

No. 295109

**FILED**

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

OCT 13 2011

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STATE OF WASHINGTON  
By \_\_\_\_\_

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

**Petitioner,**

**v.**

**GAVIN J. CREGAN, a married man,**

**Respondent.**

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....5

1. The Recreational Use Act, RCW 4.24.200 and RCW 4.24.210, provides a landowner immunity from liability for its negligence only when the landowner has not limited public access for recreation by charging any fee for entry.....5

2. Mr. Cregan has a fundamental right to seek adjudication of his action for bodily injury, which should not be extinguished by broad statutory construction.....6

3. The Recreational Use Act’s restriction of immunity to cases where no fee limits public access to the land should be broadly interpreted to avoid extension of immunity to cases of occasional or incidental free entry or use, where the landowner systematically and consistently denies access to all other members of the public who have not paid its standard fees for entry or use.....8

4. Prior Washington cases have denied recreational use immunity where the claimant paid no fee, when the landowner otherwise systematically limits public access by charging a fee.....11

5. Fourth Memorial’s attack on the applicability of Plano is inappropos.....15

6. Fourth Memorial cannot reconcile its demand for immunity with the Plano court’s denial of immunity to the City of Renton .....18

7. As in Neilson, this landowner’s property use is primarily for the generation of revenue.....19

8. The Washington cases relied upon by Fourth Memorial do not support or compel a grant of immunity in its favor.....20

9. Fourth Memorial’s reliance on legislative history is inappropriate, irrelevant and incomplete.....24

10. Fourth Memorial’s reliance on cases from other jurisdictions is misplaced and is addressed to a non-issue.....27

VI. CONCLUSION.....28

APPENDIX.....1

A. § 4.24.200. Liability of owners or others in possession of land and water areas for injuries to recreation users -- Purpose.....1

B. § 4.24.210. Liability of owners or others in possession of land and water areas for injuries to recreation users –Limitation.....2

**TABLE OF AUTHORITIES**

**CASES**

*City of Union Gap v. Dep't. of Ecology*, 148 Wn App 519, 195 P3d 580  
(2008).....8

*Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244  
(1972).....7

*Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 p.3d  
4 (2002).....25

*Ducey v. United States*, 713 F.2d 504, 511 (9th Cir. 1983).....11

*Gaeta v. Seattle City Light*, 54 Wn. App. 603, 774 P.2d 1255  
(1989).....22

*Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061  
(1993).....25

*Home v. North Kitsap School District*, 92 Wn.App. 709, 965 P.2d 1112  
(1998).....21, 22

*Hunter v. North Mason Sch. Dist.*, 85 Wn.2d 810, 814, 539 P.2d 845  
(1975).....6

*Interest of J.F.*, 109 Wn. App. 718, 37 P.3d 1227 (2001).....11

*Jones v. United States*, 693 F.2d 1299 (9<sup>th</sup> Cir. 1982).....24

*LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 1027, *cert. denied*, 493  
U.S. 814 (1989).....1

*Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 105, 829 P.2d  
746 (1992).....7

*Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 824 P.2d 541, *review  
denied*, 119 Wn.2d 1011 (1992).....6

*McCarver v. Manson Park*, 92 Wn.2d 370, 597 P.2d 1362 (1979)  
.....23, 26, 27

<i>McNeal v. Allen</i> , 95 Wn.2d 265, 621 P.2d 1285 (1980).....	7
<i>Michaels, et al v. CH2M Hill, et al</i> , 171 Wn2d 587, P3d, 2011 Wash. LEXIS 382, (No. 84168-3, decided May 26, 2011).....	7
<i>Morgan v. United States</i> , 709 F.2d 580, 584, (9 <sup>th</sup> Cir. 1983).....	26
<i>Nielsen v. Port of Bellingham</i> , 107 Wn. App. 662, 27 P.3d 1242 (2001), rev. denied, 145 Wn.2d 1027, 42 P.3d 974 (2002) .....	14, 15, 19, 20, 23
<i>Plano v. City of Renton</i> , 103 Wn. App. 910, 911-12, 14 P.3d 871 (2000).....	passim
<i>Rozner v. City of Bellevue</i> , 116 Wn.2d 342, 347, 804 P.2d 24 (1991).....	13
<i>Sidis v. Brodie/Dohrmann</i> , 117 Wn.2d 325, 329, 815 P.2d 781 (1991).....	25
<i>State v. Jacobs</i> , 154 Wn.2d 596, 600, P.7, 115 P.3d 281 (2005) .....	24, 25
<i>State v. Vance</i> , 29 Wash. 435, 70 P. 34 (1902).....	6
<i>Strain v. West Travel, Inc.</i> , 117 Wn. App. 251, 254, 70 P.3d 158, <i>review denied</i> 150 Wn.2d 1029, 82 P.3d 243 (2003).....	7, 10
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 657, 152 P.3d 1020 (2007).....	24
<i>Widman v. Johnson</i> , 81 Wn.App. 110; 912 P.2d 1095 (1996).....	22, 23

STATUTES

RCW 4.24.200.....	passim
RCW 4.24.210.....	passim

## I. INTRODUCTION

This matter is before this court on discretionary review, upon the trial court's certification for immediate appeal, of a summary judgment ruling dismissing the defendant's affirmative defense of recreational use immunity in a premises liability action brought to recover damages for serious ankle and leg fractures suffered by a volunteer nurse/counselor on a giant old fiberglass slide at defendant's summer camp in June, 2008.

