



No. 295109

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

GAVIN J. CREGAN, a married person,
Respondent

v.

FOURTH MEMORIAL CHURCH, a non-profit Washington
Corporation, d/b/a RIVERVIEW BIBLE CAMP,
Petitioner

BRIEF OF PETITIONER

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Camp**



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I. ASSIGNMENTS OF ERROR

1. The Court erred by denying Riverview Bible Camp's Motion for Summary Judgment to dismiss Mr. Cregan's complaint because Riverview Bible Camp is immune from liability under the Recreational Use Act.

2. The Court erred by granting Mr. Cregan's Motion for Summary Judgment striking Riverview Bible Camp's affirmative defense of immunity under the Recreational Use Act.

3. The Court erred by concluding that the use of the Giant Slide was an activity that was not contemplated for by the Recreational Use Immunity Act.

4. The Court erred when it raised concerns about whether the Riverview Bible Camp needed to be open to any member of the public for free recreational use at any time.

5. The Court erred by deciding that the Recreational Use Act did not apply to Riverview Bible Camp because it had charged other groups a fee for the exact same use it allowed Beats & Rhythms.

6. The Court erred in applying the cases of Plano and Nelson, in its analysis.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Recreational Use Act applies from the use of a slide?
2. Whether Riverview Bible Camp can be protected under the Recreational Use Act if it allowed access to certain members of the public?
3. Whether Riverview Bible Camp charged Mr. Cregan a non-monetary fee for recreational activities?
4. Whether charging a fee for past groups precludes Riverview Bible Camp from being afforded immunity under the Recreational Use Act?

III. STATEMENT OF THE CASE

Riverview Bible Camp is a camp located outside of Cusick, Washington that is privately owned by Fourth Memorial Church, a non profit organization (hereinafter referred to as “Riverview Bible Camp”). (CP 109).

Riverview Bible Camp remains financially viable through the payment of admission fees, third-party donations, and assistance from Fourth Memorial Church. (CP 104). Groups are allowed to either rent the

facility, or to be guests of Riverview Bible Camp. (CP 104). Groups that are admitted as guests are offered free food and lodging, but are required to provide all staffing. (CP 105).

Riverview Bible Camp decided to allow Beats & Rhythms to use their facility free of charge for one weekend during the summer of 2008. Beats & Rhythms is an organization that provides a camp for children with congenital heart defects. (CP 106). Tim Mason, the camp director, explains that Riverview Bible Camp selected Beats & Rhythms to be a guest group to give back to their community and to help another nonprofit organization. (CP 106). Beats & Rhythms used the facility as a guest group for free the weekend of June 27, 2008. (CP 105). As such, they were responsible for the presence of counselors and chaperones. (CP 112).

On Friday, June 27, 2008, Gavin Cregan drove to the Riverview Bible Camp late in the afternoon after work and checked in with the Beats & Rhythms personnel who organized the event. (CP 130-132). After getting a tour of the facility by the Beats & Rhythms' supervising counselor, Beth Dullanty, Mr. Cregan walked over to the outdoor slide where people were congregating. (CP 130-132). After watching people use the slide for about ten minutes, he decided to try it for himself. Cregan went down the slide two times in two different lanes without any

problems. (CP 132).

On the third time down the slide, Mr. Cregan was on a different lane than the previous times. He describes that on this third time down as he went over the first of two humps, his legs went straight, and he felt his legs lose contact with the slide. (CP 122-123). He does not know if his buttocks ever lost contact with the slide. (CP 134). He explains that the burlap sack had bunched up back under his left foot, but remained under his right foot. (CP 134). As his left foot came back down, it made contact with the slide surface, and he sustained his injury to his ankle. (CP 136).

Mr. Cregan filed his complaint on February 9, 2010 in Spokane County Washington Superior Court. (CP 3-14). Riverview Bible Camp filed an answer to the Complaint in this action and asserted an affirmative defense of immunity under Washington's Recreational Use Immunity Statute, RCW 4.24.200-210. (CP 15-22). On September 20, 2010, Mr. Cregan filed a Motion for Partial Summary Judgment to Strike Riverview Bible Camp's Affirmative Defense of Immunity under Washington's Recreational Use Immunity Statute. (CP 28-30). Mr. Cregan alleged that RCW 4.24.200-210 did not apply because (1) Riverview Bible Camp was not open to the general public all the time; (2) Riverview Bible Camp typically charged a fee for the use of the facility; and (3) Mr. Cregan

believed that he was in fact charged a non-monetary fee by being required to provide services as a nurse to participate in the retreat at Riverview Bible Camp. (CP 34-42).

