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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GAVIN J. CREGAN, a married man,

Plaintiff/Respondent,

vs.

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

Defendant/Appellant.

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SUPREME COURT  
STATE OF WASHINGTON  
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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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ORIGINAL

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the proper interpretation and application of the recreational use statutes, RCW 4.24.200-.210.

## II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves a negligence claim against a landowner, and provides the opportunity for the Court to clarify what a landowner must prove in order to be eligible to invoke immunity under the recreational use statutes, RCW 4.24.200-.210, thereby avoiding application of the common law of premises liability.<sup>1</sup>

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<sup>1</sup> The current versions of RCW 4.24.200 and RCW 4.24.210 are reproduced in the Appendix to this brief.

This action was commenced by plaintiff/respondent Gavin J. Cregan (Cregan) against Fourth Memorial Church, d/b/a Riverview Bible Camp (Riverview). The underlying facts are drawn from the briefing of the parties and Riverview's answer and third-party complaint. See Riverview Br. at 2-7; Cregan Amended Br. at 1-5; Ans. to Complaint and Affirmative Defenses and Third-Party Complaint, CP 15-22.

For purposes of this brief the following facts are relevant: Riverview operates a Bible Camp on its property along the Pend Oreille River near Cusick, Washington. The Bible Camp facilities are not open to the general public. See Cregan Amended Br. at 2 (noting facilities "are not open to the public"); Riverview Br. at 2-3, 5 & Riverview Reply at 1-2 (urging the Bible Camp was open to the public at the time of injury because Beats & Rhythms and Cregan are members of the public). There is a slide located on the property. Riverview allowed the group "Beats & Rhythms," a support group for children with congenital heart defects, to use the property over a weekend in June 2008. Cregan, a member of this group, was injured while using the slide.

Riverview regularly rented out its property to other groups for a fee. This was apparently done under a standard form rental agreement. However, on this occasion, Riverview allowed Beats & Rhythms to use the property without payment of a fee. This arrangement was

memorialized in the standard form rental agreement, but for a “zero fee.” Cregan Amended Br. at 3.<sup>2</sup> Riverview acknowledges that it “selected Beats & Rhythms to be a guest group to give back to their community and to help another nonprofit organization.” Riverview Br. at 3.

The superior court denied Riverview’s motion for summary judgment of dismissal based upon recreational use immunity and granted Cregan’s motion for partial summary judgment, striking the immunity defense. Riverview successfully sought interlocutory review in the Court of Appeals, Division III. Upon completion of the briefing, Division III certified the case to this Court, which accepted the certification.

### **III. ISSUE PRESENTED**

What must a landowner prove in order to invoke recreational use immunity under RCW 4.24.200-.210, thereby avoiding application of the common law of premises liability?

### **IV. SUMMARY OF ARGUMENT**

In order for a landowner to invoke recreational use immunity under RCW 4.24.200-.210 to defeat a negligence claim it must prove that it (1) allowed the entrant to use the property for recreational purposes as a member of the public, and (2) did not charge a fee of any kind. If either of

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<sup>2</sup> The briefing before the Court does not reveal the text of the standard form rental agreement, or indicate whether the agreement between Riverview and Beats & Rhythms is of record on appeal. In Riverview’s answer and third-party complaint, it “admits that it entered into a rental agreement with Beats & Rhythms,” and asserts that its agreement with Beats & Rhythms included terms governing indemnity and insurance coverage. CP 16.

these requirements is not met, the immunity is unavailable, and the landowner's liability is determined under the common law of premises liability.

Recreational use immunity does not apply in this case because the Beats & Rhythms group was not allowed to use the property as members of the public. Instead, the use was limited to this specific group, as evidenced by a rental agreement, although no rental fee was charged.

## V. ARGUMENT

### A. **Background Regarding The Common Law Of Premises Liability, And Landowner Immunity Under The Recreational Use Statutes, RCW 4.24.200-.210.**

Under the common law of premises liability the duty of care by a landowner depends upon whether the entrant on the property is an invitee, a licensee, or a trespasser. See generally Younce v. Ferguson, 106 Wn.2d 658, 662-66, 724 P.2d 991 (1986). At common law, a recreational entrant could qualify as a "public" invitee for which a landowner would owe a duty of ordinary care to keep the premises in a reasonably safe condition. See Davis v. State, 144 Wn.2d 612, 615-16, 30 P.3d 460 (2001). With the enactment of Washington's recreational use statutes, RCW 4.24.200-.210, the Legislature modified the common law duty owed to public invitees in order to encourage landowners to open their lands to the public for recreational purposes. See RCW 4.24.200 (indicating purpose of

recreational use statutes is to encourage landowners to make their lands available to the public for recreational purposes by limiting their tort liability towards these entrants).

RCW 4.24.210 sets forth the limited recreational use immunity available to landowners who make their land available for recreational purposes. The statute provides in relevant part:

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, hanggliding, paragliding, 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.

