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COURT OF APPEALS,

FILED

DIVISION III

DEC 28 2010

OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

Petitioner,

v.

GAVIN J. CREGAN, a married man,

Respondent.

RESPONDENT'S ANSWER TO PETITIONER'S MOTION

FOR DISCRETIONARY REVIEW

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on the specific entry onto land giving rise to the claim for which immunity is sought:

Except as provided in sections 537.345 to 537.348, an owner of land owes no duty of care to any person who enters on the land without charge to keep his land safe for recreational use or to give any general or specific warning with respect to any natural or artificial condition, structure, or personal property thereon.

RSMo 2000, 537.346

As noted in the case cited but not quoted by Defendant, under the Missouri law:

To invoke the RUA, the general requirements are "(1) an owner of the land; (2) entry upon the land; (3) entry upon the land without charge; and (4) entry for recreational use." *Lonergan v. May*, 53 S.W.3d 122, 128 (Mo. App. 2001). If these requirements are met, then the owner "owes no duty to the entrants to keep the land safe or to give any general or specific warnings with respect to any natural or artificial condition, structure, or personal property on the land, unless one of the exceptions contained in section 537.348 apply." *Id.*

State ex rel Young v. Wood, 254 S.W.3d 871, 873 (2008)

Under the Washington statute, the focus is upon the availability of the property to members of the public, without charging a fee of any kind, providing 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* therefore. . .(emphasis supplied)

RCW 4.24.210(1)

Thus, the Missouri authorities argued by Defendant are simply irrelevant to the discussion in this case. Likewise, Defendant's lengthy

argument about the act's legislative history is both inappropriate and irrelevant. 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) Citation to legislative history is improper where there is no showing of ambiguity.

In any event, the legislative comments relied upon by Defendant do not support Defendant's argument, as each of them assumes a fact pattern of access without any fee being charged, and is focused on an issue other than the effect of charging fees. In the hunting example relied upon by Defendant, 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. Similarly, Senator Canfield's example is focused on the liability for failure to warn and the trespasser status of the person injured. Neither is relevant to the case at bar, even if it were appropriate to consider them.

Defendant's reliance on *McCarver v. Manson Park and Rec. Dist.*, 92 Wn.2d 370, 597 P.2d 1362 (1979) is misplaced. There, the Plaintiff attempted to argue that the act applied only to property which had a primary use other than recreation, harkening back to the earliest version of

the statute, which applied to agricultural and forest land made available to the public. No such issue is involved in this case.

Given the Defendant's virtually total reliance on admittance fees to operate this camp, an additional basis for denying immunity would be that the Defendant's use of the property is not a recreational use within the meaning of the act, similar to the conclusion reached by the *Nielsen* court. That court characterized the Port's use in that case as "commercial," but a less profit-oriented characterization in the case at bar would be "fee generating." Just as Defendant characterizes the docks involved in the *Plano* and *Nielson* cases as "fee generating docks" for which immunity is justly denied, (Defendant's Motion for Discretionary Review, p.16), so can Defendant's operation be fairly characterized as a "fee generating camp," equally ineligible for immunity. Insofar as the precise instrumentality which caused the injury is concerned, a giant fiberglass slide, and considering the ubiquity of the admission fee requirement, this camp is indistinguishable from a commercial amusement park which once a year waives its fees for a single group.

Defendant 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 Defendant

wishes to make the issue in this case the meaning of the statutory language “members of the public,” the case is contrary to Defendant’s position. It was undisputed that the football game was open to the public to attend, without any fee. 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, Defendant was not holding its Camp open for use by members of the public when Plaintiff was injured. According to Defendant, the camp was only available free to Beats and Rhythms. There is no evidence that anyone else could use the camp that weekend without paying a fee.

