

72865-2

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No. 72865-2

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ELIZABETH OLSON,

Appellant,

v.

TUKWILA SCHOOL DISTRICT,

Respondent.

BRIEF OF RESPONDENT

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I. Introduction

The Recreational Use Immunity Statute, RCW 4.24.200-210 (“the Statute”), was enacted to encourage landowners to open their lands to the public. The Tukwila School District (“the District”) opens the Foster High School Stadium to walkers and joggers to use the track. The District places reasonable, nondiscriminatory conditions on this public use. The District also has occasionally collected fees from private groups to use the facilities.

Ms. Olson was injured while using the facility without cost to her as she had done hundreds of times in the past. She sued. To avoid the Statute’s immunity, she argued that these conditions and unrelated fees somehow render the District ineligible for immunity under the Statute. The trial court granted summary judgment to the District.

Under the Statute a landowner who does not charge a fee for allowing “members of the public to use” land “for outdoor recreation” “shall not be liable for unintentional injuries to such users.” The District’s conditions on use and access do not change the “public” character of the use by Ms. Olson and other members of the public using the District’s track.

The District did not charge Ms. Olson or other walkers or joggers to use the track. If the fees that the District has charged occasionally to private groups for their exclusive use of the facility

render the immunity inapplicable in Ms. Olson's case, numerous public schools and municipal parks practically would never have immunity. Such a decision would undermine the legislative intent of the Recreational Immunity Statute. This Court should affirm the summary judgment in favor of the District.

Finally, the undisputed facts surrounding Ms. Olson's accident are such that the District as a landowner would have been entitled to summary judgment even without the immunity created by the Statute.

II. Statement of Issues

1. The Recreational Use Immunity Statute was enacted to encourage landowners to open their lands to the public. Landowners who do so may restrict access to certain uses at certain times and still qualify for recreational use immunity. The District opened the outdoor recreational facilities at Foster High School to residents for jogging and walking, with reasonable, non-discriminatory restrictions on access to the track, which Ms. Olson was using at the time of her injury. Do those restrictions in this case somehow forfeit the District's immunity under RCW 4.24.210?

2. Under the Statute, the landowner who does not charge a fee for allowing "member of the public to use" the land for outdoor recreation "shall not be liable for unintentional injuries to such users." The District did not charge Ms. Olson or other walkers

or joggers to use the facilities. In the past the District did charge private groups fees for the exclusive use of the facilities on several occasions. Did charging these fees to private groups for the use of the facilities forfeit the District's immunity under the Statute when the facilities were open to the public for use without charge?

3. Even where immunity applies, the statute imposes liability on landowners "for injuries sustained to users by reason of a known dangerous artificial [and] latent condition" The District has never received a complaint or claim from users stepping down from the bleachers to the track. The condition is open and apparent. Does this lack of actual knowledge preserve the immunity of the District under the statute?

4. The step in question is not hidden or latently hazardous. The elevation change between the bleachers and the track field is visible, particularly in broad daylight, delineated by a black chain link fence and gate. Ms. Olson had spent hundreds of hours at the track and athletic facility walking and jogging. Thousands of other people have done the same. Taking the material facts in the light most favorable to the non-moving party, was summary judgment appropriate in favor of the District, even without considering the application of the Recreational Use Immunity Statute?

III. Statement of the Case

A. Statement of Facts

1. The Public had Free Access to Use the High School Stadium and Track

Elizabeth Olson fell and sprained her ankle at Foster High School's Werner Neudorf Stadium in Tukwila, Washington. CP 6. The Stadium's field and facilities, including a running track, were open to community members at no charge for the purposes of outdoor recreation. CP 49. Members of the public who could show proof of address as residents of Tukwila were issued free access cards. CP 2, 49. Ms. Olson was at the track to walk and run. CP 6. Her injury was caused by an open and obvious condition, a step down from the Stadium bleachers to the track surface. See, CP 68-74.

The District's policy regarding use of Werner Neudorf Stadium provides, in pertinent part:

Use of the Track: Unscheduled use of the track is permitted for community members wishing to jog or walk from **5:00 a.m. - 8:00 a.m.** (prior to students arriving to school) and **4:00 p.m. - 10:00 p.m.** (when students are not present for school instruction or when sponsored athletic events are occurring). Community use is appropriate on weekends when students are not in school.

CP 49.

Ms. Olson had been issued a keycard access pass by the District at no charge. CP 2. Ms. Olson was a resident of Renton at

the time of her fall.¹ CP 52, 64. Ms. Olson would often come to the track after work or on her days off. CP 56, 57. Ms. Olson did not normally use her keycard to access the facility, since the entrance gate was “rarely ever closed” during the Stadium’s open hours.² CP 64.

Ms. Olson had been regularly visiting the Stadium and track area since her move to Tukwila in 2006. CP 54. In addition to tennis at Foster High School and swimming at the Tukwila pool, she jogged or walked at the Stadium’s track “several times a week.” CP 53-54. At the time of her injury, she had been going to the track for at least five or six years. CP 54-55.

Two signs posted near the Stadium stated the District’s use restrictions:

Tukwila School District Rules

Welcome to Foster High School

1. During School hours all visitors must check in at the school office.
2. This facility is closed from dusk until dawn, with the exception of school sanctioned events.
3. No weapons allowed.
4. No drugs, alcohol, or tobacco allowed.
5. No motorized or wheeled vehicles allowed
6. No loitering.

¹ The District has never denied an application and does not require applicants to renew their applications if they move. CP 221, 224.

² The record reflects access cards were unnecessary, since the gates to the track were unlocked during the hours between 5 a.m. and 10 p.m. CP 222-223.

7. Violations of Tukwila School District policies and/or local, state or federal laws are prohibited.
8. Criminal trespass is prohibited.
9. No skateboarding.
10. Use of school district property requires prior approval.

Violators are subject to removal and prosecution by Tukwila School District and the Tukwila Police Department.

* * *

Facility open between the hours of
5:00 am and 10:00 pm
No Pets (service animals allowed)
No Cleated Shoes
No Food or Drink (water allowed)
No Bicycle, Skateboards, or Wheeled Devices
Allowed (wheel chairs allowed)

CP 206-207, 213-214, 217.