RCW 4.24.210(1). Essentially, this statute creates a new category of entrant on the land—"recreational user." John C. Barrett, Good Sports and

Bad Lands: The Application of Washington's Recreational Use Statute  
Limiting Landowner Liability, 53 Wash. L. Rev. 1, 28 (1977).<sup>3</sup>

In order for a landowner to avail itself of the immunity provided by RCW 4.24.210 it must prove, among other things, that it (1) allowed the entrant to use the property for recreational purposes as a member of the public; and (2) did not charge a fee of any kind for the use. If either of these elements is missing, the immunity does not apply. Under Court of Appeals cases interpreting RCW 4.24.210 the use of the property is viewed from the standpoint of the landowner, see Gaeta v. Seattle City Light, 54 Wn.App. 603, 608, 774 P.2d 1255, *review denied*, 113 Wn.2d 1020 (1989), focusing on the use at the time of the accident or injury, see Home v. North Kitsap Sch. Dist., 92 Wn.App. 709, 714, 965 P.2d 1112 (1998).

Interpretation of RCW 4.24.210 is governed by the customary rules of statutory construction. Courts will attempt to discern the plain meaning of the words and phrases whenever possible, in furtherance of the legislative intent underlying the statute. See generally Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). However, if any words or phrases in RCW 4.24.210 are ambiguous, then they should be strictly construed because the statute serves to immunize conduct that may

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<sup>3</sup> RCW 4.24.210 is based upon a model act, but the text of this statute is unique to Washington. See Barrett, 53 Wash. L. Rev. at 3-9.

otherwise be subject to tort liability. See Van Scoik v. State, 149 Wn.App. 328, 334, 203 P.3d 389 (2009) (strictly construing “unintentional injuries” to deny recreational use immunity to landowner for injuries caused by assault by third party on the property); Plano v. City of Renton, 103 Wn.App. 910, 911-15, 14 P.3d 871 (2000) (strictly construing “without charging a fee of any kind” to deny recreational use immunity to owner of dock simultaneously used on a fee and non-fee basis); Tennyson v. Plum Creek Timber Co., 73 Wn.App. 550, 557-58, 872 P.2d 524 (strictly construing “others in lawful possession and control of any lands” to deny recreational use immunity to contractors that worked on the property), *review denied*, 124 Wn.2d 1029 (1994); Matthews v. Elk Pioneer Days, 64 Wn.App. 433, 439, 824 P.2d 541 (strictly construing “outdoor recreation” to deny recreational use immunity to sponsor of outdoor festival), *review denied*, 119 Wn.2d 1011 (1992).<sup>4</sup> As this Court noted in Keene v. Edie, 131 Wn.2d 822, 832, 935 P.2d 588 (1997) (quoting Freehe v. Freehe, 81

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<sup>4</sup> The analysis in Matthews appears to be separate from the rule of construction invoked elsewhere in the opinion, requiring strict construction of a statute in derogation of the common law. See 64 Wn.App. at 437. The rule of strict construction of statutes in derogation of the common law has been criticized. See Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 102, 829 P.2d 746 (1992) (acknowledging but not addressing criticism of the rule). Nonetheless, the rule continues to serve as a helpful analytical tool in appropriate cases. See Potter v. Wash. State Patrol, 165 Wn.2d 67, 76-80, 196 P.3d 691 (2008) (invoking rule in refusing to find statutory vehicle impoundment procedures abrogated common law recovery for conversion); Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 600, 257 P.3d 532 (2011) (invoking rule in interpreting design professional immunity statute, RCW 51.24.035). At any rate, the rule of strict construction for immunities is a sufficient guide for the Court's analysis here.

Wn.2d 183, 192, 500 P.2d 771 (1972)), “absent express statutory provision, or compelling public policy, the law should not immunize tortfeasors or deny remedy to their victims.” If this Court cannot resolve the statutory construction issues raised in this case under the plain meaning rule due to ambiguities in the statute, it must strictly construe the relevant statutory language.

As in other premises liability contexts, if the facts surrounding the entrant’s use of the property are undisputed, then the legal consequences of the use may be resolved as a matter of law. See Beebe v. Moses, 113 Wn.App. 464, 467, 54 P.3d 188 (2002). However, where there are disputes of material fact, the question is for the jury. See id. (recognizing question whether entrant is social guest or business invitee is for the jury); see also Ravenscroft v. Washington Water Power Co., 136 Wn.2d 911, 969 P.2d 75 (1998) (recognizing question whether artificial condition was “latent” in determining application of recreational use immunity is for the jury).

It remains to be determined whether the superior court correctly ruled on cross motions for summary judgment that Riverview did not establish its right to invoke recreational use immunity. This question is subject to de novo review. See Lallas v. Skagit County, 167 Wn.2d 861, 864, 225 P.3d 910 (2009).