2. Defendant seeks review of a denial of summary judgment, and therefore must demonstrate obvious error.

Defendant assigns error to the failure of the trial court to deny its motion for dismissal under RCW 4.24.210. It assigns error to the court’s granting of Plaintiff’s motion for summary judgment striking its affirmative defense of recreational use immunity, on the ground that Defendant is thereby precluded from succeeding in its motion for

dismissal. That desired dismissal is also why Defendant argues further proceedings are useless, the status quo has been altered, its freedom of action has been substantially limited and that review would terminate the litigation. All of those arguments and objections always apply to the denial of any motion for summary judgment of dismissal. Indeed, if dismissal is not required, there is no doubt that this simple premises liability case should proceed to trial as scheduled and as usual.

The case law is quite clear that the denial of a motion for summary judgment is not a proper subject of a motion for discretionary review unless the error is obvious or RAP 2.3(b)(4) has been satisfied. *Sea-PacCo, v. United Food & Comm. Workers Local Union 44*, 103 Wn. 2d 800, 699 P.2d 217 (1985); *Smith v. City of Kelso*, 112 Wn. App. 277; 48 P.3d 372 (2002).

Denial of a motion for summary judgment is generally not an appealable order under Rule of Appellate Procedure (RAP) 2.2(a) and discretionary review of such orders is not ordinarily granted. Under RAP 2.3(b)(1) discretionary review may be granted where "the superior court has committed an obvious error which would render further proceedings useless" An order denying summary judgment is interlocutory in nature and "not a final judgment for the claim still remains pending trial. The issue can be reviewed after trial in an appeal from final judgment."

DGHI Enters. v. Pacific Cities, Inc., 137 Wn.2d 933, 949 (Wash. 1999)

3. **The Court of Appeals is not bound by the trial court's certification under RAP 2.3(b)(4), and makes its own decision whether immediate appeal is appropriate under that rule.**

Although the trial court has certified its summary judgment orders for immediate appeal, the Court of Appeals is not bound by that determination.

The rule [RAP 2.3(b)(4)] parallels 28 U.S.C. § 1292(b), which allows a district court judge to certify an order for review. The appellate court may consider the parties' and lower court's assessment for an interlocutory determination without replacing its independent assessment of the three criteria for acceptance of review in RAP 2.3b)(1), (2) and (3).

Washington Appellate Practice Deskbook (Wash. State Bar Assoc. 3d ed. 2005), § 10.8(1), p. 10-12.

There are no reported Washington cases that discuss in any detail the certification process. The federal cases, which involve the identical language of 28 U.S.C. § 1292(b), are instructive. *See* 2A Karl Tegland, *Washington Practice*, at 161-62 (6th ed. 2004). Regardless of the trial court's certification, the appellate court makes its own determination whether an immediate appeal is appropriate. *In re Hamilton*, 122 F.3d 13 (1997). "Both the district judge and the court of appeals are to exercise independent judgment in each case and are not to act routinely." *Milbert v. Bison Laboratories*, 260 F.2d 431, 433 (3rd Cir. 1958).

Finally, even if the district judge certifies the order under § 1292(b), the appellant still "has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment."... The appellate court may deny the appeal for any reason, including docket congestion.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 57 L.Ed.2d 351, 98 S.Ct. 2454 (1978) (citation omitted).

As the federal courts have explained, “A mere claim that the district court's ruling was incorrect does not demonstrate a substantial ground for difference of opinion” for purposes of justifying an interlocutory appeal. *Wausau Business Ins. Co. v. Turner Constr. Co.*, 151 F. Supp.2d 488, 491 (S.D.N.Y. 2001). “Interlocutory appeal was not intended as a ‘vehicle to provide early review of difficult rulings in hard cases.’” *German v. Federal Home Loan Mortgage Corp.*, 896 F.Supp. 1385, 1398 (S.D.N.Y. 1995). Rather, existence of a “substantial ground for a difference of opinion” within the meaning of the rule “has been construed to be ‘synonymous with a substantial likelihood that appellant's position would prevail on appeal.’” *Bennett v. Southwest Airlines Co.*, 2006 WL 1987821, *1 (N.D. Ill. July 13, 2006) (quoting *Seven-Up Co. v. O-So Grape Co.*, 179 F.Supp. 167, 172 (S.D.Ill.1959)), *rev'd on other grounds*, 484 F.3d 907 (7th Cir. 2007).