Over those five years, the District had charged fees for private groups to use all aspects of the athletic facilities at the Stadium, including the track, artificial turf, announcer and control booth, custodian, field supervisor, police security, and scoreboard. CP 214, 226-228. The fees for use of different parts of the facilities followed the District's policy for community use of the facilities. See, CP 47-49.

From information provided during discovery, exclusive private use of the track has been limited to seven instances over the last five year for a total fee collected of \$6,810. See, CP 209-

210, 214, 226-228. At all other times during open hours, the public freely used the track for walking or jogging. CP 209.

2. Ms. Olson's Fall.

On April 26, 2012, late in the afternoon, visibility was good, and the weather was sunny with some clouds. CP 58. Ms. Olson began her workout by running up and down the bleacher stairs in preparation for a three-mile run. CP 59.

After her warm up, she was "revved up to go onto the track" and took a "big flying step" through a gate exiting the bleacher area and down onto the track. CP 60-62. According to Ms. Olson:

I stepped on my foot too – almost too hard and I lost my balance and then rolled – so I hit my foot, one, on the right side of my left foot, and then rolled it, okay, and snapped one of my ligaments.

CP 58.

Ms. Olson testified that she had never entered the track through this particular gate before, but used that entryway on the day of the incident: "I think the gate was open and I thought, 'Oh, this is the easy way to get onto the track.'" CP 61.

A series of pictures in the record show the step down to the track that was the scene of her injury. CP 68-74. This photograph is typical of the day in question:



CP 68.

The District has employed Ronald Young as a maintenance worker for over fourteen years. CP 83. His shop is located next to the Stadium, and his responsibilities include maintenance of the football field and track area. CP 83. During his fourteen years Mr. Young has been at the facility daily, has walked up and down the step at issue hundreds of times, and is very familiar with the bleachers and track area. CP 78-79, 84.

Q. Have you ever walked through that gate?

A. Many times.

Q. So you've walked both up and down that step.

True?

- A. Mm-hm.
Q. You've never been hurt doing that?
A. No, sir.

CP 80-81. In his fourteen years working for the District, Mr. Young has not heard of any complaints or injuries related to the step at issue before the incident at issue:

- Q. Are you aware of any other injuries aside from my client's that have been reported in relationship to that step ... ?
A. No, sir.

CP 82.

Mr. Young has seen hundreds, if not thousands of people running, jogging, or walking up at the facility and down the bleachers and stepping through the gate onto the track. CP 84. He has never heard of or received any complaints from anyone about the step being dangerous. CP 84. In his position, he would have been informed had a complaint been made or an injury occurred.

CP 84.

B. Statement of Proceedings

Plaintiff first filed a lawsuit in April 2013. Both parties participated in extensive discovery including depositions of Ms. Olson, her friend Abby Politeo, and District employees, Sally Jerome and Ronald Young. On February 28, 2014, the District filed a Motion for Summary Judgment. Plaintiff voluntarily dismissed that lawsuit on March 5, 2014. See *Olson v. Tukwila School District*, King Co. Cause No. 13-2-16358-6 KNT.

Ms. Olson then retained new counsel and filed her complaint in this case on July 3, 2014. CP 1-7. The District answered, see, CP 13-24, responded to new discovery requests from Ms. Olson, and then filed its Motion for Summary Judgment based on RCW 4.24.210 "Recreational Use Immunity." CP 25-86.

With her September 22, 2014 response to the Motion for Summary Judgment, CP 87-98. Ms. Olson filed a separate motion for summary judgment to strike the defense of the Washington State Recreational Use Immunity statute. CP 114-125.

The District replied and opposed the cross-motion. CP 234-240, 204-212. After Ms. Olson replied, CP 230-233, hearing was held before King County Superior Court Judge Chun. RP 1-46. He took the matter under advisement, then he wrote an opinion and order. CP 254-256.

The Honorable Judge Chun ruled:

[Recreational Use] immunity applies in this case, because, at the time of the incident, defendant was allowing "members of the public" --including plaintiff-- "to use" the facility at issue "for the purposes of outdoor recreation, without charging a fee of any kind therefor[.]" See [RCW 4.24.210(1)]. And plaintiff was "such" a user, *i.e.*, she was using the facility for a recreational purpose. See *id.*

The foregoing construction of the statute accords with Washington case law. See, *e.g.*, *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 286 (2012) (statute did not apply where the landowner, who otherwise operated an admission-fee-based camp, allowed a

group access for no charge; at the time of the access, other members of the public were excluded and thus the camp was not open to the public for the purposes of the statute). A review of *Cregan* and other authorities persuades the Court that --as asserted by defense counsel at oral argument-- the distinction between a private group and a public user is one that makes a legal difference.

Further, to conclude that occasional fees charged to private groups would render the immunity inapplicable here would mean that numerous public schools and municipal parks (who also charge such occasional fees) would never be immune, which would seem to undermine both the legislative intent and well as established case law. To the extent judicial notice is required here -i.e., with respect to public schools and municipal parks- the Court takes such notice pursuant to ER 201.

CP 255.

Ms. Olson filed her notice of appeal on December 17, 2014.

CP 273.

IV. Argument

A. Standard of Review.

This Court can affirm the dismissal by the trial court on any ground found in the record. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002). In *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 693-694, 317 P.3d 987 (2014), the Court set out the approach for the Court's review of a Recreational Use Immunity defense:

When the facts are undisputed, immunity is a question of law for the court. See *Beebe v. Moses*, 113 Wn. App. 464, 467, 54 P.3d 188 (2002) (noting that invitee status is question of law where facts are undisputed); *Botka v. Estate of Hoerr*, 105 Wn. App. 974, 983, 21 P.3d 723 (2001) (noting that invitee status “can be implied from the prior conduct and statements of the property possessors or their agents”). But where material facts are disputed, a trial is needed to resolve the issue.

Because recreational use immunity is an affirmative defense, the landowner asserting it carries the burden of proving entitlement to immunity under the statute. See *Olpinski v. Clement*, 73 Wn.2d 944, 950, 442 P.2d 260 (1968).

In construing a statute, our “fundamental objective . . . is to ascertain and carry out the intent of the legislature.” *State v. Morales*, 173 Wn.2d 560, 567, 269 P.3d 263 (2012). “We determine the intent of the legislature primarily from the statutory language.” *Id.* (citing *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995)). While legislative intent cannot overcome “an otherwise discernible, plain meaning” on the face of the statute, we must interpret the terms of a statute in harmony with its purpose. *N. Coast Air Servs., Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 321, 759 P.2d 405 (1988). [Footnote omitted.]