## II. ASSIGNMENTS OF ERROR

Appellant's assignments of error 3—6 purport to assign error to oral comments by the trial court. Because this court's review of summary judgment rulings is de novo, oral comments by the trial court are irrelevant to the issue of error. An order granting summary judgment may be affirmed on any legal basis supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989)

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Recreational Use Act must be interpreted to extend immunity to encompass and preclude premises liability claims arising from occasional or incidental free recreational use, where the landowner systematically and consistently charges a fee for all other

public access to the property and bases the grant of free use on the unguided discretion of the property manager in the absence of any written policy for such free access.

#### IV. STATEMENT OF THE CASE

Riverview Bible Camp (“the Camp,” hereafter) is owned and operated by defendant Fourth Memorial Church (“Fourth Memorial” hereafter). CP 16. The Camp facilities are not open to the public. Fourth Memorial operates the Camp “to increase the Kingdom of God.” CP 103-104.

Since at least 1995, Fourth Memorial has exclusively rented the Camp to various secular and Christian groups, charging fees for entry and for use of Camp facilities and services, calculated and quoted per head, per day, in varying amounts depending upon which parts of the camp will be used. CP 46, 48-49, 59.

The Camp’s financial support is dependent upon rental income, and donations. CP 53. The annual Camp budget includes an operating profit from rentals, and the group user fees are set at a level intended to cover the operating costs of the facility. CP 50. 2009, the year following Respondent’s injury, was the first year the Camp lost money on an operations basis in the 8 1/2 years the current Director has been involved. CP 51-52, 46.

Groups are allowed to rent the Camp based in part upon their beliefs. Fourth Memorial rents the facility to Christian groups, and secular groups, but not to non-Christian religious groups. CP 47.

The slide which injured Gavin Cregan can be used only by members of admitted groups (and, of course, the Camp and Fourth Memorial staff). CP 52. Individuals are not allowed entry to the Camp except as part of a group. CP 47. Walk-ins are not allowed. CP 53.

Respondent Cregan is a registered nurse, who in the spring of 2008 was newly hired as a pediatric recovery room nurse at Sacred Heart Hospital. CP 61-62. Mr. Cregan agreed to serve as a volunteer adult nurse/counselor for a weekend summer camp program of a non-profit support group working with pediatric cardiac patients, affiliated with the hospital through its staff, Beats & Rhythms. CP 62. The program was to be conducted at the Camp, a facility on the Pend Oreille River, approximately 60 miles north of Spokane. CP 62.

Upon the Camp director's discretion and in the absence of any written policy of Fourth Memorial, the fees were waived for Beats & Rhythms, and the Camp facilities were rented to that group under the Camp's standard form rental contract for zero fee. CP 48, 49. Beats & Rhythms was the only group admitted to the camp without payment of fees in 2008 and 2009. CP 51, 54. However, when the group re-applied

in 2010, the director denied entry because of the commencement of this lawsuit. CP 49-50. The Camp's director characterized the frequency of granting free use as "occasionally." CP 105.

On June 27, 2008, Gavin Cregan reported to the Camp for the first day of the Beats & Rhythms program. CP 62. After an introductory tour of the Camp layout, he was directed to the Giant Slide, where children and adults were sliding down the old three-story fiberglass slide on burlap bags. CP 62.

The Giant Slide is an amusement park thrill-ride left-over from Expo '74, acquired by Fourth Memorial and installed at the Camp some time before 1995. CP 16, 57. On his second or third trip down the undulating slide, Mr. Cregan was launched into the air, causing him to lose control. He landed on his left foot/ankle, which caught, twisted and rotated as his body continued down the slide. He suffered tri-malleolar fractures, leaving him with permanent restrictions of motion in his left leg and ankle. CP 62-63.

Gavin Cregan brought this premises liability action against Fourth Memorial to recover tort damages. CP 3—14. Fourth Memorial cross-complained against Beats & Rhythms, and alleged that its own liability was precluded by immunity pursuant to RCW 4.24.200 and RCW 4.24.210. CP 18—19.