In this respect, the situation at bar is similar to that under CR 54(b), where the trial court must enter findings and make an express determination of the finality of a judgment involving less than all of the claims or parties in a multi-claim or multi-party action. It is clear that the appellate courts are not bound by the trial court's determination, and that the appellate courts make their own determination whether the issue is

sufficiently final to be ripe for appeal. *Fox v. Sunmaster Products*, 115 Wn. 2d 498, 798 P.2d 808 (1990)

In federal court, the authoritative treatise discussion of 28 U.S.C. 1292(b) is Wright & Miller, 16 Fed. Prac. & Proc. Juris. 2d §a 3930:

[S]ection 1292(b) is best used to inject an element of flexibility into the technical rules of appellate jurisdiction established for final judgment appeals under §a 1291 and for interlocutory appeals under §a 1292(a). The three factors should be viewed together as the statutory language equivalent of a direction to *consider the probable gains and losses of immediate appeal*. The *advantages* of immediate appeal increase with the *probabilities of prompt reversal*, the length of the district court *proceedings saved by reversal of an erroneous ruling*, and the substantiality of the *burdens imposed on the parties by a wrong ruling*. The *disadvantages* of an immediate appeal increase with the *probabilities* that *lengthy appellate consideration* will be required, that the *order will be affirmed*, that continued district court *proceedings without appeal might moot* the issue, that reversal would not substantially alter the course of district court proceedings, or that the parties will not be relieved of any significant burden by reversal.

Stuart v. Radioshack Corporation, 2009 U.S. Dist. LEXIS 57963 (N. Dist. CA) (emphasis supplied)

Respondent respectfully submits that the trial court has mistakenly applied these factors and has inappropriately certified the orders for immediate appeal. The court particularly failed to weigh properly the probability that the orders would be affirmed on appeal and the improbability of reversal, as argued in the foregoing sections of this Answer. (A 226-229) Defendant can cite no case on point or persuasive for its position. Its attempt to distinguish the *Plano* and *Neilson* cases is labored. For a necessary trial, it would substitute a useless appeal.

The trial court misjudged the delay to be caused by discretionary review, mistakenly believing that discretionary review would be “expedited” to minimize the appellate process compared to an appeal from a final judgment. (A 230) This is a simple premises liability case, which should take 4-6 trial days (or less if the third-party claim against Beat & Rhythms is dismissed, as expected). The slight chance of avoiding a short trial is far outweighed by the lengthy delay created by an unnecessary appeal likely to result in affirmance.

F. CONCLUSION

An operation that is almost totally dependent upon charging user fees for access to its property is not entitled to immunity from civil liability for its negligence under RCW 4.24.210, particularly as such a statute is required to be strictly construed. The Court of Appeals should make its own decision about whether the subject orders on summary judgment cross-motions are appropriate for immediate review.

Defendant’s affirmative defense raising the statutory bar of RCW 4.24.210 was properly dismissed and its requested piecemeal interlocutory

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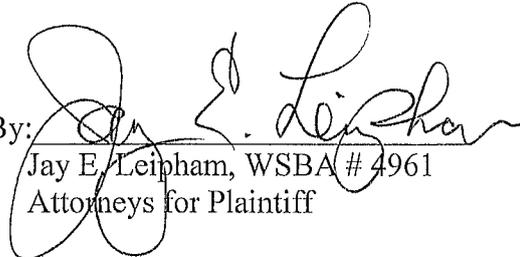
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appeal will merely delay a necessary trial. The motion for discretionary review should be denied.

RESPECTFULLY SUBMITTED this 28th day of December, 2010.

RICHTER-WIMBERLEY, P.S.