This Court reviews the trial court’s decision on the motion for summary judgment *de novo*, engaging in the same inquiry as the trial court, viewing the facts, as well as the reasonable inferences from those facts, in the light most favorable to the nonmoving party. See *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B. Recreational Immunity Applies and Bars Ms. Olson's Claims

1. This Appeal Presents Questions on Two of the Statute's Requirements.

The statutes provide:

(1) Except as otherwise provided in subsection [] (4) of this section, any public . . . landowners, . . . or others in lawful possession and control of any lands . . . , who allow members of the public to use them for the purposes of outdoor recreation, . . . without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

* * *

(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.

In ***Cregan v. Fourth Mem'l Church***, 175 Wn.2d 279, 284 P.3d 860 (2012), *cited with approval by Camicia*, 179 Wn.2d at 695-696, the Washington Supreme Court observed, "Thus, to be immune under RCW 4.24.210(1) the landowner must establish that the use (1) was open to members of the public (2) for recreational purposes and (3) no fee of any kind was charged." The Court's spare recitation of the elements of the statute in these cases has caused confusion for Ms. Olson in her interpretation of the statute.

No one questions that Ms. Olson was engaged in outdoor recreational activity. She was exercising, walking and running

outside at the Stadium's track. But Ms. Olson claims that the requirement that "no fee of any kind was charged therefor" is not met on the facts of this case because the District has at times charged private groups for their exclusive use of the facility. She also claims that this facility was not open to "members of the public" because of the District's access and use restrictions. Ms. Olson has it wrong on both counts.

"The public and free-use requirements under RCW 4.24.210(1) are separate inquiries." *Cregan*, 175 Wn.2d at 285. Ms. Olson's analysis blurs these distinct inquiries. Each inquiry is undertaken in the following sections of argument.

2. Public Use: The District's Reasonable Access and Use Facilities were Open to the Public.

The legislature did not define the term "public" as used in the statute. In *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285-86 (2012), the Washington Supreme Court provided an in-depth analysis of the meaning of "public" in the statute:

Landowners who open their lands to the public may be able to restrict some access and still qualify for recreational use immunity, but the line between what is considered "public" despite some restriction and only private use will depend on the specific facts at hand. The facts surrounding access are viewed objectively . . . Permissible restriction could include limiting the types of recreational activity allowed on the land. For example, a landowner that permits the public to hike or picnic may wish to prohibit the public from hunting on its land. A landowner may also allow

public access only during nonbusiness times.
See *Home v. N. Kitsap Sch. Dist.*, 92 Wn. App. 709, 712, 965 P.2d 1112 (1998) (public permitted to use field except during school events). In all of these examples, the land is still held open to the public. (That is, anyone is welcome to hike or picnic even though hunting is not allowed; or anyone is welcome to use the football field during permitted hours.) [Citations omitted; emphasis added.]

In *Home v. North Kitsap Sch. Dist.*, 92 Wn. App. 709, 714-717, 965 P.2d 1112 (1998), the Court of Appeals surveyed the national application of recreational use statutes as applied to school athletic fields. In each of the cases referenced by the court, the immunity did not apply only because at the time of the injury the district was using its facility solely for a students' activity and not holding the facility open for use by members of the public. The facility need not be held open to the public at all times for immunity to be available. See, *Home*, 92 Wn. App. at 714.

By contrast here, the track was open to the public when Ms. Olson used it and was injured. Ms. Olson was using the outdoor track free of charge for the type of outdoor recreational activity contemplated by the statute. The District's policy balanced the need for community access with use for student activities. See, CP 47-49.

Ms. Olson's argument challenges whether the athletic area is open to the public, because the District restricted access,

according to the posted sign at the Stadium.³ The sign she criticizes stated:

Tukwila School District Rules
Welcome to Foster High School

1. During School hours all visitors must check in at the school office.
2. This facility is closed from dusk until dawn, with the exception of school sanctioned events.
3. No weapons allowed.
4. No drugs, alcohol, or tobacco allowed.
5. No motorized or wheeled vehicles allowed
6. No loitering.
7. Violations of Tukwila School District policies and/or local, state or federal laws are prohibited.
8. Criminal trespass is prohibited.
9. No skateboarding.
10. Use of school district property requires prior approval.

Violators are subject to removal and prosecution by Tukwila School District and the Tukwila Police Department.

* * *

Facility open between the hours of
5:00 am and 10:00 pm
No Pets (service animals allowed)
No Cleated Shoes
No Food or Drink (water allowed)
No Bicycle, Skateboards, or Wheeled Devices
Allowed (wheel chairs allowed)

CP 206-207, 214, 217.

³ Ms. Olson argues: "If the facility . . . was open to the public, the general public would be allowed to use the facility and the Residents of Tukwila would not need permission to use the facility, as well as there would not be a gated entrance and such limiting signage to keep people off the facility grounds." Brief of Appellant at 13-14.

Ms. Olson remarkably suggests that the reservation of the right “to exclude members of the public carrying weapons or drugs, or carrying alcohol,” as well as these other restrictions, and the signs announcing these limitations, compromises the access of members of the public. See, Brief of Appellant at 8-9. She also complains about the District having a gate that is capable of being locked:

On the day of the site inspection by Joellen Gill, the gate was open and there was a key to open the gate hanging overhead. If the facility was truly “open”, the Tukwila School District would not bother adding a key to open the gate. There would also not be a locked gate at all with a “key only” access.

Id. at 14-15.⁴

In *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993), *aff'g* 64 Wn. App. 930, 827 P.2d 329 (1992), the Court upheld the immunity of the City of Kennewick for a dangerous but obvious condition on the land at a city park. The City of Kennewick Municipal Code restricts use at city parks, in the same manner the posted restrictions at the Stadium in this case restrict use:

9-44-020: Park Rules: The following are hereby adopted as park rules and regulations of the City of Kennewick, which are applicable to all public parks and recreational areas owned by or include the control of the officials of the City of Kennewick:

⁴ Access cards are not even necessary to enter, since the gates to the track are unlocked during the hours of 5 a.m. and 10 p.m. CP 222-223.

