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FILED

No. 295109

DEC 27 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: *[Signature]*

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

(S)

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

Petitioner,

v.

GAVIN J. CREGAN, a married man,

Respondent.

**PETITIONER'S SUPPLEMENTARY PLEADINGS FOR
DISCRETIONARY REVIEW**

**MATTHEW T. RIES
WSBA #29407
STAMPER RUBENS, P.S.
720 West Boone, Suite 200
Spokane, WA 99201
(509) 326-4800
Attorneys for Petitioner**

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A. IDENTITY OF PETITIONER

FOURTH MEMORIAL CHURCH, d/b/a RIVERVIEW BIBLE CAMP (hereinafter “Riverview Bible Camp”), by and through its attorney Matthew T. Ries of Stamper Rubens, respectfully submits this supplementary pleading in support of its request that this Court accept review.

B. DECISION

On December 17, 2010 Judge Linda G. Tompkins signed an Order Granting Certification for Discretionary Review of Judge Tompkins’ October 22, 2010 Order Granting Plaintiff’s Motion for Partial Summary Judgment Striking Affirmative Defense of Immunity and Denying Defendant Fourth Memorial Church’s Cross-Motion for Summary Judgment. Judge Tompkins recognized that the application of the Recreational Use Act, RCW 4.24.200-210, involves a controlling question of law, which if found to be applicable, would render further proceedings unnecessary. The Court recognized that there was a substantial ground for a difference of opinion regarding the application of the Recreational Use Act, and a dearth of case law addressing the fact pattern in this case. Finally, the Court found that the immediate review of the order by the Court of Appeals would materially advance the ultimate termination of the litigation. Accordingly, the Court held that the legal question of whether

RCW 4.24.200-210 applies to this case is appropriate for Discretionary Review by the Court of Appeals pursuant to RAP 2.3(b)(4).

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals should accept Discretionary Review of the legal issue of whether RCW 4.24.200-210 applies to this case in light of the Superior Court's Order Granting Certification pursuant to RAP 2.3(b)(4)?

D. STATEMENT OF THE CASE

After the Superior Court's Ruling of October 22, 2010, the Petitioner and Respondent discussed stipulating to have the Court of Appeals review the application of the Recreational Use Act on Discretionary Review. (Appendix at A194). On November 16, 2010, the Petitioner filed its Notice for Discretionary of Review to the Court of Appeals. Based upon the belief that the Respondent would stipulate to review, Petitioner drafted a Stipulation for Discretionary Review and sent it to the Respondent. On November 26, 2010, Respondent notified the Petitioner that he would not stipulate. (Appendix at pp. A213 to A215). As a result, on December 1, 2010 Petitioner filed a Motion for Discretionary Review under RAP 2.3(b)(2).

On December 3, 2010, the Petitioner filed its Motion and Memorandum in Superior Court for Judge Tompkins to Certify Judge

Tompkins' October 22, 2010 Order, pursuant to RAP 2.3(b)(4). (Appendix at A171 to A206). On December 17, 2010, the Court heard oral argument, and granted the Petitioner's Motion for Certification. (Appendix at A222-23). Judge Tompkins explained the basis of her order in the transcript that has been included in the Appendix for the Court's review. (Appendix at pp. A224-30). The Petitioner is filing this supplemental pleading in order to bring this to the Commissioner's attention in anticipation of the January 5, 2011 hearing.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The Petitioner is additionally seeking Discretionary Review pursuant to RAP 2.3(b)(4), which provides in relevant part:

(b)...discretionary review may be accepted only in the following circumstances:

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Due to the lack of Washington case law interpreting the standard for certifying a trial court order for the discretionary review, the Petitioner cited to the Federal Courts' three part analysis interpreting the similar Federal statute, 28 U.S.C. §1292(b), when arguing the motion to certify before Judge Tompkins. The "court may certify an interlocutory order for

appeal if it is of the opinion that (1) the order ‘involves a controlling question of law’; (2) ‘as to which there is substantial ground for difference of opinion,’ and (3) an immediate appeal ‘may materially advance the ultimate termination of the litigation.’” Primavera Familienstiftung v. Askin, 139 F.Supp.2d 567, 569 (2001) (quoting 28 U.S.C. §1292(b)).