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

CERTIFICATE OF SERVICE

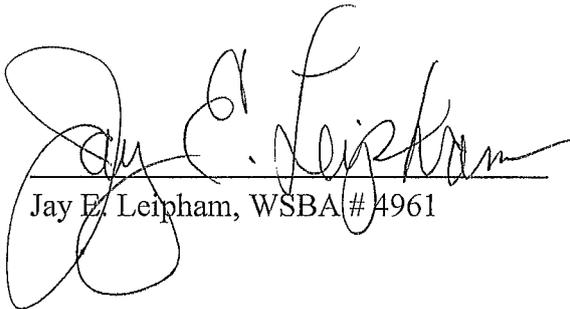
I hereby certify that on the 28th day of December, 2010, I caused Respondent's Answer to Petitioner's Motion For Discretionary Review to be delivered the foregoing to the following counsel of record in the manner indicated:

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A. IDENTITY OF RESPONDENT

GAVIN CREGAN, by and through his attorney Jay E. Leipham, of Richter-Wimberley, P.S., respectfully requests this court to deny Respondent's Motion for Discretionary Review.

B. DECISION AND RECORD

Petitioner's Motion properly identifies the subject decision.

Please note that counsel have agreed that Petitioner's Appendix and Petitioner's Supplemental Appendix should include the entire pertinent record below. The Appendices are indexed by document and page number in the foregoing Table of Contents, for the Commissioner's ease of reference. The Appendix and Supplemental Appendix are numbered sequentially as though one document. For brevity, citations to the Appendix herein use the form, "A [Appendix page number]." The record on Defendant's Motion for Certification was delayed by the lateness of the hearing date and the Christmas holiday, but was received late afternoon on December 27, 2010, and is indexed above.

C. ISSUES PRESENTED FOR REVIEW

Petitioner's Motion properly states the issues presented by its Motion.

D. STATEMENT OF THE CASE

1. Introductory Summary

Defendant operates a summer camp, charging admission fees to groups to whom it rents the facilities. (A 57-58) Plaintiff Gavin Cregan, a registered nurse, was a volunteer counselor for a group of pediatric cardiac

patients which had rented the camp for the weekend of June 27, 2008. (A 147-148) Defendant waived its admission fee for that group, the only group for which such waiver was made during the 2008 season. (A 62; 70) Shortly after arrival on Friday, June 27, 2008, Plaintiff suffered tri-malleolar fractures of his left ankle and lower leg, using Defendant's 1974-era, amusement park style, giant fiberglass slide with members of his group. (A 149; A 143) The severity of the fractures and the sequelae of their surgical correction have left Plaintiff with permanent pain and restrictions of motion in his ankle. (A 149)

Plaintiff brought an action to recover damages caused by the Defendant's negligent failure to assemble, align, repair and maintain the slide properly. (A 7-12) Defendant asserted recreational use immunity under RCW 4.24.200-210 as an affirmative defense. (A 13-20)

Plaintiff moved for summary judgment striking that affirmative defense. (A 118-119) Defendant cross-moved for summary judgment dismissing Plaintiff's action, under that statute. (A 168-170) On October 22, 2010, the trial court denied Defendant's motion and granted Plaintiff's motion, striking Defendant's affirmative defense. (A 110-112) Defendant seeks discretionary review of that ruling.

2. Detailed Facts

The Camp facilities are not open to the public without the payment of a fee, except at the occasional discretion of the Director to waive such fees. (A 61) Since at least 1995, Fourth Memorial has charged fees for

entry and for use of Camp facilities and services, calculated and quoted per head and per day, the amount depending upon which parts of the camp will be used. (A 57-58; 145.)

Groups are allowed or denied entry to the Camp based in part upon their beliefs. (A 60) The slide can be used only by members of admitted groups (and, of course, the Camp and Church staff). (A 139) Individuals are not allowed entry to the Camp except as part of a group. (A 60) Walk-ins are not allowed. (A 139)

As a matter of the director's discretion, the fees were waived for Beats & Rhythms, the group for which plaintiff volunteered to be a counselor, and the Camp was rented to Beats & Rhythms under the Camp's standard form rental contract, for a zero fee. (A 61-62) Beats & Rhythms was the only group admitted without payment of fees in 2008. (Appendix, A 70, 140) But when the group applied in 2010, the director denied them entry, because of the commencement of this lawsuit. (A 63)