- (1) Parks close one-half hour after sunset until 6:00 a.m. Written permission from City of Kennewick Parks Department may be obtained for special events;
- (2) All dogs must be on leashes;
- (3) No horse riding is allowed;
- (4) Defacing or destroying property is prohibited;
- (5) Areas being irrigated or mowed are closed to public use;
- (6) All waste material must be deposited in refuse cans;
- (7) Kite flying is prohibited in Lawrence Scott and Kenwood Parks due to hazardous conditions;
- (8) No alcohol allowed on park/recreation premises. Written permission may be obtained for special events in Columbia Park;
- (9) No golf practice use, except within the boundaries of the Columbia Park Golf Course;
- (10) Pet owners must pick up pet waste and deposit in refuse containers;
- (11) At fishing lagoon at the east end of Columbia Park;
 - (a) Only juveniles (14 years and younger) and persons with disabilities with a reduced fee license are allowed to fish;
 - (b) Fishing Season is year round;
 - (c) Daily fishing limit is a total of five (5) game fish, no minimum size;
 - (d) No bird feeding;
 - (e) No swimming allowed;
 - (f) No floating devices allowed without a permit;
- (12) Tobacco products use is not permitted within 20-feet of park playgrounds and tot-lots.

9-44-025: Trespassing: In addition to such other penalties as may be imposed by law for the violation of posted rules and regulations or the commission of other offenses in Kennewick Municipal Parks, the Kennewick Police or the Director of Parks are authorized to issue trespass notifications to any person against whom they have probable cause to believe have committed a crime or infraction while on

a City park. The trespass notification will be valid for 30 to 365 days and will identify the park or parks from which the offender is excluded. The Park Commission may extend or expand this notice by motion.

9-44-030: Posting of Rules: These rules and regulations are to be posted at conspicuous places in the City parks and recreational areas. The authority and penalties for the above rules and regulations are indicated in Kennewick Municipal Code 10.08.040.

9-44-040: Open to Public Events: "Open to Public" events are not allowed except with written permission from the Parks and Recreation Department.

Kennewick Municipal Code, Chapters 9.44.020-9.44.040 [See Appendix; emphases added.].

Neither the Washington Supreme Court nor the Court of Appeals even considered that Kennewick's "restrictions" on use by members of the public impacted the potential applicability of the immunity statute. Municipal parks and exercise areas – like the District's track area – expressly fall within the types of outdoor public recreational areas contemplated by the statute. Municipalities are afforded the Statute's immunity protection to encourage open space for recreation. See RCW 4.24.200.

In addition to reasonable **access** restrictions, **Cregan** provides that reasonable restrictions on the **user** may also be appropriate:

For example, a landowner may allow minor children on his or her land only if accompanied by an adult. Such restrictions may be permitted provided the restrictions are not ... discriminatory.

Cregan, 175 Wn.2d at 286 n.5. “Members of the public” do not need to include those who smoke, consume alcohol, carry weapons or play golf for the land to be open to “public use.”

The “public” issue in **Cregan** was whether the landowner opened the land to the public at all. In that case, the land was privately owned, and restrictively managed:

Fourth Memorial allows only select groups to privately use its camp. The policy behind the statute is to encourage landowners to open their land for free public recreational use. That is not the situation here. [Emphasis added.]

Cregan, 175 Wn.2d at 286.

The District’s limitation on access to authorized card holders bears little resemblance to the practice of Fourth Memorial which “restrict[ed] users based on their religious affiliation.” See, *Id.* The District’s situation is more akin to the City of Kennewick Municipal Code secs. 9-44-020 (“Written permission may be obtained for special events.”); 9-44-040 (“Open to Public” events are not allowed except with written permission from the Parks and Recreation Department.”).

The access limitations and requirements of the District’s use and access policy should not negate the District’s immunity. The District’s policy and practice reflects only reasonable and nondiscriminatory restriction on users and access such as those discussed with approval in **Cregan**.

3. Free Use:

a. The Plain Meaning of “Fee of any kind therefor” Does Not Include Fees for Other Uses.

The free-use element is a distinct inquiry from the “public use” element. *Cregan*, 175 Wn.2d at 285. To ascertain and carry out the intent of the legislature, the Court must look to the statutory language. *Camicia*, 179 Wn.2d at 694. The statute provides in pertinent part:

[P]ublic . . . landowners . . . who allow members of the public to use them for the purposes of outdoor recreation . . . without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.

RCW 4.24.210(1). The statute fairly read provides that a landowner who does not charge a fee for allowing “members of the public to use” the land for outdoor recreation “shall not be liable for unintentional injuries to such users.”

The plain meaning of the statute should dispense with Ms. Olson’s arguments. She was not charged a “fee therefor,” *i.e.*, for her use of the track. No one was ever charged a fee for the use to which she put the facilities, warming up, then walking or jogging around the track. The only fees charged for use of the track were charged as part of infrequent exclusive rental of the facility by a private group.

b. The Fees Charged Do Not Deprive the District of Immunity

Over the past five years, the District charged fees for private groups to use the Stadium including the artificial turf, announcer, control booth, scoreboard, custodian, field supervisor, and police security. CP 214, 226-228. As for the track at the Stadium, the following table provided during discovery, shows that the private use of the track has been limited to seven instances over the last five years for a total of \$6,810:

Neudorf Track	Neudorf Track					
TUKWILA 049	TUKWILA SKYWAY SOCCER CLUB (TUSK)	8064	H	4/9/2009	Neudorf Stadium Track	2,280.00
SEATTLE 087	SEATTLE CHRISTIAN SCHOOL	8792	H	6/12/2011	Neudorf Stadium Track TRACK & FIELD	250
SEATTLE 087	SEATTLE CHRISTIAN SCHOOL	8972	H	6/12/2011	Neudorf Stadium Track TRACK & FIELD	250
SOMALI C001	SOMALI COMMUNITY COALITION SERVICES	8838	H	6/22/2011	SOMALI COMMUNITY SOCCER TOURNA	2,460.00
BARTON F000	BARTON FOOTBALL ACADEMY	9030	H	5/27/2012	Neudorf Stadium Turf APRIL 15, 2012	70

SOMALI C001	SOMALI COMMUNITY COALITION SERVICES	9072	H	6/11/2012	SOMALI COMMUNITY SOCCER TOURNA	1,200.00
TUKWILA 049	TUKWILA SKYWAY SOCCER CLUB (TUSK)	9072	H	12/18/2012	10 Additional Game Hours Cup Play 12/15	300

CP 228.