On October 11, 2010, Riverview Bible Camp filed a response to Mr. Cregan's Motion for Summary Judgment and also filed a Cross Motion for Summary Judgment, to establish as a matter of law that the Recreational Use Act under RCW 4.24.200-210 applied and protected Riverview Bible Camp from liability. (CP 71-95). Riverview Bible Camp argued that (1) Beats and Rhythms and Mr. Cregan were "members of the public" as contemplated by RCW 4.24.210; (2) Mr. Cregan was never directed by Riverview Bible Camp to provide services; (3) restricting the protections of the Recreational Use Act to landowners who never charged a fee, or ever planned on charging a fee for the use of his land would contravene the intent of RCW 4.24.200-210; and (4) the intent of the Recreational Use Act is to analyze the landowners' use of the land at the time the injury occurred. (CP 71-95).

On October 22, 2010, Judge Linda G. Tompkins heard oral argument from attorneys in this case, and issued an Order Granting Mr. Cregan's Motion for Partial Summary Judgment and Striking Riverview Bible Camp's affirmative defense of immunity under the Recreational Use

Act. (CP 162-164). Judge Tompkins in the same order denied Riverview Bible Camp's Cross-Motion for Summary Judgment to dismiss the lawsuit based upon the Recreational Use Act. (CP 162-164).

Judge Tompkins explained in her oral opinion that she did not believe the Recreational Use Act applied to Riverview Bible Camp because (1) Riverview Bible Camp had charged fees for the precise same use that Beats & Rhythms were afforded to different groups at different times; (RP, pg. 4, lns. 15-18) (2) the cases of Plano and Nelson were "more closely in line" with this case because "Respondents on those days were not charged fees either, but defense was not able to avail themselves of the immunity argument" (RP, pg. 5, lns. 15-18); (3) the "Giant Slide" was possibly an activity that could "be provided in an enclosed facility in the middle of a city;" (RP, pg. 5, lns. 2-9) and (4) raised concerns about whether "if a member of the public had driven in would they have been permitted access to the slide free of charge?" (RP, pg. 4, lns. 21-24).

On December 3, 2010, Riverview Bible Camp filed a Motion for Certification of Judge Tompkins Order for Discretionary Review. (CP 171-203). Riverview Bible Camp argued that the court should certify that its order represents a controlling question of law, which is the basis of substantial difference of opinion. (CP 176). Mr. Cregan filed a response

motion in opposition to certification on October 10, claiming that discretionary review would cause undue delay and unnecessary expense. (CP 204-212).

On December 17, 2010, Judge Tompkins considered oral argument regarding the strictly legal question, and signed an order granting certification of her October 22, 2010 order, holding that the issue involved a controlling question of law as to which there is a substantial ground for difference of opinion, and that immediate review of the order may materially advance the ultimate termination of the litigation. (CP 219-220).

Commissioner Wasson of The Court of Appeals of the State of Washington, Division III, heard oral argument, and subsequently issued a Ruling on January 12, 2011. (Comm. Ruling, pg. 1). Commissioner Wasson concluded that the issues in the case presents a “substantial ground for difference of opinion” under RAP 2.3(b)(4) and granted Riverview Bible Camp’s Motion for Discretionary Review. (Comm. Ruling, pg. 1-5).

IV. ARGUMENT

A. Standard of Review.

The appellate court considers only evidence that was considered by

the trial court, and that is contained in the record on appeal. See, e.g., Riojas v. Grant County Public Utility Dist., 117 Wn. App. 694, 72 P.3d 1093 (Div. 3 2003). Where a case on appeal was decided on summary judgment, any findings of fact are superfluous and subject to the de novo standard of review. Thongchoom v. Graco Children's Products, Inc., 117 Wn. App. 299, 71 P.3d 214 (Div. 3 2003).