Mr. Cregan and Fourth Memorial filed cross-motions for summary judgment on the issue of Fourth Memorial's defense of statutory immunity. CP 28—33; 71—73. On October 22, 2010, the trial court heard argument and entered an order granting Mr. Cregan's motion, denying Fourth Memorial's motion and dismissing its affirmative defense of statutory immunity. CP 162—164. This appeal is taken from that ruling, as a matter of discretionary review upon the trial court's certification for immediate appeal. CP 219—220.

#### V. ARGUMENT

1. The Recreational Use Act, RCW 4.24.200 and RCW 4.24.210, provides a landowner immunity from liability for its negligence only when the landowner has not limited public access for recreation by charging any fee for entry.

The statutory intent of the Recreational Use Act is simple and clear. It immunizes landowners from liability for their negligence and fault when the property is made available to “the public” for outdoor recreation “without charging a fee of any kind.” If any public recreational access is conditioned upon the payment of an entry fee, the statutory immunity does not apply. RCW 4.24.200 provides, in pertinent part:

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. . .(emphasis supplied)

RCW 4.24.200

RCW 4.24.210 provides immunity solely to property owners/occupiers:

. . .who allow *members of the public* to use them for the purposes of outdoor recreation. . .*without charging a fee of any kind* therefor. . .

RCW 4.24.210(1) (emphasis supplied)

2. Mr. Cregan has a fundamental right to seek adjudication of his action for bodily injury, which should not be extinguished by broad statutory construction.

A person suffering personal injuries caused by the fault or negligence of another has a fundamental, substantial property right to seek indemnity through a lawsuit under common law. *Hunter v. North Mason Sch. Dist.*, 85 Wn.2d 810, 814, 539 P.2d 845 (1975); *see also State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902) (fundamental rights of citizenship include “the rights to the usual remedies to collect debts, and to enforce other personal rights”). Statutes in derogation of common law rules of liability are strictly construed, *Matthews v. Elk Pioneer Days*, 64 Wn.App. 433, 437-438, 824 P.2d 541, *review denied*, 119 Wn.2d 1011 (1992) and no intent to change the common law will be found unless it

appears with clarity. *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980).

Immunity is not to be broadly applied nor easily extended. It leaves wronged claimants without a remedy, which “runs contrary to the most fundamental precepts of our legal system.” *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 105, 829 P.2d 746 (1992) (discussing quasi-judicial immunity). Such statutory operation “is not to be extended for the benefit of those who do not *clearly* come within the terms of the statute.” *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972) (emphasis in original).

The Recreational Use Act is no exception to these rules: it is in derogation of common law rules of liability and must be strictly and narrowly construed. *Plano v. City of Renton*, 103 Wn.App. 910, 911-12, 14 P.3d 871 (2000). The Supreme Court has recently endorsed the *Plano* decision, applying the case to a different immunity statute in *Michaels, et al v. CH2M Hill, et al*, 171 Wn.2d 587, \_\_\_ P.3d \_\_\_, 2011 Wash. LEXIS 382, (No. 84168-3, decided May 26, 2011) Narrow construction means that the provision is “applied only to situations that are plainly and unmistakably consistent with the terms and spirit of the legislation.” *Strain v. West Travel, Inc.*, 117 Wn.App. 251, 254, 70 P.3d 158, *review denied* 150 Wn.2d 1029, 82 P.3d 243 (2003).

Strict or narrow statutory construction requires the court to prefer a narrow, restricted interpretation to a broad, more liberal interpretation. *City of Union Gap v. Dep't. of Ecology*, 148 Wn.App 519, 195 P.3d 580 (2008). The statute should not be applied beyond the scope clearly mandated by the statute, and any doubt should be resolved against immunity. *Id.*

3. The Recreational Use Act's restriction of immunity to cases where no fee limits public access to the land should be broadly interpreted to avoid extension of immunity to cases of occasional or incidental free entry or use, where the landowner systematically and consistently denies access to all other members of the public who have not paid its standard fees for entry or use.

Both below and in this court, Fourth Memorial has not cited any Washington case which has extended the specific statutory immunity of Washington's Recreational Use Act to an incidental or occasional free use, where the landowner or occupier systematically and consistently charges a fee for public access. The statute itself does not compel such a result. Its language makes clear that the purpose of the statute is to provide landowners an incentive to allow free public access to private land for recreational purposes. It also clearly provides that the charging of a fee "*of any kind*" for such public access precludes the immunity. RCW 4.24.210 (1) (emphasis supplied)

The statutory focus is upon free public access, not occasional free individual use. Before immunity is granted, free access must be provided to “*members*” of the public, not just to any member and not just to the individual bringing the claim which gives rise to the assertion of the defense. The language relates the “*charging a fee of any kind*” to such public access, not to any specific entry upon the land by any given individual or group. The word “. . .*therefor*” modifies or relates to the phrase “*members of the public to use*”. RCW 4.24.210 (1). Read literally, if any “*members of the public*” are charged a fee to use the property, the statute does protect the landowner from liability for its conduct. *Id.* (All emphases supplied).