The occasional private use of the District's Stadium, including the track area, presents the opposite situation from that addressed in *Cregan, supra*. In *Cregan*, the landowner allowed the plaintiff's group access for no charge in a deviation from its normal operation an admission fee-based camp only accessible to Christian or secular groups. Immunity did not apply since the free use was not the normal practice.

Here, immunity should apply. Ms. Olson used the track at no charge consistent with the District's normal policy of free public access. CP 49. The occasional fee-based private use of the Stadium is the exception to the normal practice. The District's policy of charging fees for facilities is consistent with the case law. See, e.g., *Home, supra*. Ms. Olson cannot rely on the seven instances of private rentals to exclude the District from immunity under the statute.

In the trial court, Ms. Olson argued that *Plano v. City of Renton*, 103 Wn. App. 910, 14 P.3d 871 (2000), supported her

position. That case held that the City was not entitled to statutory immunity when the area where Plano's accident occurred was subject to a fee for use. By contrast here, the area at issue was being used free of any charge. The fact that the district had occasionally charged private groups for **exclusive** use of the track should not change that conclusion. The **Plano** court observed:

A landowner can also charge a fee for public use of a portion of its recreational land without losing immunity for public use of the remainder. A Florida case illustrates the point. *Kleer v. United States*, 761 F.2d 1492 (11th Cir. 1985). The plaintiff was injured while diving from a bridge in an undeveloped portion of the Ocala National Forest. There was no fee for using this area. The court found immunity despite the fact that the government charged fees in developed areas of the National Forest. *Kleer*, 761 F.2d at 1495.

Washington's statute, which like Florida's is intended to encourage owners to make land available for public use, see RCW 4.24.200, is consistent with the approach in *Kleer*. A landowner does not need to devote an entire contiguous parcel of land to public use without charge in order to have immunity. See *Kleer*, 761 F.2d at 1495. A landowner must only show that it charges no fee for using the land or water area where the injury occurred. [Emphasis added.]

103 Wn. App. at 914.

Similarly, a landowner does not need to hold open the land for all times without ever charging a fee for use of the facility. Charging an occasional fee for Stadium rental does not change the fact that no fee was charged for such use as Ms. Olson and other members of the public put the track.

The Court in *Home*, 92 Wn. App. at 714, observed that “a landowner may use the land for different purposes at different times” and not lose immunity. To determine immunity, “[I]t is necessary to focus on the nature of the landowner’s use at the time of the accident being litigated.” *Id.* The District never charged a fee for use of the track for walking or jogging. The only time a fee was charged for the track was when the District rented out the entire facility for the exclusive use of a private group. The District’s policy appropriately balances free community use with use for other purposes. See, CP 47-49.

c. Oregon Case Law Provides No Support to Ms. Olson; the Cases Implicitly Support the District’s Position

Ms. Olson contends the District should not be immune “if a fee was charged for any use.” Brief of Appellant at 23, citing *Coleman v. Oregon Parks & Recreation Dep’t*, 347 Or. 94, 217 P.3d 651 (2009). In the Oregon case, plaintiff Coleman arrived at Tugman Park intending to camp overnight. 347 Or. at 96. At that time, Tugman Park charged a fee for campsite and gazebo rental, but was otherwise open to the public free of charge. *Id.* Having paid for the campsite, Coleman decided to explore the park with a friend on their mountain bikes. *Id.* While on a designated trail, where the public was free to ride, Coleman rode his bike off a connected bridge, which lacked a ramp on one side.

The Oregon Supreme Court, in a four-to-three decision, denied the defendant state park department's motion for summary judgment and concluded that it "did not establish that it made 'no charge for permission to use' the Park." **Coleman**, 347 Or. at 104, 217 P.3d 651. The Court further held:

To be entitled to immunity, the landowner must make **no** charge for permission to use the land. If the landowner makes a charge for permission to use the its land, immunity does not apply, even if the injured person is not engaged in the use that was the basis for the charge at the time of injury. So, as in this case, if the landowner makes a charge to use a park for camping, the landowner forfeits its immunity, even if a camper is injured while biking. [Emphasis in original]

Id. at 102–103. Ms. Olson seeks to extend **Coleman** to her case.

The effort must fail. ORS 105.682 grants immunity to landowners who open their land to the public for recreational purposes:

(1) Except as provided by subsection (2) of this section, and subject to the provisions of ORS 105.688, an owner of land is not liable in contract or tort for any personal injury, death or property damage that arises out of the use of the land for recreational purposes

ORS 105.688(2)(a) limits the immunity for recreational use provided in ORS 105.682:

The immunities provided by ORS 105.682 apply only if . . . the owner makes no charge for permission to use the land[.]

The facts and holding in **Coleman** are of no assistance to Ms. Olson. As a camper, Coleman was subject to and did pay a fee to use Tugman Park. The decision stands for the proposition that it does not matter that Coleman was using a part of the park for a purpose that was free to other non-camper users of the park.⁵ Coleman had paid the fee which the Parks Dept. charged for permission to use the land. The Parks Dept. was not immune from suit by Coleman.

In **Stringer v. U.S. Dept. Of Agriculture (Forest Service)**, ___ F.Supp. ___ 2014 WL 5365326 (D.Or. 2014).3d, the federal court in Oregon refused to extend **Coleman** to a plaintiff who had not paid a fee for use of National Forest Service land. In **Stringer**.3d, a snowmobiler in the Deschutes National Forest tried to avoid the immunity afforded the federal agency by the Oregon statute. Snowmobilers were not charged fees for the use of the forest service land; but campers and skiers were charged fees for use of the same lands. *Id.* *1.

The federal court found the immunity statute applied to bar the snowmobiler's suit:

As articulated in *Coleman*, there must be some requisite relationship between the fee charged and the injured plaintiff. 347 Or. at 103–104, 217 P.3d 651 (“As campers, plaintiffs were entitled to use all of Tugman Park, including its bike trials.... The state also

⁵ The decision hinged in part on the definition of “land” in ORS 105.672(3). See, **Coleman**, 347 Or. at 103.

did not establish that as a camper, plaintiffs' use was limited to the piece of land associated with the charge.")