B. The Recreational Use Immunity Act Affords Riverview Bible Camp Immunity for Mr. Cregan's Injury.

If the Court applies the undisputed facts to the plain wording of the statute, the Recreational Use Act clearly applies to protect Riverview Bible Camp from liability. “Washington's recreational use statutes were intended to modify the common law duty owed to public invitees so as to encourage landowners to open their lands to the public for recreational purposes.” Davis v. State, 144 Wn.2d 612, 616, 30 P.3d 460, 462 (2001). The statute provides in relevant part:

(1) Except as otherwise provided in subsection (3) or (4) ¹ 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**

¹ Mr. Cregan has not challenged in the summary judgment proceedings that any of the exceptions in the statute apply. Accordingly, the disposition of this case depends on the Court's interpretation of subsection (1) of RCW 4.24.210.

for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, hanggliding, paragliding, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, **without charging a fee of any kind therefor**, shall not be liable for unintentional injuries to such users.

RCW 4.24.210 (emphasis added).

Here, Riverview Bible Camp privately owns the property upon which the Giant Slide is located. Riverview Bible Camp allowed Beats & Rhythms, as members of the public, use of its premises, including the Giant Slide, for purposes of outdoor recreation, without charging a fee of any kind. Applying these undisputed facts to the plain language of the statute, it is clear that Riverview Bible Camp falls within the protection afforded under the Recreational Use Act.

Mr. Cregan has attempted to insert additional language to RCW 4.24.210, and misconstrue the holdings of various Washington cases, to argue why the Recreational Use Act is inapplicable. The Trial Court Judge independently reasoned that the Recreational Use Act did not apply because a slide was not contemplated by the statute. Riverview Bible

Camps will address each of the arguments, and show why they fail in this case.

C. The Recreational Use Act Applies to the Use of a Slide.

The Trial Court Judge queried in her ruling whether the Giant Slide was possibly an activity that could “be provided in an enclosed facility in the middle of a city”, and whether it then fell outside the protections of the Recreational Use Immunity Act. (RP pg. 5, lns. 2-9). This issue was never raised by the Mr. Cregan, nor briefed by the parties because it is well settled that the Recreation Use Act applies to slides and outdoor playground equipment. Division III of the Court of Appeals recently concluded that the Red Wagon slide in the middle of the City of Spokane is the type of outdoor recreation that is protected by the Recreational Use Act. Swinehart v. City of Spokane, 145 Wn. App. 836, 848, 187 P.3d 345, 351 (Div. 3, 2008) (citing Curran v. City of Marysville, 53 Wn. App. 358, 360-61, 766 P.2d 1141 (1989) (applying the Recreational Use Act to playground equipment)).

The use of the Giant Slide located at Riverview Bible Camp represents the type of outdoor recreational activity included within RCW 4.24.200-210. The Court’s inquiry about the applicability of the Act to outdoor playground equipment is in error.

D. **Riverview Bible Camp is Not Required to Leave Its Camp Open to the Entire General Public for Free Use At All Times for the Recreational Use Act to Apply.**

Mr. Cregan has argued that the Recreational Use Act cannot apply to protect Riverview Bible Camp because the camp did not allow all members of the public use at all times. This argument fails because Washington's Recreational Use Act noticeably lacks language requiring that a landowner to open their land to every member of the general public at all times for the Act to apply. Courts in other jurisdictions have rejected similar arguments where parties have attempted to graft on language to similar recreational use statutes. The legislative history of the statute further supports the interpretation that select members of the public can be allowed to use the property for specified periods of time.

1. **Persuasive authority from jurisdictions with similar recreational use statutes supports Riverview Bible Camp's position.**

Mr. Cregan misstated the holding of Plano v. City of Renton, 103 Wn. App. 910, 14 P.3d 871 (2000), in his summary judgment briefing when argued that in Plano the court observed that "the stated purpose of the statute is to encourage property owners to make their land available for free recreation by the *general public*." Pl. Memo. in Supp. of Summ. Judge. Pg. 6 (Emphasis added) (CP 40). There is no language in the statute that requires it to be open to the "general" public. There is likewise

no such discussion in the Plano case.