The Camp's financial support and operation is dependent upon rental income, and donations. (A 139) The annual Camp budget includes an operating profit, and the group user fees are set at a level intended to cover the full operating costs of the facility. (A 66-67) 2009, the year after Plaintiff's injury, was the first year the Camp lost money on an operational basis in the 8 ½ years the current Director has been involved. (A 70-71; 132)

E. ARGUMENT WHY REVIEW SHOULD BE NOT ACCEPTED

1. The decision does not meet the requirements of RAP 2.3, as error is neither obvious nor probable.

The central and controlling fact in this case is that Riverview Bible Camp charges a fee for entry to its camp and use of the camp facilities, including the Giant Slide upon which Plaintiff was injured, virtually all of the time and to virtually all of those who use the camp. Defendant asserted that it was immune from any liability to Plaintiff under RCW 4.24.200-.210. The statutory intent is simple and clear. It provides immunity for landowners only where the property is made available to the “public” for outdoor recreation “without charging a fee of any kind.”

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 4.24.210 provides immunity solely to property owners:

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

RCW 4.24.210(1)

Defendant admits that it charges most users a fee to use its facilities, but contends that its waiver of the fee for the group for which Plaintiff volunteered to serve entitles it to immunity for Plaintiff’s injury.

The case law is as clear as the statute itself that charging other users a fee precludes Defendant from the protection afforded by the statute, without regard to whether plaintiff or the group which sponsored his participation paid or was expected to pay the fee.

In *Plano v. City of Renton*, 103 Wn. App. 910, 14 P.3d 871 (2000), the court held that the City's standard 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 not having paid the charge. 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 the third night of moorage, and was injured the following morning. The City denied liability, claiming the protection of RCW 4.24.210.

Both parties 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.

In the course of its opinion, the Court noted that the statute, as an immunity statute and in derogation of common law, must be strictly construed:

“The statutory grant of immunity is to be strictly construed.” *Ibid.*, at 912. [citing *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437-38, 824 P.2d 541, review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992).]

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

The determinative factor was that some users were charged a fee for use of the facility where the injury occurred. 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 was different, and held that the City’s fee for 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).

Ibid., at 913.

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), 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, relying in part upon the *Plano* case. As noted, the Port’s petition for review was denied by the Supreme Court.

The *Neilson* court cited and relied upon the *Plano* decision, emphasizing that “the purpose of [the defendant Port’s] marina at Squaticum Harbor is commercial--the mooring of fishing boats and pleasure craft for a fee.” Thus, that the area was also used by sightseers, and had been used by the plaintiff (who was an invitee of a moorage tenant), without paying a fee did not give rise to immunity under the statute. The trial court’s ruling, and the jury’s verdict, were affirmed.

Defendant attempts to distinguish *Plano* and *Neilson* from the case at bar by arguing that not charging a fee for the day of the injury brings this case within the ambit of the statute. This argument is only recently articulated. The factual basis for the argument is unclear, and has not been the subject of discovery. Plaintiff was injured shortly after his arrival late

on the afternoon on Friday, June 27. (A 148). There is no evidence in this record that no fees were charged on that date, only that Beats & Rhythm's fee had been waived for that weekend. The group which preceded Beats & Rhythms and rented the Camp through the afternoon of that Friday presumably paid a fee. Discovery on that issue is still pending.

But in any event, Defendant ignores the language of the *Plano* court which addresses that issue:

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, emphasis supplied.

In both *Plano* and *Neilson*, the court denied immunity based upon the landowner's typical conduct for the area where the injury occurred: typically charging a fee precludes immunity under the statute, and transitory waiving or non-collection of the fee fails to create immunity. While Defendant attempts to distinguish these cases, neither below or in this court has Defendant cited a Washington appellate decision overruling, conflicting with or even criticizing the language of these cases. Judge Tompkins' reliance upon these cases was not error, either obvious or probable.

Unable to cite to Washington law, Defendant relies upon Missouri law. However, Defendant ignores the vast differences between the Missouri statute and Washington's statute. The Missouri statute focuses