Petitioner explained to Judge Tompkins that certification is appropriate because all of the conditions in RAP 2.3(b)(4) have been satisfied. First, the interpretation and application of RCW 4.24.200-210 is a dispositive and controlling legal question. If the Recreational Use Act is found to be applicable, there are no remaining questions of fact that would prevent the Court from dismissing the Plaintiff’s lawsuit. (Appendix at A219).

Second, a substantial ground for dispute does exist over whether the Recreational Use Act is applicable to the case at hand. Petitioner explained that there are no Washington cases that deal with this factual scenario. The cases cited by Respondent are distinguishable and inapplicable. RCW 4.24.200-210 explicitly grants protection to landowners who allow free use to members of the public for recreational purposes. The legislative history further explains that the statute was designed to promote this type of use of the property, and afford landowners protection from premises liability. When the facts of this case

are applied to the plain wording of the statute, the Recreational Use Act is clearly applicable. (Appendix at A219).

Finally, the third factor is satisfied because immediate review by Court of Appeals would likely materially advance the termination of this litigation. The application of the Recreational Use Act is a dispositive issue. It is more efficient to have this issue determined now on discretionary review before lengthy litigation continues, and before a lengthy jury trial is conducted to address the negligence and damages issues, and then appealing this dispositive issue. Delaying review of this important issue will only extend and increase the cost of the litigation. (Appendix at A219 to A220).

After hearing oral argument by the parties, Judge Tompkins explained that she was satisfied that all three elements of the test had been satisfied and that certification was appropriate under RAP 2.3(b)(4). (Appendix at A224-230). The Court had little difficulty finding that the first and third conditions are met. First, the interpretation and application of RCW 4.24.200-210 was a dispositive and controlling legal question. If the Recreational Use Act is found to be applicable, there are no remaining questions of fact that would prevent the Court from dismissing the Plaintiff's lawsuit. (Appendix at A226 ll. 17-22).

Likewise, the third condition is met because the immediate review

may materially advance the ultimate termination of the litigation. If the Court's ruling on the application of the Recreational Use Act stands, there will be less to argue about going forward, and this matter can proceed more quickly to resolution. (Appendix at A226 ll. 17-22).

The Court spent more time addressing the second condition, but ultimately concluded that a substantial ground for dispute does exist over whether the Recreational Use Act is applicable to the case at hand. Judge Tompkins explained that each side made "very credible arguments", and that there are reasonable grounds to differ on the application of the Recreational Use Act. (Appendix at A226 ll. 23-25, A227 ll. 1-8.) The Court looked to the federal precedent for guidance and explained that one of the key considerations for determining if there exists a substantial ground for difference of opinion on a legal issue, is the dearth of precedence in the controlling jurisdiction.

The federal case is illuminating in giving more detail into how to go about examining the substantial grounds for difference of opinion standard, suggesting there is usually a dearth of precedence within the controlling jurisdiction. **We have searched high and low, all of us, and have not been able to find a case on all fours that answers this question with these types of facts for this particular statute.**

(Appendix at A227 ll. 9-15) (emphasis added). Given the lack of precedence on point, and given factual nuances of this case, the Court

found that there is likely a substantial ground for difference of opinion as to whether the Recreational Use Act is applicable. (Appendix at A229 ll. 20-24). After giving thorough analysis on the elements, the Court was comfortable concluding certification is appropriate, and signed an order granting certification. (Appendix at A222-23).