This same type of argument was raised and rejected by the Missouri Supreme Court in the case of State ex. rel. Young v. Wood, 254 S.W.3d 871, 873 (Mo. 2008). In that case, two separate hunters were granted permission to enter on to the farm for the purpose of hunting wild turkeys. While they were hunting, one of the hunters ended up accidentally shooting the other hunter. Missouri's recreational use statute is similar to Washington's in its protections of private landowners. V.A.M.S. 537.346. The court rejected the respondent's argument that the property owner had to "open their property to the entire general public" to protect the landowner under the recreational use statute. State ex. rel. Young v. Wood, 254 S.W.3d at 873 (emphasis added). The plaintiff had relied upon a statement in a previously reported opinion that the purpose was to encourage landowners to open their land to *the public* for recreational use by restricting the landowner's liability. The court rejected the argument explaining that there was no such language in the statute.

The use of the term "public" merely reflects the fact that the statute is designed to encourage landowners with property suitable for certain recreational activities to allow members of the public to participate in those activities. Nowhere does the RUA require that land be opened to the entire general public, and this Court will not add language to a statute that is clear and unambiguous. *Lombardi*, 846 S.W.2d at 202 n. 9. This reading of Missouri's RUA

mirrors that of the Eighth Circuit. *Wilson v. United States*, 989 F.2d 953, 957 (8th Cir.1993).

State ex rel. Young v. Wood, 254 S.W.3d at 873-874 (Mo. 2008).

Similarly, Wilson v. United States, 989 F.2d 953, 957 (8th Cir. 1993), involved a Boy Scout group that was allowed on to a military base for an activity. Several boys were injured while playing with an aluminum irrigation pole that came into contact with an overhead power line. The argument was raised that inviting a specific group such as the Boy Scouts does not constitute the “members of the general public.” The court rejected the argument because the respondent was attempting to rely upon a distinction not made within the language of the Missouri Recreational Land Use Statute. There was no such language requiring that it be made available and open to the “general public.” “The plain language of the statute indicates that a landowner owes no duty of care ‘to any person who enters on the land without charge’ for recreational purposes.” Wilson, 989 F.2d at 957 (quoting Mo.Rev.Stat. §537.346) (emphasis in original).

Courts from other jurisdictions have likewise held that a property need not be held open to the entire general public in order for the recreational use act to apply. See Holden ex rel. Holden v. Schwer, 242 Neb. 389, 495 N.W.2d 269, 274 (1993) (“a landowner need allow only

some members of the public, on a casual basis, to enter and use his land for recreational purposes to enjoy the protection” of recreational use immunity); see also Howard v. U.S., 181 F.3d 1064, 1071 (1999) (the court held that the dock where the injury was sustained was open to military personnel, their families and their guests, and even though it was closed to the “general” public, was sufficient to qualify for immunity under Hawaii’s recreational use statute).

There is no language in RCW 4.24.210 that requires the property to be opened up to the entire *general* public in order for a property owner to be afforded the protection under the Recreational Use Act. Washington courts decline to insert words into a statute when the language, taken as a whole, is clear and unambiguous. State v. Watson, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). Courts also do not add or subtract from the clear language of a statute unless an addition or subtraction is imperatively required to make the statute rational. Id. There is certainly no imperative need to add words to the statute to make it rational. The landowner has the right to allow one member of the public, or thousands of members of the public on to the owner’s property for free for recreation uses. That is what the statute clearly states, and it should be interpreted as such. Just as a person or group is permitted to give to the charity of their choice, Fourth Memorial Church is likewise permitted to give charitably of the use of its

facilities free of charge to groups, such as Beat & Rhythms.

2. **Washington's legislative history supports the interpretation that the Recreational Use Act can be applicable to individual members of the public for limited periods of time.**

A review of the legislative history further supports the interpretation that property owners can give permission for specified persons to come on the property for specific time periods and still be afforded protection under the Recreational Use Act.

A provision that remains susceptible to more than one reasonable interpretation after such an inquiry is ambiguous and a court may then appropriately employ tools of statutory construction, including legislative history, to discern its meaning. *Campbell & Gwinn*, 146 Wash.2d at 12, 43 P.3d 4.

Tingey v. Haisch 159 Wn.2d 652, 657, 152 P.3d 1020, 1023 (2007). The court will examine the floor debate stated in the Senate Journal as part of a statute's legislative history. See e.g. Tingey, 159 Wn.2d at 661.

