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NO. 86835-2

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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GAVIN J. CREGAN, a married man,

Respondent,

v.

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

Petitioner.

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**RESPONDENT'S ANSWER TO  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION AMICUS CURIAE BRIEF**

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ORIGINAL

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## **I. INTRODUCTION**

The Washington State Association for Justice Foundation (“WSAJF”) filed an amicus brief discussing what a landowner must prove in order to invoke immunity under RCW 4.24.200-.210, Washington’s recreational use statute, thereby avoiding application of the common law of premises liability. RCW 4.24.200 states the purpose of the statute “... 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 ...” RCW 4.24.210 limits the immunity available under that statute to owners or others in possession of land “... who allow members of the public to use them for the purposes of outdoor recreation ... without charging a fee of any kind therefore, ...” WSAJF argues that because the plaintiff Cregan was a member of a group specifically invited to use the defendant’s premises, and the premises were not open to the general public, Cregan is not a “member of the public” within the meaning of RCW 4.24.210 and the defendant landowner is not entitled to immunity. WSAJF Brief p. 4.

## **II. STATEMENT OF THE CASE**

Gavin Cregan was newly hired at Sacred Heart Medical Center when he was approached by hospital staff members and asked to serve as

a volunteer camp counselor for a pediatric cardiac patient support group called Beats & Rhythms. CP 61-62. Cregan agreed to volunteer for the camp, which was to be held at Riverview Bible Camp (hereinafter referred to as "Riverview") later in June, 2008. CP 62. Riverview is owned by the defendant Fourth Memorial Church (hereinafter referred to as the "Church"). CP 109.

Riverview is available for rental by various secular and Christian groups. CP 103-104. Riverview is not available for use by individuals, but rather is only available to groups who have scheduled the facility for use. CP 104. The rental fees charged to the groups who use Riverview are intended to cover the expenses for operating the camp. CP 110-111.

Occasionally, Riverview will allow a group to use its facility without charge, to be nonpaying "guests" at the camp. CP 104-105. One of the Church's purposes in operating Riverview is to provide a facility for guests. CP 103-104. Restrictions are placed upon the religious groups that may rent or be guests of the camp based upon "their beliefs." CP 104. There are no written policies regarding what groups can rent the facilities or be admitted as guests. CP 105. Which groups are permitted to use the facility without any rental charge is determined solely by the discretion of the camp director. CP 105.

Riverview selected Beats & Rhythms to be a guest group permitted to use the facilities without any charge. CP 76. Riverview gave Beats & Rhythms a fee waiver because Riverview "... wanted to ... be able to give something back, help another nonprofit, be a blessing to a group of people, at least once a year, we wanted to do this." CP 106. In 2008, Beats & Rhythms was the only group permitted to use the Riverview facilities as guests without charge. CP 54, 114. Beats & Rhythms signed Riverview's standard rental agreement for use of the facilities, and Riverview inserted into that agreement a "zero" instead of its rental fee. CP 106.

The slide on Riverview's premises where Cregan was injured was available for use only to the Riverview staff and members of groups that executed rental agreements. CP 52-53. The Riverview facilities where the slide was located were kept locked and were not available to anyone who was not a member of a group which had a signed a rental agreement. CP 52-53.

**III. ARGUMENT – CREGAN WAS NOT A "MEMBER OF THE PUBLIC," WITHIN THE MEANING OF RCW 4.24.210, ALLOWED TO USE RIVERVIEW'S FACILITIES, SO IMMUNITY IS NOT AVAILABLE TO RIVERVIEW**

The appellate court decision in *Home v. North Kitsap School District*, 92 Wn. App 709, 765 P.2d 1112 (1998) is the closest a Washington court has come to addressing the issue of whether a

landowner must hold property open to members of the general public in order to be entitled to recreational use statute immunity. Home was injured while coaching a football game at the defendant school district's football field. When he filed suit for personal injuries the school district was granted summary judgment immunity under RCW 4.24.210. 92 Wn. App. at 712. The appellate court noted that Home was injured during a school-sponsored football game, which was open to spectators without charging any admission fee. *Id.* The court held that it was undisputed that the school district was not holding the football field open for use by members of the public when Home was injured, and accordingly the school district was not entitled to immunity under RCW 4.24.210. *Id.* at 717.