RAP 2.3(b) was amended in 1998 to add the subsection allowing for discretionary review where the parties stipulate to review, or where it has been certified by the superior court. The Drafter's comments accompanying the change to the rule explained in relevant part:

The committee contemplated that where the trial judge was willing to certify, or the parties to stipulate, that immediate review might "materially advance the ultimate termination of the litigation," **this amendment would increase the likelihood of acceptance of review in circumstances that are effectively dispositive of the case. Examples are denials of motions to dismiss or summary judgments dealing with *questions of law such as immunity or statutes of limitations.***

Tegland, 2A Wash. Prac., Rules Practice RAP 2.3 (6th ed.) (emphasis added). This is exactly the type of case that was contemplated by the rules committee. The Recreational Use Act is a dispositive issue that would afford the Riverview Bible Camp immunity from the premises liability. This Court should uphold the intent by the rule committee and give deference to Judge Tompkins' order certifying that the legal issue appropriate for discretionary review.

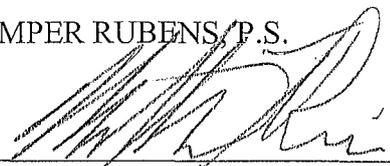
F. CONCLUSION

Riverview Bible Camp respectfully requests that this Court accept Discretionary Review under RAP 2.3(b)(4), because review will materially advance the ultimate resolution of this litigation in an efficient and less expensive manner than an appeal after trial. There are no questions of fact in the present case that would preclude the Court from dismissing the matter in its entirety if RCW 4.24.200-210 is determined to apply. This is exactly the type of issue and situation where the Court of Appeals should intervene and accept review of this fundamental legal question of law.

As outlined above, the Superior Court encouraged Discretionary Review by Certifying its Judgment, and emphasized that the issues surrounding the interpretation and application of RCW 4.24.200-210 is ripe for review by the Court of Appeals.

RESPECTFULLY SUBMITTED this 27 day of December, 2010.

STAMPER RUBENS, P.S.

By: 

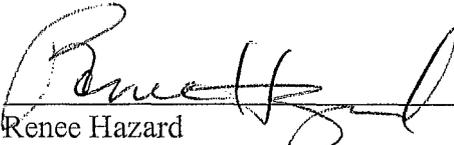
MATTHEW T. RIES
WSBA #29407
Attorney for Petitioner/
Defendant Fourth Memorial
Church

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Jay Leipham	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
Richter-Wimberley, PS	<input checked="" type="checkbox"/>	Hand Delivered
422 W. Riverside Ave., Ste. 1300	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201	<input type="checkbox"/>	Telecopy (Facsimile)
	<input type="checkbox"/>	Email

John P. Bowman	<input type="checkbox"/>	U.S. Mail, Postage Prepaid
Keefe, Bowman & Bruya, P.S.	<input checked="" type="checkbox"/>	Hand Delivered
601 W. Main, Ste. 1102	<input type="checkbox"/>	Overnight Mail
Spokane, WA 99201-0613	<input type="checkbox"/>	Telecopy (Facsimile)
	<input type="checkbox"/>	Email



Renee Hazard

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SPOKANE COUNTY CLERK

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RICHTER-WIMBERLEY, P.S.

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DEC - 3 2010

SUPERIOR COURT
ADMINISTRATORS OFFICE

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

GAVIN J. CREGAN, a married man,)

Plaintiff,)

vs.)

No. 10-2-00572-7

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

MOTION FOR CERTIFICATION OF
JUDGE TOMPKINS' RULING OF
OCTOBER 22, 2010

Defendant.)

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

Third Party Plaintiff,)

vs.)

BEATS & RHYTHMS, a Washington)
corporation,)

Third Party Defendant.)

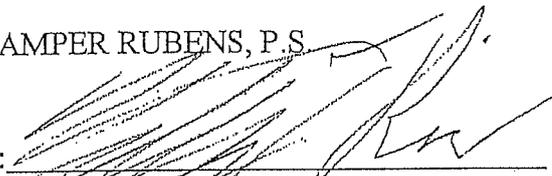
Defendant, Fourth Memorial Church, d/b/a Riverview Bible Camp, by and through its attorney, Matthew T. Ries of the law firm of Stamper, Rubens, P.S., hereby moves the Court for certification of Judge Tompkins' October 22, 2010 ruling. Defendant reserves any motion for a Stay of Proceedings pending Certification of Superior Court, and acceptance of Discretionary Review from the Court of Appeals.