The statutes were first enacted in 1967. Laws of 1967, ch. 216. Commentators have said that it is patterned after a model act proposed in 1965 by the Council of State Governments. See 24 Suggested State Legislation, Public Recreation On Private Lands: Limitation On Liability, 150-52 (1965). See also J. Barrett, Good Sports And Bad Lands: The Application Of Washington's Recreational Use Statute Limiting Landowner Liability, 53 Wash.L.Rev. 1 (1977). Although the statute has

been amended over the years to broaden the activities, the relevant language pertaining to the term “members of the public” at issue in this case has not been changed or modified. This purpose of the statute is plainly stated in RCW 4.24.200.

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.

RCW 4.24.200 (emphasis added).

The legislative intent can be seen in the 1967 Senate Journal concerning Engrossed House Bill No. 258. Senator Woodall, advocating in support of House Bill No. 258, explains the exposure private landowners would have under the new law if a person who is permitted to come on the property and hunt is injured by a latent hole.

Let me give you an example. Senator Donohue buys a section of range land. He has not explored it by foot. Someone says, ‘Can I hunt on this range land?’ and the Senator says, ‘Yes, you can hunt.’ Unbeknownst to Senator Donohue, the prior owner somewhere dug a well and didn’t properly cover it. Now this is an artificial, latent defect – artificial because it’s man-made, latent because it appears to be covered and isn’t. Senator Donohue has not personally explored this whole section. This amendment says that the Senator does not have to post something he doesn’t know about. If there is an open well that is known about, he has to post it. But he shouldn’t be liable for

something on this land that he doesn't know about.

H.R. 258, Wash.S.Jour. 42nd Legis. 875 (1967) (CP 93-94); see also Morgan v. United States, 709 F.2d 580, 584 (9th Cir. 1983) (the court quoted the same legislative history in the opinion to interpret RCW 4.24.210 for an injury sustained on Lake Roosevelt). This intent to limit the application of the Recreational Use Act to potentially a single person who asks permission to come on the property is reiterated by Senator Woodall when asked the following question by Senator Canfield:

My last question is a little more serious. Some fishermen were down on my place one day and they thought they saw something on the bottom of the river and upon closer inspection it looked like it was a car; whereupon, they reported that to the sheriff's office and they sent down a crew and dragged the place and dragged out a car and it had a dead body in it of a young man who had been dead for some time. Now the deceased apparently ran his car or by having his car run down this steep hill and over this bank that I referred to a minute ago landed in the water and was either killed when he hit or drowned. Now am I liable because I didn't post these signs against that hazard?

Senator Woodall:

No, under that condition you are not because you did not give him permission. He did not request permission. He entered solely at his own risk. We are only talking about persons who come up and say, 'Mr. Canfield, may I hunt on your property?' and you want to be a good guy and you say, 'Yes, go ahead.' That is the type of situation we are talking about. When a man comes in and doesn't ask you, he clearly takes everything at his own risk.

H.R. 258, Wash.S.Jour. 42nd Legis. 876-77 (CP 94).

This legislative history demonstrates how the drafters of the statute intended that private property could be allowed to be used as recreational use for specified persons, and for a specified time period. A farmer does not have to leave his property open all the time for any and all persons to hunt and roam over as they please. The farmer can use his property as a working farm when he needs to, and in the Fall after the harvest is in, he may allow hunters, hikers, or whomever, to come on to the property to use it for recreational purposes provided they ask for permission. If they do not, then they would be considered trespassers.

In this case, Riverview Bible Camp is acting in just the same manner as the farmer who allows a hunter to come on his property. Riverview Bible Camp is a non-profit organization that operates a camp. It manages to usually make a slim profit with the help of donations and the fees charged to groups and campers for the use of the facility. Although in 2009, it actually lost money. (CP 114-115) Like the farmer, Riverview Bible Camp wanted to give back to society and allow a worthy organization such as Beats & Rhythms to use the facility for a weekend free of charge. That was the only group allowed to use the facility without a charge in the summers of 2008 and 2009. Given the language of the statute, and the legislative history, it is apparent that Riverview Bible Camp's charitable act was exactly what the Legislature intended, and the

conduct they hoped would occur with the enactment of the statute.

3. **Washington Courts analyze how the property is being used at the time of the injury.**

Washington Courts have recognized that property can be used for different purposes at different times. Courts must focus on the landowner's use of the land at *the particular time of the injury* being litigated. Home v. North Kitsap School District, 92. Wn. App 709, 715, 965 P.2d 1112, 1116 (1998).