Other jurisdictions have directly addressed the issue of whether their respective recreational use statutes provide immunity only if landowners permit members of the general public to use their land, or if immunity is also available to landowners who permit any person, and not the general public, to use their property for recreational purposes. In *Conant v. Stroup*, 51 P.3d 1263 (Or. App. 2002), *review granted*, 64 P.3d 576 (Or. 2003), *review dismissed as improvidently granted*, 81 P.3d 709 (Or. 2003), the plaintiff was injured while jogging on the defendants' property. The plaintiff filed a complaint against the defendants for

negligence, and at trial the defendants moved for a directed verdict seeking immunity under Oregon's recreational use statute. 51 P.3d at 1264. The defendants argued that because the plaintiff was permitted to use their property without paying a fee, they were entitled to immunity under the statute. The plaintiff responded that the statute only applies when the general public is permitted to use property, and in this case only the plaintiff and a few other joggers and cyclists were permitted to use the defendants' property which was not open to the general public. *Id.* The trial court granted the directed verdict, holding that the statute applies when any person is allowed to use the property for recreational purposes and does not require landowners to open their property to the general public. *Id.*

The court of appeals examined Oregon's recreational use statute. ORS 105.676 declares "it is the public policy of the State of Oregon to encourage owners of land *to make their land available to the public* for recreational purposes, ... by limiting their liability toward persons entering thereon for such purposes ..." To give effect to that policy, ORS 105.682 provides, "An owner of land is not liable ... when the owner of land either directly or indirectly permits *any person* to use the land for recreational purposes, ..." *Id.* at 1265. The court considered the meaning of the "purpose" statute:

The term “public” ordinarily refers to

1: a place accessible or visible to all members of the community ... 2a: an organized body of people ... b: the people as a whole ... [or] 3: a group of people distinguished by common interests or characteristics.

*Webster’s Third New Int’l Dictionary, 1836 ...; See also Black’s at 1227 (defining “public” as either “the public at large” or enough people “as contradistinguishes them from a few”).*

... The purpose of the statute is thus plain. If private landowners will make their lands available *to the general public* for recreational purposes, the state will “trade” that public access for immunity from liability that might result from use of the property. ... In light of that purpose, it seems likely to us that the legislature intended the immunity to apply only when permission is granted to a person as a member of the public generally, not as a specific invitee.

51 P.3d at 1265-1266 (emphasis added by court).

The appellate court noted that Oregon, like a number of states, based its recreational use statute on a model act. *Id.* at 1266-1267. The court stated:

... [A] number of states began to grapple with a basic drafting problem posed by the wording of the model act. On the one hand, the model act expressed a basic *quid pro quo* in its declaration of policy, namely, permission *to the general public* to use private land for recreational purposes in exchange for immunity from liability for resulting injuries. On the other hand, the model act referred to the immunity as applying when a landowner granted permission to “any person” without qualification that the

person must be a member of general public to whom permission had been granted. The problem, of course, was that, if read literally and in isolation, the immunity provisions effectively would nullify the law of premises liability as it pertains to invitees: Any time an individual is invited an owner's back yard for croquet, immunity would apply.

51 P.3d at 1267 (emphasis added by court).

The court cited a number of other state courts which have construed the model act to give effect to its purpose by determining that permission to "any person" refers to any person as a member of the general public using the landowner's property for recreational purposes.

*Id.* at 1267-1268. The court concluded:

We find persuasive the decisions of other courts that hold that the immunity created by the model act is limited to cases in which permission is given to the general public to use private land for recreational purposes. The reasoning of those courts has been that only such a construction of the act keeps faith with the stated purpose of making private land available *to the public* for recreational purposes while, at the same time, avoids the inadvertent evisceration of common-law doctrines concerning the duties of landowners to invitees. The purpose of the Oregon statute is clearly stated. And nothing in its wording suggests that the legislature intended broadly to sweep away the ordinary duties of landowners towards invitees in cases not involving the use of their land by the public generally. Accordingly, we conclude that ORS 105.682 applies only when private landowners permit the public to use their land for recreational purposes.

51 P.3d at 1268 (emphasis added by court).

Other jurisdictions interpreting similar recreational use statutes have construed the phrase “any person” as referring to a member of the general public. *Estate of Jaycob Gordon-Couture v. Brown*, 152 N.H. 265, 876 A.2d 196, 201-202 (N.H. 2005); *Hall v. Henn*, 208 Ill.2d 325, 802 N.E.2d 797, 799-800 (Ill. 2003); *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1293 (Utah, 1996). Cf. *Fryberger v. Lake Cable Recreation Association, Inc.*, 40 Ohio St.3d 349, 553 N.E.2d 738, 740-741 (Ohio 1988). In order to qualify for immunity under the recreational use act, landowners must make their property “open to all” and “not limited to any particular group.” *Perrine*, 911 P.2d at 1292-1293. “Landowners may impose reasonable restrictions on the type of recreational activities allowed on their land, but they must allow all members of the public to engage in the approved activities to qualify for immunity.” *Id.* at 1293.

On the other hand, the Church cites cases from other jurisdictions which hold that in order to invoke the immunity provided under their respective recreational use statutes, a landowner need only allow any person to use the owner’s land for recreational purposes, and landowners need not open their land to the public at large. *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873-874 (Mo. 2008); *Howard v. United States*, 181 F.3d 1064 (9<sup>th</sup> Cir. 1999); *Wilson v. United States*, 989 F.2d 953, 957

(8<sup>th</sup> Cir. 1993); *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269, 273-274 (1993). *State ex rel. Young* is typical of the holdings in these cases:

Nowhere does the RUA [recreational use act] 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.

