held open to the public for the purpose of outdoor recreation without fees, and the District was not aware of any injury-causing dangerous artificial

¹²⁵ *Stiles v. Kearney*, 168 Wash. App. 250, 267, 277 P.3d 9, 17 (2012); *Boyles v. Washington State Dep’t of Ret. Sys.*, 105 Wash. 2d 499, 507, 716 P.2d 869, 873 (1986).

latent condition. RCW 4.24.210 expressly includes “public landowners” such as the District, applies to “any lands” such as outdoor basketball courts, and applies to “outdoor recreation” such as playing outdoor basketball for fun. The District opened its property to the members of the general public, such as Archer, for the purpose of recreational, and should be granted Recreational Use Immunity against Archer’s claims. This appeal is frivolous because Archer has provided no grounds for reversing the trial court, and the District should be awarded reasonable attorney’s fees incurred in responding to this appeal.

Recreational Use Immunity was enacted to encourage landowners like the District to make their lands available for public recreational use by providing limited immunity to claims by recreational users such as Archer. Denying the District of Recreational Use Immunity and subjecting it to liability to recreational users such as Archer would discourage the District from keeping its playground open to the public contrary to the stated policy intent behind RCW 4.24.210. The District respectfully

¹²⁶ See *e.g. Mahoney v. Shinpoch*, 107 Wash. 2d 679, 692, 732 P.2d 510, 517 (1987) (appeal was frivolous where appellant interpretation of the law contrary to legislative intent.)

requests that this Court affirm summary judgment dismissing Archer's claims based on Recreational Use Immunity.

DATED this 5th day of October, 2015.

PREG O'DONNELL & GILLETT PLLC

/s/ Emma Gillespie
Emma Gillespie, WSBA #33255
Karen L. Phu, WSBA #42136
Attorneys for Respondent Marysville
School District

DECLARATION OF SERVICE

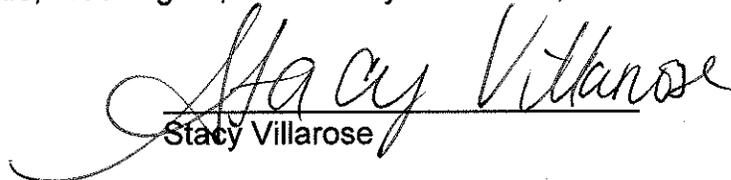
The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

Counsel for Plaintiffs:

John Budlong, Esq.
Tara L. Eubanks, Esq.
The Budlong Law Firm
100 Second Avenue South, Suite 200
Edmonds, WA 98020
Via Email, with recipient's approval

David J. Sadick
Via Email, with recipient's approval

DATED at Seattle, Washington, this 5th day of October, 2015.


Stacy Villarose

APPENDIX

RCW 4.24.200. Liability of owners or others in possession of land and water areas for injuries to recreation users — Purpose.

The purpose of RCW 4.24.200 and 4.24.210 is to encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

[1969 ex.s. c 24 § 1; 1967 c 216 § 1.]

RCW 4.24.210. Liability of owners or others in possession of land and water areas for injuries to recreation users — Known dangerous artificial latent conditions — Other limitations.

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners, hydroelectric project owners, or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, aviation activities including, but not limited to, the operation of airplanes, ultra-light airplanes, hanggliders, parachutes, and paragliders, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, rafting, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

(2) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowner or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who offer or allow such land to be used for purposes of a fish or wildlife cooperative project, or allow access to such land for cleanup of litter or other solid waste, shall not be liable for unintentional injuries to any volunteer group or to any other users.

(3) Any public or private landowner, or others in lawful possession and control of the land, may charge an administrative fee of up to twenty-five dollars for the cutting, gathering, and removing of firewood from the land.

(4)

(a) Nothing in this section shall prevent the liability of a landowner or others in lawful possession and control for injuries sustained to users by reason of a known dangerous artificial latent condition for which warning signs have not been conspicuously posted.

(i) A fixed anchor used in rock climbing and put in place by someone other than a landowner is not a known dangerous artificial latent condition and a landowner under subsection (1) of this section shall not be liable for unintentional injuries resulting from the condition or use of such an anchor.

(ii) Releasing water or flows and making waterways or channels available for kayaking, canoeing, or rafting purposes pursuant to and in substantial compliance with a hydroelectric license issued by the federal energy regulatory commission, and making adjacent lands available for purposes of allowing viewing of such activities, does not create a known dangerous artificial latent condition and hydroelectric project owners under subsection (1) of this section shall not be liable for unintentional injuries to the recreational users and observers resulting from such releases and activities.