According to Division One, the proper approach when applying this statute is to analyze the purpose for which the landowner was using the land, as opposed to the purpose for which the Respondent was using the land.^{FN6}
We agree, although we observe that a landowner may use the land for different purposes at different times. Here, then, it is necessary to focus on the nature of the landowner's use at the time of the accident being litigated.^{FN7}

Home v. North Kitsap School District, 92 Wn. App. at 714 (citing footnote 7 Widman v. Johnson, 81 Wn. App. 110, 114, 912 P.2d 1095, review denied, 130 Wn.2d 1018, 928 P.2d 414 (1996)) (emphasis added).

Similarly, Widman v. Johnson, 81 Wn. App. 110, 110-112, 912 P.2d 1095 (1996) involved a situation where a car accident occurred on a logging road that had been opened up to the public for recreational use, even though no trespassing signs had been put up in the past to prohibit public use. Widman, 81 Wn. App. 110-112. At the time in question, signs

were posted that clearly indicated that this road was open for recreational use. Id. at 111-112. The court recognized that the property use can change and thus it is necessary to look how the property is being used at the time of the accident. Id. at 114.

The Washington Supreme Court rejected the argument that the courts should look at the predominant use when deciding whether the recreational use act applied. McCarver v. Manson Park & Recreational District, 92 Wn.2d 370, 377, 597 P.2d 1362 (1979). That is to say, courts are not to analyze whether a property is used primarily as a business, and only secondarily as a recreational use, in determining whether the recreational use statute applies.

We decline to impose a limiting construction upon the statute differentiating land classifications based upon primary and secondary uses where the legislature did not. Arguments to achieve such a result should appropriately be addressed to the legislature.

McCarver, 92 Wn.2d at 377

Riverview Bible Camp welcomed Beats & Rhythms onto the property, with the intent to allow free, outdoor recreational use. Riverview Bible Camp allowed Beats & Rhythms to use the camp facility free of charge because this was Riverview Bible Camp's opportunity to give back to the community. Beats & Rhythms was left to supervise the

activities in the camp by using its own chaperones and counselors. The Recreational Use Act must be interpreted to afford Riverview Bible Camp immunity, because its use of its land for the free, public, outdoor recreational use is what the Recreational Use Act was intended to encourage. Any contrary interpretation would discourage private landowners from opening their land for such recreational use in the future.

E. Riverview Bible Camp Did Not Charge Mr. Cregan a “Fee of Any Kind” for the Use of the Slide.

Mr. Cregan initially argued in his Memorandum in Support of his Motion for Summary Judgment that his presence as a nurse at Riverview Bible Camp amounted to a non-monetary fee, and therefore the Recreational Use Act is inapplicable. This argument was apparently abandoned by Mr. Cregan as he did not reply to the arguments raised by Riverview Bible Camp, and Mr. Cregan did not assert this argument again in subsequent briefing. Nevertheless, to the extent that Mr. Cregan continues to assert this argument on appeal, the argument fails for a number of reasons.

First, Mr. Cregan cited to no authority which supported his contention that a non-financial fee can somehow make RCW 4.24.210 inapplicable. The statute specifically states: “without charging a *fee* of any kind.” RCW 4.24.210. The fact that the statute specifically references

a “fee” bolsters the interpretation that there must be a monetary fee paid.

The reference in R.C.W. § 4.24.210 to a “fee of any kind” arguably excludes non-monetary forms of consideration, such as advertising and other incidental benefits. Indeed, under the recreational use act, even one who accompanies a paying guest may be denied invitee status unless it can be inferred that the fee was charged for both entrants.

J. Barrett, Good Sports And Bad Lands: The Application Of Washington's Recreational Use Statute Limiting Landowner Liability, 53 Wash.L.Rev. 1, 12 (1977).

Second, it is important to look at who was supposedly requiring Mr. Cregan be a nurse in order to participate that weekend. There is no allegation that Riverview Bible Camp required him to be a nurse at the camp. If anyone, it would have been Beats & Rhythms. Riverview Bible Camp simply opened up its camp to Beats & Rhythms. Who they used as counselors, or supervisors, was up to them. Even if Beats & Rhythms could somehow be found to be charging a non-monetary fee to Mr. Cregan to participate, it is irrelevant for purposes of determining whether RCW 4.24.210 applies. The analysis is whether Riverview Bible Camp charged Mr. Cregan a fee. The answer is clearly “no”.