Stringer, unlike the Colemans, lacked this requisite relationship. Stringer was neither a camper nor a skier; he was a snowmobiler. As a snowmobiler, Stringer engaged in an activity not subject to a "charge" under ORS § 105.672(1)(a).

2014 WL 5365326 *3-*4.3d. In this case, there is no relationship between Ms. Olson and any fees ever charged by the District for use of the track or Stadium.

If anything, the Oregon decisions accord with the spirit of the Washington cases, including the Washington Court of Appeals decision in *Plano, supra*. Plaintiff Plano was using the moorage, a part of the City of Renton's property for which it charged a fee for use. Other parts of the park were free to use. Even though Plano had not paid a fee for the day of her accident, Plano had purchased an annual boat launch permit which permitted her to moor for one night, and she had paid a fee for another night. *Plano*, 103 Wn. App. at 913. The *Plano* court observed, "Under the statute, immunity is available only if Renton does not charge a fee of *any* kind for *such* use." *Id.* at 914 (emphasis added). But Renton did charge a fee for the moorage use.

If *Coleman* and *Stringer*.3d provide this Court any guidance, it may be in interpreting the meaning of the phrase in Washington's statute, "without charging a fee of any kind therefor."

By comparison, Oregon’s statutory immunity only applies if the landowner “makes no charge for permission to use the land.”

In Ms. Olson’s case, the District never collected a fee from any member of the public for the general use of the track at the Stadium for running or walking. Ms. Olson never paid a fee. The fees charged private groups by the District for the exclusive use of the facilities do not forfeit the immunity granted to the District by RCW 4.24.210 to suits by members of the public for the use in this case.

C. No Exception To Immunity: The District had No Actual Knowledge of Any Dangerous Condition

Even where immunity applies, the statute imposes liability on landowners “for injuries sustained to users by reason of a known dangerous artificial [and] latent condition for which warning signs have not been conspicuously posted.” RCW 4.24.210(4)(a) (emphasis added).

As written, the four terms “known”, “dangerous”, “artificial”, and “latent” modify “condition”, not one another ... In particular, “latent” modifies “condition”, not “danger”. Therefore injuries that result from latent dangers presented by a patent condition are not actionable under RCW 4.24.210.

Van Dinter, 121 Wn.2d at 46. Here, as the photos show, the condition which allegedly caused her injury – the step down from the bleacher area to the track – was open and obvious to any user and not a known, dangerous, latent condition.

Washington courts have construed this statute to require that a plaintiff establish actual knowledge, as opposed to constructive knowledge, that a condition is dangerous. A plaintiff must “come forward with evidentiary facts from which a trier of fact could reasonably infer actual knowledge, by a preponderance of the evidence.” [Citations omitted.]

Jewels v. City of Bellingham, 180 Wn. App. 605, 610, 324 P.3d 700 (2014).

In ***Narouth v. Spokane County***, 121 Wn. App. 389, 88 P.3d 996 (2004), the court affirmed summary judgment for the County where Narouth slipped on a poorly maintained stairway in the park and twisted her ankle. *Id.* at 391. The County claimed immunity under the recreational use statute, because the park was open to the public free of charge; and while the worn edge and accumulation of pine needles on the steps was dangerous, the condition was neither known nor latent. *Id.* at 393. The appellate court upheld summary judgment on the “known” element because Narouth presented no evidence of the County’s actual knowledge and did not contradict the County’s evidence that no prior complaints or claims of injury has been made concerning the steps. *Id.*

Like Narouth, Ms. Olson sprained her ankle on a step. In *Narouth* the step was poorly maintained with a worn edge and an accumulation of pine needles. Here, Ms. Olson does not even claim the step was poorly maintained.

In the fourteen years Mr. Young has been a maintenance worker for the District, the District has never received a complaint or claim of injury from users stepping down from the bleachers to the track. There is no genuine issue of material fact. The District had no actual knowledge of any injury-causing condition. Its recreational use immunity remains intact. The District was entitled to summary judgment as a matter of law.

D. No Liability To Ms. Olson Even In The Absence Of Immunity.

Ms. Olson argues vehemently that the land was not held open to the public under the circumstances of the District's restrictions. She apparently recognizes that this argument leaves her only with the status of a mere licensee. See, Brief of Appellant at 39 ("Plaintiff was a licensee because of the locked gate, signage of exclusions, limited key and keycard access to the facility") She invokes the "protection of Washington law due licensees from Defendant." *Id.* She cannot be an invitee if her version of the facts and law is accepted. As a licensee she certainly cannot avoid summary judgment.

1. The District is Entitled to Summary Judgment Dismissing the Claims of Ms. Olson as a Mere Licensee.

While she claims she was entitled to the "protections of Washington law as a licensee," she does not recognize how limited

those protections are for her. Ms. Olson cannot show that the District breached any duty to her as a licensee under her version of the facts of this case.

A "licensee" enters the occupier's premises with the occupier's permission or tolerance, either (a) without an invitation or (b) with an invitation but for a purpose unrelated to any business dealings between the two. *Home v. N. Kitsap S.D.*, 92. Wn. App. at 718, quoting *Dotson v. Haddock*, 46 Wn.2d 52, 55, 278 P.2d 338 (1955); WPI 120.08; RESTATEMENT (SECOND) OF TORTS § 330.

Under the Restatement formulation:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

RESTATEMENT (SECOND) OF TORTS § 342.

Plaintiff's expert Jolene Gill's opinion that the step where Plaintiff was injured was unreasonably high and difficult to detect does not create any genuine issue of material fact. The District did

not know and reasonably should not have known of this as a hidden unreasonably dangerous condition. The condition existed for many years. There was never a complaint or prior accident. The District was not on notice of an unreasonably dangerous condition.

2. Even If She Were An Invitee Ms. Olson Could Not Avoid Summary Judgment On The Facts Of This Case.

The fault lies with Ms. Olson for her own injuries. Even assuming the step was unreasonably dangerous and the District should have somehow discovered it, Ms. Olson must prove that the District should “expect that [she] will not discover or realize the danger” and that, in fact, Ms. Olson “did not know or have reason to know of the condition and the risk involved.” *Compare*, RESTATEMENT (SECOND) OF TORTS § 342(a), (c) (duty to licensee) *with* RESTATEMENT (SECOND) OF TORTS § 343(a), (b) (duty to invitee).