STAMPER RUBENS PS
ATTORNEYS AT LAW

DATED this 3 day of December 2010.

STAMPER RUBENS, P.S.

By:



MATTHEW T. RIES, WSBA #29407
Attorney for Defendant, Fourth
Memorial Church, d/b/a Riverview Bible
Camp

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Leipham
Richter-Wimberley, PS
422 W. Riverside Ave., Ste. 1300
Spokane, WA 99201

- U.S. Mail, Postage Prepaid
- Hand Delivered
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LAUREL K. VITALE

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 SUPERIOR COURT
 ADMINISTRATORS OFFICE

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

GAVIN J. CREGAN, a married man,)
)
 Plaintiff,)

vs.)

No. 10-2-00572-7

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

MEMORANDUM IN SUPPORT OF
 DEFENDANT'S MOTION FOR
 CERTIFICATION OF JUDGE TOMPKINS'
 RULING OF OCTOBER 22, 2010

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

vs.)

BEATS & RHYTHMS, a Washington)
 corporation,)
 Third Party Defendant.)

Defendant, Fourth Memorial Church, d/b/a Riverview Bible Camp, by and through its attorney, Matthew T. Ries of the law firm of Stamper, Rubens, P.S., hereby files this Memorandum in Support of Judge Tompkins' October 22, 2010 ruling. Defendant reserves any motion for a Stay of Proceedings pending Certification of Superior Court, and acceptance of Discretionary Review from the Court of Appeals.

STAMPER RUBENS PS
 ATTORNEYS AT LAW

MEMORANDUM IN SUPPORT OF DEFENDANT'S
 MOTION FOR CERTIFICATION OF JUDGE TOMPKINS'
 RULING OF OCTOBER 22, 2010: 1

720 WEST BOONE, SUITE 200
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I. PROCEDURAL HISTORY

On October 22, 2010, this Court heard oral argument from attorneys in this case, and issued an Order Granting Plaintiff's Motion for Partial Summary Judgment Striking Riverview Bible Camp's affirmative defense of immunity under the Recreational Use Act. The Court in the same order denied Riverview Bible Camp's Cross-Motion for Summary Judgment to dismiss the lawsuit based upon the Recreational Use Act. (See Order Granting Plaintiff's Motion for Partial Summary Judgment Striking Affirmative Defense of Immunity and Denying Defendant Fourth Memorial Church's Cross-Motion for Partial Summary Judgment, pg. 3, attached as **Exhibit "A"** to the affidavit of Matthew T. Ries, incorporated herein by this reference.)

This Court explained in her oral opinion that the issue of statutory interpretation and application of the facts presented a difficult task, and that the situation necessitated a close call. The application of RCW 4.24.200-210 presented a dispositive question of law, as the facts were not disputed. (See Summary Judgment Motion Hearing Transcript, pg. 3-5, attached as **Exhibit "B"** to the Aff. of M. Ries.)

..... Soon after oral argument, the parties seemingly agreed to stipulate that because the order concerned a controlling issue of law, that discretionary review was appropriate under RAP 2.3(b)(4). (See redacted letter from Jay Leipham, attorney for Plaintiff dated November 11, 2010, attached as **Exhibit "C"** to the Aff. of M. Ries). On November 16, 2010, Riverview Bible Camp filed a Notice of Discretionary Review. (See **Exhibit "D"** to the Aff. of M. Ries.) Due to vacation of Plaintiff's counsel, counsel for the parties were only able to communicate by email around the Thanksgiving week. Defendant drafted a stipulated motion and order for discretionary review, based upon the communications between the parties. On November 26, 2010, Plaintiff's counsel indicated that he would not stipulate for discretionary review. Defendant Riverview Bible Camp revised the motion for discretionary review and filed it with the Court of Appeals on December 1, 2010. Oral argument is scheduled to take place before the Court of Appeals Commissioner on January 5, 2011. (See **Exhibit "E"** to Aff. of M. Ries.) Defendant obtained the earliest available hearing date to ask this Court to certify the order as appropriate for discretionary review.