The language which creates the preclusion effect of charging an entry fee, “*without charging a fee of any kind,*” is not time-limited or time-related. *Id.* (Emphasis supplied.) Thus, denial of public access through charging any sort of fee for entry or use precludes the application of the statute’s immunity. Where such denial of access is systematic, consistent and pervasive, and free use is only occasional or incidental and is dependent upon management discretion in the absence of any guiding policy, the landowner has not satisfied the letter or the spirit of the act and is not entitled to immunity from the consequences of its negligence or fault.

The logic of Fourth Memorial's position is that a landowner owes no duty of care to anyone it allows to enter its property for recreation without paying a fee, without regard to the extent of the landowner's denial of free access to the rest of the public. Certainly, the legislature easily could have worded the statute in such a manner if it had intended such a result. Other states have done so, (see the statutes at issue in the Missouri, Nebraska and Hawaii cases cited by Fourth Memorial, Appellant's Brief, p. 12—14) and the legislature presumably was aware of such other legislation.

But our legislature did not limit or narrow the preclusion effect of charging fees. It chose language which clearly denies immunity to landowners for limiting public access by "*charging a fee of any kind.*" *Id.* (Emphasis supplied.) The legislature could have, but did not, narrow that preclusion by any reference to the time of such charge, the identity of the payor or in any other way. It clearly linked "*charging a fee of any kind*" to the preclusion of immunity without limitation. *Id.* This court should give effect to the legislature's choice of language, and should not limit such preclusion.

It is well established that statutes entitled to liberal construction must have their exceptions and limitations strictly and narrowly construed. *Strain v. West Travel, Inc.*, 117 Wn.App. 251, 70 P.3d 158,

(2003), *supra*. Logically and conversely, where a statute in derogation of common law is strictly construed, statutory limitations of and exceptions to such statutory operation are broadly construed. *Interest of J.F.*, 109 Wn.App. 718, 733, 37 P.3d 1227 (2001); *see also, Ducey v. United States*, 713 F.2d 504, 511 (9th Cir. 1983) (applying Nevada law, the court holding that a recreational use statute is in derogation of common law, and consequently its exceptions “must be given the broadest reading that is within the fair intendment of the language used.”)

In the context of Washington’s Recreational Use Act, the preclusion of immunity by virtue of limiting public access through charging any fee is such a limitation of the statutory operation. It should not be construed away or interpreted out of effect for the benefit of a landowner whose land is typically, systematically and consistently available to the public only upon payment of a fee for entry and use and whose occasional free use is subject to the unguided discretion of the property manager. Any doubt about the scope of the statute must be resolved against the application of immunity.

4. Prior Washington cases have denied recreational use immunity where the claimant paid no fee, when the landowner otherwise systematically limits public access by charging a fee.

In *Plano v. City of Renton*, 103 Wn.App. 910, 14 P.3d 871 (2000), the court held that the City’s standard overnight moorage charge

precluded immunity under the statute for an injury caused by the condition of the metal ramp leading to the boat slips, despite the plaintiff's free use at the time of her injury. Plaintiff fell on the City's ramp and suffered a compound leg fracture. She had purchased an annual boat launch permit which gave her one free night of moorage. She paid \$10 for the second night of moorage. She did not pay the fee for her third night of moorage and was injured the following day when she went to unmoor her boat following the free day-use moorage period.

There, as here, the landowner (City of Renton) denied liability, claiming the protection of RCW 4.24.210. Both parties also filed cross-motions for summary judgment on the issue. The trial court granted the City's motion under the statute and entered an order of dismissal. Plaintiff appealed. Division One reversed and remanded for entry of partial summary judgment on Plaintiff's motion to strike the City's statutory affirmative defense, and for trial on her injury claim.

As noted above, the Court observed that the statute, as an immunity statute and in derogation of common law, must be strictly construed. Additionally, the Court noted that the defendant City did not charge a fee to enter the park where its dock was located, nor any fee to use most of the park's facilities and allowed free day-use of the moorage.

The Court also noted that non-moorage users could enter the area and walk among the moored boats without ever paying a fee.

But the court also noted that the City did charge for overnight moorage and that the allegedly defective ramp which allegedly injured Plaintiff was the connection between the floating boat moorage and the City's fixed pier. *Plano*, at 915. The determinative factor for the Division I court was that some members of the public, other than the plaintiff, were charged a fee for use of the facility where the injury occurred. *Id.* Observing that the stated purpose of the statute is to encourage property owners to make their land available for free recreation by the public (*See* RCW 4.24.200, above), the court distinguished cases from other states, where the statutory immunity language differs from Washington's. *Plano*, at 914. The court held that the City's fee for some overnight moorage users precluded application of the immunity statute for an injury in that area of the park, without regard to whether the injured user paid or was expected to pay the fee:

The question under Washington's statute, however, is not whether [plaintiff] actually paid a fee for using the moorage, or whether [defendant] actually charged a fee to the person injured. The question is whether [defendant] charges a "fee of any kind" for using the moorage. This statutory language needs no interpretation as it is unambiguous. *See Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991).