254 S.W.3d at 873.

*Wilson* and *State ex rel. Young* concern Missouri's recreational use statute. Unlike Washington, and the other jurisdictions cited in this brief, Missouri does not have a "purpose" statute which states the purpose of the recreational use statute is to encourage landowners to make their property available to the public for recreation. See Mo. Rev. Stat. § 537.345-537.348. While the Nebraska statute analyzed in *Holden* and the Hawaii statute analyzed in *Howard* do include language stating the purpose of those respective statutes is to encourage landowners to make their lands available to the public (*Holden*, 495 N.W.2d at 272, quoting Neb. Rev. Stat. § 37-1001; Haw. Rev. Stat. § 520-1), the immunity language from those states' statutes differs from Washington's statute. Both the Nebraska and the Hawaii statutes provide immunity to landowners who allow "any person" to use their property for recreational purposes without charge. *Holden*, 495 N.W.2d at 273, quoting Neb. Rev. Stat. § 37-1003; *Howard*, 181 F.3d at 1071, quoting Haw. Rev. Stat. § 520-4. Similarly,

Missouri's statute provides immunity to owners who allow "any person" to enter the land without charge. *State ex rel. Young v. Wood*, 254 S.W.3d at 873, quoting RSMo 2000, § 537.346.

In contrast, Washington's recreational use statute provides immunity to landowners who allow "members of the public" to use their property for recreational purposes without charging a fee of any kind. RCW 4.24.210. Unlike the Missouri, Nebraska and Hawaii statutes, Washington's recreational use immunity statute refers to "members of the public," which is a direct reference back to RCW 4.24.200 and its statement of the purpose of Washington's recreational use statute to encourage landowners to make their property available "to the public." If the meaning of statutory language is clear on its face, an appellate court gives effect to that plain meaning derived from the language of the statute alone. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 146 P.3d 893 (2006). The plain meaning of a statutory provision may be discerned "... from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Read together, RCW 4.24.200 and .210 indicate the legislative intent in enacting those statutes was to provide immunity only when owners or possessors of land permit the public in general to use their land for recreational purposes.

In *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 257 P.3d 532

(2011), this Court stated:

Statutory grants of immunity in derogation of the common law are strictly construed. *Plano v. City of Renton*, 103 Wn. App. 910, 911-912, 14 P.3d 871 (2000) (citing *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437-438, 824 P.2d 541 (1992)).

171 Wn.2d at 600. The *Plano* and *Matthews* cases cited by this Court are decisions where the respective appellate courts held that Washington's recreational use statute should be strictly construed.

The plain meaning of "members of the public" in RCW 4.24.210(1) requires a landowner to allow the general public to use land for recreational purposes without charging any fee whatsoever in order to invoke immunity. The statutory immunity does not apply when a landowner only permits a specifically invited group, and not the general public, to use the property. A strict construction of the recreational use statute requires landowners to make their property available to the general public in order to qualify for immunity.

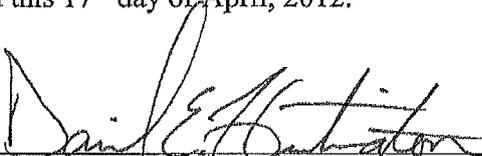
Cregan was a member of a group selected at the sole discretion of Riverview's director to use the camp facilities without being charged a fee. Riverview did not make the camp available to the public. Cregan was a selected guest, and not a "member of the public," within the

meaning of RCW 4.24.210 at the time of his injury. The Church is not entitled to immunity.

IV. CONCLUSION

The trial court's order should be affirmed.

Respectfully submitted this 17<sup>th</sup> day of April, 2012.

  
Daniel E. Huntington, WSBA #8277  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

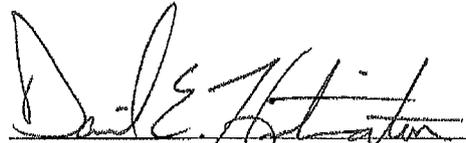
I hereby certify that I electronically filed the foregoing Respondent's Answer to Washington State Association for Justice Foundation Amicus Curiae Brief with the Clerk of the Supreme Court for the State of Washington via e-mail on April 17, 2012.

I further certify that on April 17, 2012, I caused to be delivered the foregoing Respondent's Answer to Washington State Association for Justice Foundation Amicus Curiae Brief to the following counsel of record in the manner indicated:

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Dear Mr. Carpenter:

Re: Gavin J. Cregan v. Fourth Memorial Church, d/b/a Riverview Bible Camp  
Supreme Court Case No. 86835-2

Please see the attached Respondent's Answer to Washington State Association for Justice Foundation Amicus Curiae Brief sent to you for filing by email.

Respectfully submitted,

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