Washington courts look at the purpose for which the landowner intended the property to be used, as opposed to the purpose for which the plaintiff was using the land. Gaeta v. Seattle City Light, 54 Wn. App. 603, 608-09, 774 P.2d 1255 (1989). In Gaeta, a motorcyclist was travelling

across the country on a sight-seeing tour and decided to drive across the Diablo Dam. While driving across the dam, which was open to the public for recreational use, the motorcycle got caught in the track causing the rider to fall and sustain an injury. Seattle City Light operated the road over the dam for the public recreation. It had no commercial activities or business interest in a resort that was across from the dam. The motorcyclist argued that the Recreational Use Act did not apply because his sole purpose in using the roadway over the dam was commercial, to reach the resort where he could purchase some gasoline for his motorcycle. The court rejected the argument and explained:

We find the proper approach in deciding whether or not the recreational use act applies is to view it from the standpoint of the landowner or occupier. If he has brought himself within the terms of the statute, then it is not significant that a person coming onto the property may have some commercial purpose in mind. By opening up the lands for recreational use without a fee, City Light has brought itself under the protection of the immunity statute, and it therefore is immaterial that Gaeta may have driven across the dam in search of gasoline at the resort.

Gaeta v. Seattle City Light, 54 Wn. App. at 608-609.

Likewise, in Jones v. United States, 693 F.2d 1299, 1300 (9th Cir.1982), the plaintiff was injured in the Olympic National Park while snow-sliding on an inner tube she had rented from a concessionaire. The concessionaire, located in the park on Government property, paid the

Government a fixed rental fee and a percentage of its gross receipts. Id. at 1303. In holding that no fee had been charged which would deny the Government its immunity under Washington's Recreational Use Act, the court noted that members of the public were not charged a fee to enter onto the land or to use the land, and that the plaintiff could have used the slope for free of charge if she had brought her own tube. Id. at 1303-04. The fee that the plaintiff had paid was simply a fee for use of the tube, not for use of the Government's land. Id. at 1303. The Government was therefore immune from liability. Id. at 1303-04.

Analyzing this case from the perspective of the landowner, Riverview Bible Camp did not charge a fee of any kind, and clearly comes within the protection of the Recreational Use Act. Whether Mr. Cregan had some commercial purpose, or felt that there was a quid pro quo requirement with Beats & Rhythms is irrelevant to the analysis of whether the Recreational Use Act applies. By opening up the land for recreational use without a fee, Riverview Bible Camp should be afforded protection under the Recreational Use Act.

F. **The Recreational Use Act Applies Because the Property Was Being Used for Recreational Purposes at the Time of the Injury.**

It is undisputed that Riverview Bible Camp allowed Beats &

Rhythms the free and exclusive use of the premises at the time the injury occurred. Mr. Cregan cites to two factually distinguishable cases to argue that if Riverview Bible Camp ever charged a fee in the past, it is precluded from ever obtaining the protection of the Recreational Use Act.

The first case cited by Mr. Cregan is Plano v. City of Renton, 103 Wn. App. 910, 14 P.3d 871 (2000). In that case the City of Renton had a boat launch area and floating dock for boat moorage. The floating moorage dock is accessible to the rest of the park by means of the two gangways that connect the dock to a fixed pier. Plano slipped and fell on the wet metal ramp that attaches the gangway to the floating dock. Renton charges a fee for moorage. Plano moored her boat and paid a moorage fee. Thus Plano is distinguishable from this case because the injured party was a paying customer on a fee generating premise. That is to say, City of Renton was charging fees for the use of that dock at the time of Plano's injury.

Mr. Cregan has cited to the language in the Plano opinion where the court stated:

But Washington's statute does not say that a landowner can have immunity so long as the lands or water areas are available free of charge some of the time. The statute simply states that there is no immunity if the owner charges a "fee of any kind."

Plano, 103 Wn. App. at 914. This quote was limited to the facts of the case. The City of Renton was charging fees for the moorage of the boats, including Plano's boat. In that case, there happened to be a free moorage window of time in the middle of the day. However, that does not change the fact that the City of Renton was charging a fee for the use of the docks at the time of the injury, and that Plano in fact paid a fee for the moorage of her boat.