*Plano*, at 913.

....

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

*Id.*, at 914.

....

[In order to have immunity under RCW 4.24.210,] [a] landowner must show only that it charges no fee for using the land or water area where the injury occurred.

*Id.*, at 915.

Similarly, in *Nielsen v. Port of Bellingham*, 107 Wn.App. 662, 27 P.3d 1242 (2001), rev. denied, 145 Wn.2d 1027, 42 P.3d 974 (2002), relying in part upon the *Plano* case, the court held that the injury claim of a user of a dock for which the defendant Port charged fees to moor commercial fishing boats and a "live-aboard" yacht was not within the coverage of the recreational use immunity statute, despite the Port making the dock available to the general public without charge for sightseeing and walking upon. The court affirmed the trial court's striking of the Port's defense of recreational use immunity, and the jury's verdict. As noted, the Port's petition for review was denied by the Supreme Court.

The *Nielsen* court cited and relied upon the *Plano* decision, emphasizing that “the purpose of [the defendant Port’s] marina at Squalicum Harbor is commercial--the mooring of fishing boats and pleasure craft for a fee.” *Nielsen*, at 668. Thus, the area’s free use by sightseers and the plaintiff (who was an invitee of a yachting moorage tenant), did not give rise to immunity under the statute.

The court’s discussion of *Plano* makes clear that a consistent history of charging a fee for public access precludes immunity, even where the incident at issue arose from a “free” use:

We noted [in *Plano*] that for immunity to attach, “[a] landowner must show only that it charges no fee for using the land or water area where the injury occurred. . .

*Neilson*, at 669.

5. Fourth Memorial’s attack on the applicability of *Plano* is *inappropos*.

Fourth Memorial insists that the *Plano* decision is somehow restricted to its precise facts, and that the court’s own stated analysis cuts against the purpose of the statute the court was interpreting. Fourth Memorial tries to distinguish *Plano*, characterizing Ms. Plano as “a paying customer on a fee generating premise.” Appellant’s Brief, p. 25.

Such characterization ignores and undermines Fourth Memorial’s own position that the use at the time of injury is the sole focus for

application of the immunity statute. It was clear that Ms. Plano had paid no fee for the day or the evening she was injured. Fourth Memorial's characterization was certainly not shared by the *Plano* court, which noted that the plaintiff had paid no such fee and that the City did not charge a fee to enter the park, to use most of the park's facilities, to walk the ramp on which Ms. Plano was injured or for day-use moorage. *Plano*, at 912-913.

The *Plano* court specifically emphasized that the issue under Washington's statute was not whether a fee had been paid by the injured plaintiff, nor whether the City required a fee to be paid by the injured plaintiff, but whether the City "charges a 'fee of any kind' for using the moorage." *Plano*, at 913. Thus, the court considered the statute to preclude immunity where the landowner systematically limited a public recreational use (overnight moorage in this case), by charging a fee for it, even where most recreational uses were free, including the use at the time of the subject injury.

In order to create a strawman, Fourth Memorial mischaracterizes the argument Mr. Cregan makes in reliance on *Plano*. It is not necessary to argue that *Plano* precludes immunity for a fee charged "at any time in the past," where the subject landowner only occasionally and incidentally allows free access and instead systematically denies access to all others

who have not paid the rent. The *Plano* court did not need to extend its ruling in such a manner, nor does this court.

Here, the rare event is not the charging of a fee, but the absence of such a charge. Fourth Memorial has admitted that over the two year span of 2008 and 2009, Beats & Rhythms was the only group permitted access to its camp without paying the customary rent. Appellant's Brief, p. 18. It has not identified any other group ever allowed free access, nor has it offered any concrete evidence of the amount or frequency of any free access by any other groups. Its director himself characterized that frequency as "occasionally," (CP 105) and conceded the decision was a matter of his "discretion," in the absence of any written policy of Fourth Memorial. CP 48.

Furthermore, the Camp is a greater "fee generating premise" than the moorage in *Plano*, by a huge margin. In *Plano*, the moorage was always free to all users except those requiring overnight moorage between 6:00 pm and 8:00 am, and even then one night was free was free to anyone who had purchased a launch permit. At the time of her injury, Ms. Plano was returning after the end of the free day-use period to remove her boat from the moorage. It seems probable that the moorage in a busy public park would have many more "free" day-users than overnight "fee" users, and yet the *Plano* court held the immunity statute

did not apply. Certainly, the operation of the park or even just the moorage would not have depended on charging overnight moorage fees. Here, the opposite is the case: the “fee” use dwarfs the tiny amount of “free” use allowed by this defendant. The budget of the Camp called for an operational profit from charging such fees. CP 50. Fourth Memorial cannot claim the protection of the statute when it fails to comply with the statutory requirement not to charge members of the public for access.