(b) Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance.

(c) Usage by members of the public, volunteer groups, or other users is permissive and does not support any claim of adverse possession.

(5) For purposes of this section, the following are not fees:

(a) A license or permit issued for statewide use under authority of chapter 79A.05 RCW or Title 77 RCW;

(b) A pass or permit issued under RCW 79A.80.020, 79A.80.030, or 79A.80.040; and

(c) A daily charge not to exceed twenty dollars per person, per day, for access to a publicly owned ORV sports park, as defined in RCW 46.09.310, or other public facility accessed by a highway, street, or nonhighway road for the purposes of off-road vehicle use.

[2012 c 15 § 1. Prior: 2011 c 320 § 11; 2011 c 171 § 2; 2011 c 53 § 1; 2006 c 212 § 6; prior: 2003 c 39 § 2; 2003 c 16 § 2; 1997 c 26 § 1; 1992 c 52 § 1; prior: 1991 c 69 § 1; 1991 c 50 § 1; 1980 c 111 § 1; 1979 c 53 § 1; 1972 ex.s. c 153 § 17; 1969 ex.s. c 24 § 2; 1967 c 216 § 2.]

Regina Milteer, MD, et al., *The importance of Play in Promoting Healthy Child Development and Maintaining Strong Parent-Child Bond: Focus on Children in Poverty*, 129 PEDIATRICS 1 (Jan 2012) available at <http://pediatrics.aappublications.org/content/129/1/e204.full>

Excerpt: The Benefits of Play (citations omitted)

It could be argued that active play is so central to child development that it should be included in the very definition of childhood. Play offers more than cherished memories of growing up, it allows children to develop creativity and imagination while developing physical, cognitive, and emotional strengths. A previous manuscript described the benefits of play in fuller detail.

Play enhances physical health by building active, healthy bodies. Physical activity beginning in early childhood prevents obesity. In fact, play may be an exceptional way to increase physical activity levels in children and, therefore, may be included as an important strategy in addressing the obesity epidemic.

Play contributes to healthy brain development. Children engage and interact with the world around them through play from a very early age. Even in the academic environment, play helps children adjust to the school setting, thereby fostering school engagement, and enhances children's learning readiness, learning behaviors, and problem-solving skills. In addition, play and recess may increase children's capacity to store new information, as their cognitive capacity is enhanced when they are offered a drastic change in activity.

Play is essential to developing social and emotional ties. First, play helps to build bonds within the family. Children's healthy development is mediated by appropriate nurturing relationships with consistent caregivers. Play allows for a different quality of interaction between parent* and child, one that allows parents to "listen" in a very different, but productive, way. When parents observe their children playing or join them in child-driven play, they can view the world through their child's eyes and, therefore, may learn to communicate or offer guidance more effectively. Less-verbal children may be able to express themselves, including their frustrations, through play, allowing their parents an opportunity to better understand their needs. Above all, the intensive engagement and relaxed interactions that occur while playing tell children that their parents are fully paying attention to them and, thereby, contribute to a strong connection. Play also helps forge connections between children. It allows them to learn how to share, to negotiate and resolve conflicts, and to learn self-advocacy skills when necessary. It teaches them leadership as well as group skills that may be useful in adult life.

Play should be an integral component of school engagement. School engagement is best realized when the educational setting attends to the social and emotional development of children as well as their cognitive development. The challenge is to make each child feel competent in a school setting, because the experience of

success forms positive associations with school attendance. Although we hope for each child to demonstrate academic strengths, opportunities to exhibit social, physical, and creative strengths optimizes the chances that children will realize their areas of strength. Play, recess time, and classes that foster creative aptitude and physical fitness allow for peer interactions that contribute both to school engagement and social-emotional learning. Social-emotional learning should not be thought of as distinct from academic learning, because it can creatively be integrated with academic learning and has been shown to enhance children's ability to learn.

Play is a natural tool that children can and should use to build their resilience. At its core, the development of resilience is about learning to overcome challenges and adversity. As mentioned, children learn to deal with social challenges and navigate peer relationships on the playground. In addition, even small children use imaginative play and fantasy to take on their fears and create or explore a world they can master. Play allows them to create fantasy heroes that conquer their deepest fears. It allows them to practice adult roles, sometimes while playing with other children and sometimes while play-acting with adults. Sensitive adults can observe this play and recognize the fears and fantasies that need to be addressed; however, in many cases, play itself helps children meet their own needs. As they experience mastery of the world they create, children develop new competencies that lead to enhanced confidence and the resilience they need to address future challenges.