STAMPER RUBENS PS
ATTORNEYS AT LAW

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II. ARGUMENT

Under RAP 2.3(b)(4) discretionary review will be accepted if the Superior Court “has certified...that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.” Rules of Appellate Procedure, 2.3(b)(4). Specifically, discretionary review of orders denying or granting summary judgment have been granted in cases where, pursuant to RAP 2.3(b)(4), the case “involved a controlling question of law to which there is a substantial ground for a difference of opinion and immediate review may materially advance the ultimate termination of litigation.” See In re Det. of Petersen, 138 Wn.2d 70, 88-90, 980 P.2d 1204 (1999).

In Clipse v. Michels Pipeline Const., Inc., the Superior Court denied the plaintiff's motion for summary judgment. Clipse v. Michels, 154 Wn. App. 573, 576, 225 P.3d 492, 494 (2010). The plaintiff moved for reconsideration. Clipse, 145 Wn. App. at 576. The Court subsequently denied that motion, but entered an order certifying that its order interpreting the statute involved controlling questions of law which created substantial ground for differing opinion, in satisfaction of RAP 2.3(b)(4). Id.

Here, the Defendant's Motion for Partial Summary Judgment was denied, while the Plaintiff's Motion for Partial Summary Judgment was granted, both of which concerned statutory interpretation of RCW 4.24.200-210. The facts of the case are not in dispute. There are differing opinions about the application of the statute. The application of Washington's Recreational Use Immunity Statute under RCW 4.24.200-210 is a dispositive question of law, which would render further proceedings unnecessary. Here, certification of the Court's Order is appropriate to show the Court of Appeals that the interpretation of the statute is a close question of law, that it is appropriate for discretionary review since it is a dispositive legal issue.

III. CONCLUSION

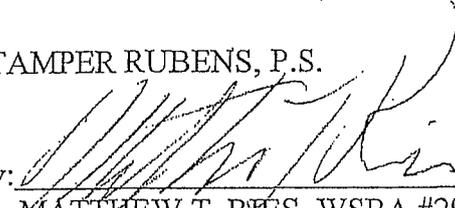
The application of RCW 4.24.200-210 to the undisputed facts in this case presents a contentious and dispositive question of law, where both parties can cite to case law, legislative history and statutory interpretation. The Defendant respectfully requests that the Superior Court certify that the order represents a controlling question of law, which is the basis of substantial difference of opinion. The Court of Appeal decision that Washington's Recreational Use Act

STAMPER RUBENS PS
ATTORNEYS AT LAW

1 applies would terminate further litigation.

2 DATED this 3 day of December 2010.

3 STAMPER RUBENS, P.S.

4
5 By: 

6 MATTHEW T. RIES, WSBA #29407

7 Attorney for Defendant, Fourth

8 Memorial Church, d/b/a Riverview Bible
9 Camp

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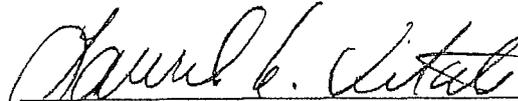
I hereby certify that on the 3rd day of December 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Leipham
Richter-Wimberley, PS
422 W. Riverside Ave., Ste. 1300
Spokane, WA 99201

- U.S. Mail, Postage Prepaid
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601 W. Main, Ste. 1102
Spokane, WA 99201-0613

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LAUREL K. VITALE

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ATTORNEYS AT LAW

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR CERTIFICATION OF JUDGE TOMPKINS'
RULING OF OCTOBER 22, 2010: 5

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

GAVIN J. CREGAN, a married man,)

Plaintiff,)

vs.)

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

Defendant.)