6. Fourth Memorial cannot reconcile its demand for immunity with the *Plano* court’s denial of immunity to the City of Renton.

Fourth Memorial strains to distinguish *Plano*, but it does not even attempt to reconcile the *Plano* denial of immunity with Fourth Memorial’s demanded for it. In *Plano*, the landowner systematically provided a substantial level of free use, but its occasional fee precluded immunity. *Plano*, at 913 In the case at bar, the landowner not only systematically denies free access but lacks any system or policy for free access beyond its director’s occasional unguided discretion, yet the landowner demands immunity based on its occasional permission of free use. Fourth Memorial concedes that *Plano* was properly decided, but cannot persuasively explain why Fourth Memorial warrants the reward of immunity from its own negligence when the City of Renton did not. The

subject statute simply cannot be applied rationally and fairly in the manner urged by this defendant.

7. As in *Nielsen*, this landowner's property use is primarily for the generation of revenue.

The analysis by the *Nielsen* court suggests an alternative analysis for the case at bar. There, the Port charged moorage fees to businesses and individuals. The plaintiff in that action was the guest of an individual yacht owner, whose use was non-commercial and presumably both residential and recreational, but much of the moorage was used by commercial fishing boats. The landowner's primary use of the property was for revenue generation, as fees were charged for all moorage. The court characterized the property's use as "commercial" rather than "recreational," and held that the Recreational Use Act therefore did not apply. *Nielsen*, at 668.

As noted by Fourth Memorial (Appellant's Brief, p. 28), the *Nielsen* court looked in part to the landowner's primary use of the property, analogizing the moorage to a roadway through a public park, built and maintained "primarily for commercial use, as opposed to recreational use." *Id.* Likewise, in the case at bar, the landowner's use of the property is primarily, indeed overwhelmingly, for the generation of revenue, as the Camp's budget calls for an operational profit from rental

fees and virtually all groups who use the Camp are charged such fees. Over the span of at least two years, Beats & Rhythms was the only group allowed free access, for one weekend out of each entire year. CP 51, 54, 62. As in *Nielsen*, under such circumstances it could be said that the Camp's use of the property is for the generation of revenue to promote its social and religious purposes, not for public recreation, and therefore is outside the Recreational Use Act.

8. The Washington cases relied upon by Fourth Memorial do not support or compel a grant of immunity in its favor.

Fourth Memorial cites five cases which apply Washington's recreational use immunity statute to some aspect of the landowner's use of the property. None of those cases control the issue before this court, and most are simply irrelevant to the case at bar. None of them involve a landowner which systematically limits public access by charging rental fees for virtually all public entry onto its land. Fourth Memorial conflates the issue whether the landowner's use of the property is recreational with the issue whether the landowner's charging of a fee precludes immunity. They are different issues. As in *Plano*, the landowner may be using the property for public recreation and still vitiate immunity by having limited public access through charging entry fees.

Does Fourth Memorial seriously contend that allowing a camper to slide down the Giant Slide becomes a different use, depending upon whether the camper's group paid a fee? The cases do not support such an analysis. The issue of recreational use is independent from the issue of the effect of charging a "fee of any kind," although they may become related where the collection of fees is the paramount landowner purpose for using the property. The outcome of this case does not turn simply on whether Fourth Memorial's use of the facility at the time of Mr. Cregan's injury constituted "recreational use" any more than the *Plano* decision turned on the nature of Renton's use of its moorage ramp.

Fourth Memorial argues that *Home v. North Kitsap School District*, 92 Wn.App. 709, 965 P.2d 1112 (1998) supports its position. However, the dispositive issue for that court was that the activity involved (a school football game) was not a "public" recreational use. The focus was on the nature of the activity being pursued, not on the free availability of the property, which was conceded by all parties. To the extent that Fourth Memorial wishes to make the issue in this case the meaning of "members of the public," the case is contrary to its position. In *Home*, it was undisputed that the football game was open to the public to attend, without any fee. *Home*, at 712. The injured person, however, was a coach for the "away" team, and the game being played was a

school-sanctioned match. Citing cases which distinguished “student” and “school” activities from “public” activities, the court described its ruling:

. . .it is undisputed that North Kitsap was not holding the football field open for use by members of the public when Home was injured, and North Kitsap is not immune by virtue of RCW 4.24.210.

*Home*, at 717.