**B. Recreational Use Immunity Under RCW 4.24.210 Does Not Apply Here Because Riverview Fails To Establish It Allowed The Beats & Rhythms Group To Use Its Property For Recreational Purposes As “Members Of The Public.”**

Under RCW 4.24.210, recreational immunity is only available if the landowner allows entrants to use the property for recreational purposes as “members of the public.” “Public” means “[r]elating or belonging to an entire community, state, or nation,” or “[o]pen or available for all to use, share, or enjoy.” Black’s Law Dictionary, s.v. “public” (9<sup>th</sup> ed. 2009).<sup>5</sup> Both definitions require that the particular recreational user be part of the larger body of public users such as “duck hunters” or “picnickers” or “snowmobilers.” Applying the plain and ordinary meaning of “members of the public,” aided by common sense, the public connection required must be more than merely incidental, and must represent the heart of the usage. See State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) (indicating plain meaning interpretation of statute must accord with common sense). The use contemplated by the statute is not limited to an individual or group for which the landowner has a particular affinity.

Riverview fails to establish it allowed the Beats & Rhythms group to use its property as “members of the public.” However benevolent and well-intentioned, Riverview only permitted a specific group to use its

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<sup>5</sup> See Anthis v. Copland, \_\_\_ Wn.2d \_\_\_, 270 P.3d 574, 583 (2012) (relying on Black’s Law Dictionary to determine ordinary meaning of word used in statute).

property on an exclusive basis. It acknowledges that it “selected Beats & Rhythms to be a guest group to give back to their community and to help another nonprofit organization.” Riverview Br. at 3. It memorialized this arrangement with its standard form rental agreement, with “zero fee.” Id.

Riverview argues that RCW 4.24.210 does not require that the recreational use be open to every member of the public, and that the situation here is no different than a hunter who asks a landowner for permission to hunt for a specified time period. See Riverview Reply Br. at 11. These situations are not the same. In the hunter hypothetical, the use is grounded in his or her status as a member of the public generally, and not on account of a particular relationship between the landowner and recreational user. Absent this distinction, neighbors invited over for a backyard barbecue would qualify as recreational users under the statute, sending the common law of premises liability into disarray.

Unquestionably, the boundary line between uses allowed to recreational users who are “members of the public” and mere private uses is imprecise, and each case will have to be resolved on its own facts.<sup>6</sup>

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<sup>6</sup> As Cregan’s recent statement of additional authorities illuminates, other jurisdictions have struggled with the meaning of similar language in their recreational immunity statutes requiring that the recreational use be “public” in nature. See Respondent’s RAP 10.8 Statement of Additional Authorities (Mar. 2, 2012). The difficulty lies in distinguishing between those uses subject to the recreational use statute and those subject to the common law rules governing premises liability. Among the cases noted by Cregan is Conant v. Stroup, 51 P.3d 1263 (Or. App. 2002), *review granted*, 64 P.3d 576 (Or.

However, the question should always be the same, i.e., has the landowner met its burden of proof that the allowed use is based upon the recreational user's status as a member of the public. This cannot be a matter of the landowner's subjective intent. See Nielsen v. Port of Bellingham, 107 Wn. App. 662, 668, 27 P.3d 1242 (2001) (relying on "reasonably objective measure" of the use of the property). Instead, the court must look at the objective evidence regarding the particular use, focusing on the recreational user's status as a member of the public. See id. Thus, for example, if a landowner allows a particular friend to hunt on the property, s/he would be doing so as a member of the public if the objective evidence clearly established that the same opportunity was available to a stranger.<sup>7</sup> There is no indication in the briefing that this is the situation here. Riverview allowed the Beats & Rhythms group to use the property for reasons unrelated to the purposes underlying RCW 4.24.210.

Under the plain meaning of "members of the public," the recreational use statute should not apply in this case. On the other hand, if the meaning of the phrase "members of the public" is deemed ambiguous

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2003), *review dismissed as improvidently granted*, 81 P.3d 709 (Or. 2003), which includes a thoughtful and extended discussion on this problem.

<sup>7</sup> This may require that in some cases the court consider other relevant facts surrounding the landowner's use of the property generally. See e.g. Home, 92 Wn.App. at 714-17 (considering non-public use at time of injury in light of other public use of same property in concluding recreational use immunity unavailable).

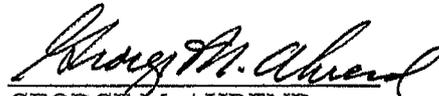
by the Court, the result here should be the same under the rule of strict construction governing immunity statutes such as this one.

## VI. CONCLUSION

This Court should adopt the argument advanced in this brief and resolve this appeal accordingly.

DATED this 1<sup>st</sup> day of April, 2012.

  
FOR BRYAN P. HARNETIAUX,  
WITH AUTHORITY

  
GEORGE M. AHREND

On behalf of WSAJ Foundation

# 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.]

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

(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners, 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, hanggliding, paragliding, rock climbing, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, kayaking, canoeing, 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

(l) 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 section 3, 4, or 5 of this act; 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.

[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; 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; 1972 ex.s. c 153 § 17; 1969 ex.s. c 24 § 2; 1967 c 216 § 2.]

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Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, a proposed amicus curiae brief is attached to this email for filing with the Court. A letter request to appear as amicus curiae was previously submitted on behalf of the Foundation by email on March 29, 2012. Counsel for the parties are being served simultaneously by copy of this email in accordance with a prior agreement among counsel.

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