A landowner is not liable for harm caused by open and obvious dangers. ***Mucsi v. Graoach Associates Ltd. Partnership No. 12***, 144 Wn.2d 847, 860, 31 P.3d 684 (2001). The fact plaintiff fell is not enough to prove Defendant should have recognized a risk. ***Brant v. Market Basket Stores***, 72 Wn.2d 446, 448 (1967).

The step in question is not hidden or latently hazardous. This is not a case of an undetectable broken step, an unusual

slippery condition, or some undetectable defect. There is an obvious elevation change between the bleachers and the track field that is clearly visible, particularly in broad daylight.

Ms. Gill admits in her report that Plaintiff was aware of an elevation change, just not the extent of the drop down. However, the boundary between the two areas at the line of elevation change is clearly marked by a black chain link fence and gate. Ms. Olson had spent countless hours at the track and athletic facility walking and jogging. Thousands of other people did the same but exercised reasonable care in stepping from the bleachers to the track.

Ms. Olson was aware there was a step down. She testified that she was unfamiliar with it. Yet she chose to take, "a big flying step." She admitted, "It was almost like a running step". CP 60-62.

Ms. Olson did not exercise reasonable caution and must bear responsibility for her own injuries and damages. Just because she did not appreciate the possibility of injuring herself taking a "running step" from the bleachers to the track does not make the step a latent unreasonably dangerous condition. The question is not whether Plaintiff herself detected the danger but rather whether it was reasonably detectable by a person exercising reasonable care. See *Van Dinter v. City of Kennewick*, 64 Wn. App. 930, 934, 827 P.2d 329 (1992), *aff'd* 121 Wn.2d 38, 846 P.2d 522 (1993).

V. CONCLUSION

The Recreational Use Immunity Statute was enacted to encourage landowners to open their lands to the public. RCW 4.24.200. The District had an appropriate policy in place to allow free community access to its facilities, balancing that use with student-related activity and also with other community activities for which fees were charged. The District's track at Foster High School was open to walkers and joggers to use for free. Ms. Olson was hurt while using it for free as a member of the public. To conclude that the restrictions expressed in signs at the track or the occasional fees charged to private groups somehow negates the immunity in Ms. Olson's case would mean that numerous public schools and municipal parks practically would never be immune. Such a decision would undermine the intent of the statute.

For all of the reasons set out in the brief, the Court should affirm Summary Judgment in favor of the District.

DATED this 29th day of May, 2015.

PREG O'DONNELL & GILLET PLLC



By
Earl Sutherland, WSBA #23928
Mark F. O'Donnell, WSBA #13606
Attorneys for Respondent Tukwila
School District

DECLARATION OF SERVICE

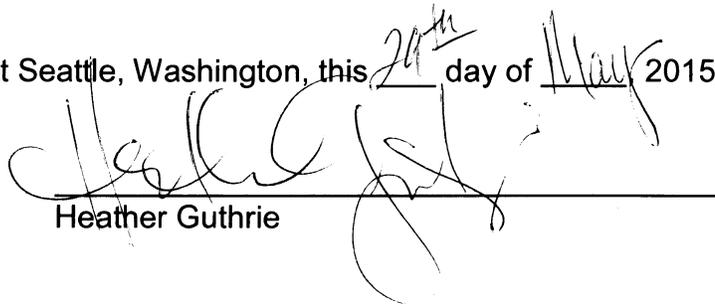
The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

Counsel for Plaintiff Elizabeth Olson:

Elizabeth Olson
2420 N. Airport Road, Apt. 10207
Ellensburg, WA 98926

- Via Messenger
- Via Facsimile –
- Via U.S. Mail, postage prepaid
- Via Overnight Mail, postage prepaid
- Via Email, with recipient's approval

DATED at Seattle, Washington, this 24th day of May, 2015.



Heather Guthrie

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APPENDIX OF STATUTES AND CODE PROVISIONS

Item **Description** **Pages**

1.	Kennewick Municipal Code	A 2-3
2.	Oregon Revised Statute 105.672	A 4
3.	Oregon Revised Statute 105.682	A 5
4.	Oregon Revised Statute 105.688	A 6-9
5.	RCW 4.24.200-210	A 10-13

Kennewick Municipal Code

9-44-020: Park Rules: The following are hereby adopted as park rules and regulations of the City of Kennewick, which are applicable to all public parks and recreational areas owned by or include the control of the officials of the City of Kennewick:

- (1) Parks close one-half hour after sunset until 6:00 a.m. Written permission from City of Kennewick Parks Department may be obtained for special events;
- (2) All dogs must be on leashes;
- (3) No horse riding is allowed;
- (4) Defacing or destroying property is prohibited;
- (5) Areas being irrigated or mowed are closed to public use;
- (6) All waste material must be deposited in refuse cans;
- (7) Kite flying is prohibited in Lawrence Scott and Kenwood Parks due to hazardous conditions;
- (8) No alcohol allowed on park/recreation premises. Written permission may be obtained for special events in Columbia Park;
- (9) No golf practice use, except within the boundaries of the Columbia Park Golf Course;
- (10) Pet owners must pick up pet waste and deposit in refuse containers;
- (11) At fishing lagoon at the east end of Columbia Park;
 - (a) Only juveniles (14 years and younger) and persons with disabilities with a reduced fee license are allowed to fish;
 - (b) Fishing Season is year round;
 - (c) Daily fishing limit is a total of five (5) game fish, no minimum size;
 - (d) No bird feeding;
 - (e) No swimming allowed;
 - (f) No floating devices allowed without a permit;
- (12) Tobacco products use is not permitted within 20-feet of park playgrounds and tot-lots.

9-44-025: Trespassing: In addition to such other penalties as may be imposed by law for the violation of posted rules and regulations or the commission of other offenses in Kennewick Municipal Parks, the Kennewick Police or the Director of Parks are authorized to issue trespass

notifications to any person against whom they have probable cause to believe have committed a crime or infraction while on a City park. The trespass notification will be valid for 30 to 365 days and will identify the park or parks from which the offender is excluded. The Park Commission may extend or expand this notice by motion.