Similarly, Fourth Memorial also relies on *Gaeta v. Seattle City Light*, 54 Wn.App. 603, 774 P.2d 1255 (1989), again ignoring that the issue in that case was whether the landowner’s purpose constituted recreational use, not whether a fee was charged any user. Fourth Memorial confuses commercial use with the fee issue, and while they may be related, the two are different concepts and different issues. The *Plano* court, *supra* , specifically considered *Gaeta*:

Our analysis on this point is consistent with *Gaeta v. Seattle City Light*, 54 Wn.App. 603, 774 P.2d 1255, *review denied*, 113 Wn.2d 1020, 781 P.2d 1322 (1989). In *Gaeta*, the plaintiff attempted to avoid the statutory immunity by showing that his purpose in coming on the land was commercial, not recreational. The court held that the application of the statutory immunity depends on the perspective of the landowner as to the use of the land, not on the purpose of the user. *Gaeta*, 54 Wn.App. at 608-09. *From Renton's perspective, the moorage is available for members of the public to use for purposes of outdoor recreation. Under the statute, immunity is available only if Renton does not charge a fee of any kind for such use.*

*Plano*, at 913-14, emphasis supplied.

Fourth Memorial's reliance on *Widman v. Johnson*, 81 Wn.App. 110; 912 P.2d 1095 (1996) is similarly misplaced. The defendant's logging road involved there had not been posted "No Trespassing" for years and at the time of the injury was openly posted specifically for public recreation without payment of any fee. *Id.* The public used it extensively. *Id.* The effect of the prior posting of the property was not an issue in the case, nor was the charging of any fee. *Id.*

In *McCarver v. Manson Park*, 92 Wn.2d 370, 597 P.2d 1362 (1979), the parties stipulated that the subject property was made available to the public for outdoor recreation without charging any fee. *McCarver*, at 372—373. The plaintiffs argued that the statute applied only to property which could be used for purposes other than recreation, so as to encourage landowners to open such land for recreational purposes. They argued that land exclusively used for recreation, such as the public park involved there, was outside that legislative purpose and the act did not apply. The court's comment quoted by appellant simply has no context in common with anything before this court.

Contrary to Fourth Memorial's assertion, *McCarver* did not decide that a property owner's predominate use of the property was irrelevant. Indeed, the predominate use of the property as a public park, free from any access-limiting fees, controlled the outcome. Unlike

Fourth Memorial's characterization of the decision, the court neither said nor implied that a predominately business use (see, e.g., *Nielsen, supra*) should not be considered in the analysis. It simply refused to adopt McCarver's reading of the statute's stated purpose to preclude its application to property which has no use other than recreation, in the absence of such limiting language in the statute.

*Jones v. United States*, 693 F.2d 1299 (9<sup>th</sup> Cir. 1982) similarly has no significant relevance to the case at bar. There, the plaintiff rented an inner tube for sliding on the snow. Use of the Park Service property was free, and she could have slid on the snow without paying any fee if she had brought her own tube or similar device. The court held that the payment of the tube rental did not constitute a fee for use of the land, and therefore did not preclude immunity. Here, there is no dispute that Fourth Memorial systematically and consistently denies public access to its property unless its standard entry fee is paid.

9. Fourth Memorial's reliance on legislative history is inappropriate, irrelevant and incomplete.

Fourth Memorial does not explicitly argue that the Recreation Use Act is ambiguous, nor does it demonstrate any ambiguity. Its quotation from *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007) omits

that court's description of the judicial inquiry concerning the "plain meaning" of a statute:

A court's objective in construing a statute is to determine the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, P 7, 115 P.3d 281 (2005). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* (alteration in original) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). A statutory provision's plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.

*Id.*

The court's point was that legislative history is not pertinent to the interpretation of a statute unless the "plain meaning" inquiry reveals an ambiguity. Without a showing of ambiguity, a court will derive a statute's meaning from its language alone. *Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993) In judicial interpretation of statutes, the first rule is that the court should assume that the legislature means exactly what it says. Plain words do not require construction. *Sidis v. Brodie/Dohrmann*, 117 Wn.2d 325, 329, 815 P.2d 781 (1991)

Nevertheless, ignoring the *Plano* court's declaration that the subject statute is unambiguous, Fourth Memorial enters into an extensive discussion of two isolated portions of the act's legislative history.

However, the cited history is not pertinent to the central issue in this case, as neither portion addresses the immunity of a landowner which systematically and consistently limits public access to groups who have paid a fee for their use of the property. In the hunting example cited, the issue is the knowledge requirement (“known dangerous”) for liability for a latent artificial condition of the property, not whether the property was a fee-hunting operation. The knowledge requirement was also the reason the history was quoted by the court in *Morgan v. United States*, 709 F.2d 580, 584, (9<sup>th</sup> Cir. 1983), cited by Fourth Memorial.

Similarly, the Senator Canfield example is focused on the liability for failure to warn of known hazards and the trespasser status of the person injured, not on the effect of charging a fee to virtually every user group. Both hypotheticals implicitly assume a pattern of no fee being charged in order to get to the issue actually being discussed, because neither the act nor its exceptions apply where fee use is involved.