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

Third Party Plaintiff,)

vs.)

BEATS & RHYTHMS, a Washington)
corporation,)

Third Party Defendant.)

No. 10-2-00572-7

AFFIDAVIT OF MATTHEW T. RIES IN
SUPPORT OF THE MOTION FOR
ORDER OF CERTIFICATION

STATE OF WASHINGTON)

) ss.

County of Spokane)

I, MATTHEW T. RIES, being first duly sworn, upon oath, depose and state:

1. I am over the age of eighteen (18) years and I am competent to testify herein.

2. I am the attorney for Defendant Fourth Memorial Church d/b/a Riverview Bible Camp and make this Affidavit in Support of Defendant's Motion for Certification of the Superior Court's Order for the purposes of Discretionary Review.

STAMPER RUBENS PS
ATTORNEYS AT LAW

1 3. Attached as Exhibit "A" is a true and correct copy of the Order Granting
2 Plaintiff's Motion for Partial Summary Judgment Striking Affirmative Defense of Immunity and
3 Denying Defendant Fourth Memorial Church's Cross-Motion for Partial Summary Judgment.

4 4. Attached as Exhibit "B" is a true correct copy of the Summary Judgment Motion
5 Hearing Transcript.

6 5. Attached as Exhibit "C" is a true and correct copy of a redacted letter dated
7 November 11, 2010 from Jay Leipham, attorney for Plaintiff.

8 6. Attached as Exhibit "D" is a true and correct copy of Plaintiff's Notice for
9 Discretionary Review.

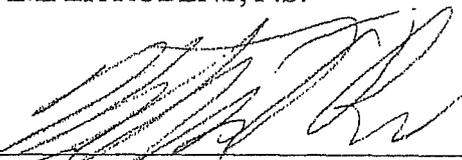
10 7. On November 26, 2010, Cregan's counsel indicated in an email that the Plaintiff
11 would not stipulate to Discretionary Review.

12 8. On November 30, 2010, our office drafted a unilateral Motion for Discretionary
13 Review, citing RAP 2.3(b)(2) and 2.3(b)(4). Lacking a stipulation from Plaintiff, Defendant
14 seeks the Superior Court's Certification of its October 22, 2010 Order under RAP 2.3(b)(4).
15

16 9. Attached as Exhibit "E" is a true and correct copy of a letter from the Court of
17 Appeals dated December 2, 2010.

18
19 DATED this 3 day of December, 2010.

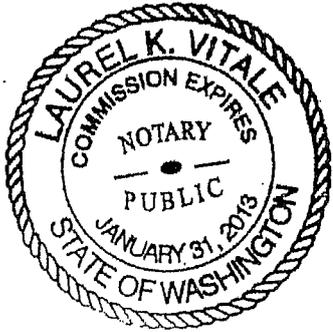
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21 STAMPER RUBENS, P.S.

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23 By: 
24 MATTHEW T. RIES, WSBA #29407
25 Attorney for Defendant Fourth Memorial
26 Church dba Riverview Bible Camp

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STAMPER RUBENS PS
ATTORNEYS AT LAW

SIGNED AND SWORN to before me this 3rd day of December 2010.



Laurel K. Vitale

NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My Commission expires: 1-31-13

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STAMPER RUBENS PS
ATTORNEYS AT LAW

1 CERTIFICATE OF SERVICE

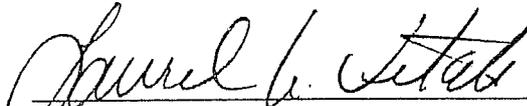
2 I hereby certify that on the 3rd day of December, 2010, I caused to be served a
3 true and correct copy of the foregoing by the method indicated below, and addressed to the
4 following:
5

6 Jay Leipham
7 Richter-Wimberley, PS
8 422 W. Riverside Ave., Ste. 1300
9 Spokane, WA 99201

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11 John P. Bowman
12 Keefe, Bowman & Bruya, P.S.
13 601 W. Main, Ste. 1102
14 Spokane, WA 99201-0613

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18 LAUREL K. VITALE

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EXHIBIT "A"

FILED

OCT 22 2010

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, SPOKANE COUNTY, WASHINGTON

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10 GAVIN J. CREGAN, a married man,

11 Plaintiff,

12 vs.