9-44-030: Posting of Rules: These rules and regulations are to be posted at conspicuous places in the City parks and recreational areas. The authority and penalties for the above rules and regulations are indicated in Kennewick Municipal Code 10.08.040.

9-44-040: Open to Public Events: "Open to Public" events are not allowed except with written permission from the Parks and Recreation Department.

ORS 105.672

As used in ORS 105.672 (Definitions for ORS 105.672 to 105.696) to 105.696 (Duty of care or liability not created):

(1) Charge:

(a) Means the admission price or fee requested or expected by an owner in return for granting permission for a person to enter or go upon the owners land.

(b) Does not mean any amount received from a public body in return for granting permission for the public to enter or go upon the owners land.

(c) Does not include the fee for a winter recreation parking permit or any other parking fee of \$15 or less per day.

(2) Harvest has that meaning given in ORS 164.813 (Unlawful cutting and transport of special forest products).

(3) Land includes all real property, whether publicly or privately owned.

(4) Owner means the possessor of any interest in any land, such as the holder of a fee title, a tenant, a lessee, an occupant, the holder of an easement, the holder of a right of way or a person in possession of the land.

(5) Recreational purposes includes, but is not limited to, outdoor activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, nature study, outdoor educational activities, waterskiing, winter sports, viewing or enjoying historical, archaeological, scenic or scientific sites or volunteering for any public purpose project.

(6) Special forest products has that meaning given in ORS 164.813 (Unlawful cutting and transport of special forest products).

(7) Woodcutting means the cutting or removal of wood from land by an individual who has obtained permission from the owner of the land to cut or remove wood. [1995 c.456 §1; 2007 c.372 §1; 2009 c.532 §1; 2010 c.52 §1]

ORS 105.682

Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products

(1) Except as provided by subsection (2) of this section, and subject to the provisions of ORS 105.688 (Applicability of immunities from liability for owner of land), an owner of land is not liable in contract or tort for any personal injury, death or property damage that arises out of the use of the land for recreational purposes, gardening, woodcutting or the harvest of special forest products when the owner of land either directly or indirectly permits any person to use the land for recreational purposes, gardening, woodcutting or the harvest of special forest products. The limitation on liability provided by this section applies if the principal purpose for entry upon the land is for recreational purposes, gardening, woodcutting or the harvest of special forest products, and is not affected if the injury, death or damage occurs while the person entering land is engaging in activities other than the use of the land for recreational purposes, gardening, woodcutting or the harvest of special forest products.

(2) This section does not limit the liability of an owner of land for intentional injury or damage to a person coming onto land for recreational purposes, gardening, woodcutting or the harvest of special forest products. [1995 c.456 §3; 2009 c.532 §4]

ORS 105.688

Applicability of immunities from liability for owner of land

- restrictions

(1) Except as specifically provided in ORS 105.672 (Definitions for ORS 105.672 to 105.696) to 105.696 (Duty of care or liability not created), the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to:

(a) All land, including but not limited to land adjacent or contiguous to any bodies of water, watercourses or the ocean shore as defined by ORS 390.605 (Definitions);

(b) All roads, bodies of water, watercourses, rights of way, buildings, fixtures and structures on the land described in paragraph (a) of this subsection;

(c) All paths, trails, roads, watercourses and other rights of way while being used by a person to reach land for recreational purposes, gardening, woodcutting or the harvest of special forest products, that are on land adjacent to the land that the person intends to use for recreational purposes, gardening, woodcutting or the harvest of special forest products, and that have not been improved, designed or maintained for the specific purpose of providing access for recreational purposes, gardening, woodcutting or the harvest of special forest products; and

(d) All machinery or equipment on the land described in paragraph (a) of this subsection.

(2) The immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to land if the owner transfers an easement to a public body to use the land.

(3) Except as provided in subsections (4) to (7) of this section, the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) do not apply if the owner makes

any charge for permission to use the land for recreational purposes, gardening, woodcutting or the harvest of special forest products.

(4) If the owner charges for permission to use the owners land for one or more specific recreational purposes and the owner provides notice in the manner provided by subsection (8) of this section, the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to any use of the land other than the activities for which the charge is imposed. If the owner charges for permission to use a specified part of the owners land for recreational purposes and the owner provides notice in the manner provided by subsection (8) of this section, the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to the remainder of the owners land.

(5) The immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) for gardening do not apply if the owner charges more than \$25 per year for the use of the land for gardening. If the owner charges more than \$25 per year for the use of the land for gardening, the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to any use of the land other than gardening. If the owner charges more than \$25 per year for permission to use a specific part of the owners land for gardening and the owner provides notice in the manner provided by subsection (8) of this section, the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to the remainder of the owners land.

(6) The immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) for woodcutting do not apply if the owner charges more than \$75 per cord for permission to use the land for woodcutting. If the owner charges more than \$75 per cord for the use of the land for woodcutting, the immunities provided by ORS 105.682 (Liabilities of owner of land

used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to any use of the land other than woodcutting. If the owner charges more than \$75 per cord for permission to use a specific part of the owners land for woodcutting and the owner provides notice in the manner provided by subsection (8) of this section, the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to the remainder of the owners land.

(7) The immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) for the harvest of special forest products do not apply if the owner makes any charge for permission to use the land for the harvest of special forest products. If the owner charges for permission to use the owners land for the harvest of special forest products, the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to any use of the land other than the harvest of special forest products. If the owner charges for permission to use a specific part of the owners land for harvesting special forest products and the owner provides notice in the manner provided by subsection (8) of this section, the immunities provided by ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) apply to the remainder of the owners land.

(8) Notices under subsections (4) to (7) of this section may be given by posting, as part of a receipt, or by such other means as may be reasonably calculated to apprise a person of:

(a) The limited uses of the land for which the charge is made, and the immunities provided under ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening, woodcutting or harvest of special forest products) for other uses of the land; or

(b) The portion of the land the use of which is subject to the charge, and the immunities provided under ORS 105.682 (Liabilities of owner of land used by public for recreational purposes, gardening,

woodcutting or harvest of special forest products) for the remainder of the land. [1995 c.456 §4; 1999 c.872 §7; 2001 c.206 §1; 2009 c.532 §2; 2010 c.52 §2]

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.

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.]