Fourth Memorial’s references to legislative history ignores significant historical background indicating that the level of free availability necessary to justify immunity should be high and wide:

However, in those instances where private owners are willing to make their land *available to members of the general public without charge*, it is possible to argue that every reasonable encouragement should be given to them.

(“*Public Recreation on Private Lands: Limitations on Liability*”, a model act promulgated by the Council of State Governments in 1965, 24 Suggested State Legislation, Council of State Governments 150-52 (1965), quoted by Justice Dolliver in *McCarver*, *supra*, 92 Wn.2d 370, at 378-379. Emphasis supplied.)

10. Fourth Memorial’s reliance on cases from other jurisdictions is misplaced and is addressed to a non-issue.

Fourth Memorial argues at length that application of the Recreational Use Act is not dependent upon the landowner making the property available to all possible users, the “general” public, citing cases from other jurisdictions for that proposition. It misunderstands and mischaracterizes Mr. Cregan’s position and argument, which is that Fourth Memorial is precluded from immunity from its negligence and fault because it has systematically and consistently denied recreational use of its property to members of the public by imposing rental fees on virtually all groups admitted to the Camp.

None of the out-of-state cases relied upon by Fourth Memorial involved landowner-imposed entry fees. The Missouri, Nebraska and Hawaii statutes involved focused upon the nature of the specific entry involved in the subject injury claim, not upon the extent to which the landowner charged entry fees to the public.

Fourth Memorial insists that it has the right to determine who may enter its property, when they may enter it and the terms of that entry. Appellant’s Brief, p. 14. Mr. Cregan does not contest Fourth Memorial’s

right to control access to its property. He does contest its claimed entitlement to immunity from liability for the negligence which has left him permanently physically impaired.

Fourth Memorial demands that it be entitled to immunity from liability for its own negligence whenever its director decides to allow someone free access, without regard to the extent of its denial of free access to the rest of the public. As observed by the *Plano* court:

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

*Plano*, at 914.

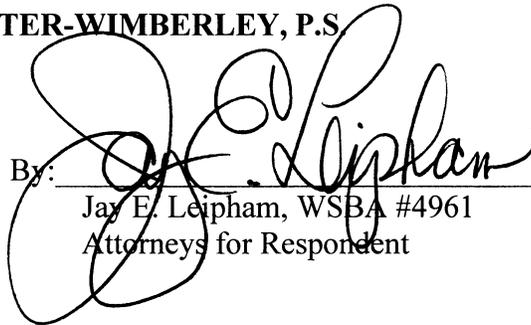
## VI. CONCLUSION

This court should not extend the immunity granted by the Recreational Use Act, RCW 4.24.200 and RCW 4.24.210, to protect from liability for its own negligence a landowner which has systematically and consistently denied access to its property to members of the public who have not paid its standard rental fees, which depends upon such fees for the operation of the subject property and which only occasionally and incidentally allows free use of the property, basing such free use upon the unguided discretion of its director, in the absence of any written policy for such free use.

The trial court's summary judgment rulings should be affirmed, and the matter should be remanded for further proceedings upon Mr. Cregan's bodily injury action.

**RESPECTFULLY SUBMITTED** on October 13, 2011.

**RICHTER-WIMBERLEY, P.S.**

By:   
Jay E. Leipham, WSBA #4961  
Attorneys for Respondent

## **APPENDIX**

### **§ 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.

**§ 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 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, 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) 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. A fixed anchor used in rock

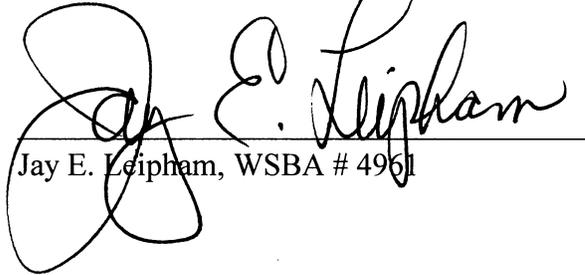
climbing and put in place by someone other than a landowner is not a known dangerous artificial latent condition and a landowner under subsection (1) of this section shall not be liable for unintentional injuries resulting from the condition or use of such an anchor. Nothing in RCW 4.24.200 and this section limits or expands in any way the doctrine of attractive nuisance. 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; and
  - b) 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 46.09.020, or other public facility accessed by a highway, street, or nonhighway road for the purposes of off-road vehicle use.

**CERTIFICATE OF SERVICE**

I hereby certify that on October 13, 2011, I caused the foregoing Amended Brief of Respondent to be delivered to the following counsel of record in the manner indicated:

John P. Bowman	<input type="checkbox"/>	U.S. Mail
Keefe, Bowman & Bruya, P.S.	<input type="checkbox"/>	Certified Mail
601 W. Main, Suite 1102	<input checked="" type="checkbox"/>	Hand Delivered
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