That above quote that Mr. Cregan has previously cited to in his memoranda cannot be applied universally as Mr. Cregan has argued. By taking that quote out of the context of that case, Mr. Cregan is arguing that if a landowner ever charged a fee at any time in the past, the landowner is forever precluded from falling within the protection of the Recreational Use Act. This cuts against the very purpose of the statute which is to encourage landowners to make their property available to the public for recreational purposes. RCW 4.24.200; Davis v. State, 144 Wn.2d at 616.

Taking the quote from Plano out of context and applying it as Mr. Cregan has advocated would further contradict the body of Washington case law that have repeatedly explained that a property use can change, and thus courts must look at how the property is being used at the particular time of the injury. Home v. North Kitsap School District, 92.

Wn. App at 715; Widman v. Johnson, 81 Wn. App. at 110-112.

In this case, at the time of the injury, the Riverview Bible Camp was not charging Beats & Rhythms or Mr. Cregan, or any other group a fee of any kind for the use of the camp facility. Beats & Rhythms was responsible for obtaining chaperones and counselors to oversee the use of Riverview Bible Camp. Riverview Bible Camp was not staffing the Beats & Rhythms camp with its own counselors to oversee the use of the camp facilities. From Riverview Bible Camp's perspective, the use of the camp facilities and slide by Beats & Rhythms and Mr. Cregan was for recreational use. Accordingly, Riverview Bible Camps should be entitled to immunity under the Recreational Use Act.

Mr. Cregan also relied upon the case of Nielsen v. Port of Bellingham, 107 Wn. App. 662, 27 P.3d 1242 (2001). This case is clearly distinguishable because the injured party was a guest of a paying customer on a fee generating premises. When Nielsen slipped on the deck ramp after leaving Dr. Wilkins' yacht (where he lived), the court explained that she was not a recreational user within the meaning of the recreation use statute, but rather an invitee of Dr. Wilkins, a paying moorage customer. Nielsen, 107 Wn. App. at 666.

The Port of Bellingham was using the marina for commercial

purposes--mooring of fishing boats and a pleasure craft for a fee. It was not used for the purpose of outdoor recreation. Nielsen, 107 Wn. App. at 668. The court explained that the marina was more akin to a busy public road that happened to run through a public park, citing the case of Smith v. Southern Pac. Transp. Co., Inc., 467 So.2d 70 (La.Ct.App.1985) (Distinguished in Gaeta, 54 Wn. App. 608). In the Smith case, a commercial truck driver was injured as the result of the city's failure to post a sign warning of the low clearance of a railroad overpass while driving on a roadway that happened to run through a city park. The roadway was built and maintained primarily for commercial use, as opposed to recreational use. Nielsen, 107 Wn. App. at 668.

In the instant case, the camp was clearly being used for recreational purposes when the accident occurred as Mr. Cregan was using a slide. Mr. Cregan was not the guest of a paying customer in the fee generating premise at the time of the accident. The Nielsen case is therefore inapplicable.

V. CONCLUSION

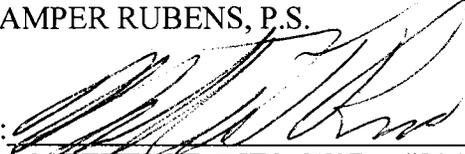
The Superior Court erred by deciding that the Recreational Use Act did not afford immunity to Riverview Bible Camp at the time of Mr. Cregan's injury. The application of distinguishable cases such as Plano

and Nelson, which dealt with fee generating docks, led to an erroneous summary judgment order. De Novo review of RCW 4.24.200-210, its legislative history, and pertinent case law establish that the Recreational Use Act was intended to promote Riverview Bible Camp's actions. The plain language of the statute does not require Riverview Bible Camp to be open to any member of the public for free recreational use at all times. Use of outdoor playground equipment is the type of outdoor recreational activity contemplated by the Recreational Use Act. Furthermore, allowing free use of its premises for outdoor recreation to members of the public without charging a fee afforded Riverview Bible Camp because the Washington legislature enacted the Recreational Use Act to promote benevolent acts of generosity. For the foregoing reasons, Riverview Bible Camp respectfully requests that the Court reverse the Superior Court's Motion for Summary Judgment Order entered on October 22, 2010, and dismiss Mr. Cregan's Complaint against Riverview Bible Camp because it is immune from liability under the Recreational Use Act.

RESPECTFULLY SUBMITTED this 7 day of June 2011

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By:



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CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of June 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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