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

15 Defendant,

16
17 FOURTH MEMORIAL CHURCH, a non-profit
18 Washington corporation, d/b/a RIVERVIEW
BIBLE CAMP,

19 Third Party Plaintiff,

20 vs.

21 BEATS & RHYTHMS, a Washington
22 corporation,

23 Third-Party Defendant.
24

NO. 10-2-00572-7

ORDER GRANTING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
STRIKING AFFIRMATIVE
DEFENSE OF IMMUNITY
AND DENYING DEFENDANT
FOURTH MEMORIAL CHURCH'S
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT

25 THIS MATTER came on regularly for hearing before the undersigned judge of the above-
26 captioned Court, upon the motion of Plaintiff for an order granting Plaintiff's motion for partial

27 I:\EL-PLFCregan\Pleadings\SJMotionOrder.pld.wpd
ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT STRIKING AFFIRMATIVE DEFENSE OF IMMUNITY AND
28 DENYING DEFENDANT FOURTH MEMORIAL CHURCH'S CROSS-MOTION
FOR PARTIAL SUMMARY JUDGMENT - PAGE 1

RICHTER-WIMBERLEY, P.S.
ATTORNEYS AT LAW
U.S. BANK BUILDING
422 W. RIVERSIDE, SUITE 1300
SPOKANE, WASHINGTON 99201-0305
(509) 455-4201
FAX • (509) 455-4217

ORIGINAL

1 summary judgment striking the fifth affirmative defense of Defendant Fourth Memorial Church,
3 wherein the Defendant alleges immunity under RCW 4.24-200-210, and upon the Defendant's cross-
4 motion for an order ruling as a matter of law that such statutes apply to the matter. The court
5 considered the following documents:

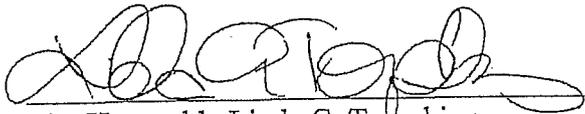
- 6 1. Plaintiff's Motion for Summary Judgment Striking Affirmative Defense of Immunity;
- 7 2. Defendant's Answer to Complaint and Affirmative Defenses;
- 8 3. Declaration of Jay E. Leipham in Support of Plaintiff's Motion for Partial Summary
9 Judgment, including the Exhibits thereto, the Deposition of Tim Mason excerpts and the
10 answers of Defendant Fourth Memorial Church to Plaintiff's Interrogatories 13 and 19;
- 11 4. Declaration of Gavin Cregan in Support of Motion for Partial Summary Judgment;
- 12 5. Plaintiff's Brief in Support of Motion for Summary Judgment Striking Affirmative Defense
13 of Immunity;
- 14 6. Plaintiff's Reply Memorandum Opposing Defendant's Motion for Dismissal (sic);
- 15 7. Defendant Fourth Memorial Church's Motion for Partial Summary Judgment;
- 16 8. Defendant's Response Memorandum to Plaintiff's Motion for Partial Summary Judgment
17 and Memorandum in Support of Defendant's Cross-Motion for Partial Summary Judgment;
- 18 9. Affidavit of Matthew T. Ries in Support of Defendant's Response to Plaintiff's Motion for
19 Partial Summary Judgment and Memorandum in Support of Defendant's Cross-Motion for
20 Summary Judgment; and
- 21 10. Reply Memorandum in Support of Defendant's Cross-Motion for Summary Judgment.
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1 Deeming itself fully informed, and finding that there is no dispute as to any fact material to
3 the application of RCW 4.24.200-210 to this cause, and that Plaintiff is entitled as a matter of law
4 to an order striking Defendant Fourth Memorial Church's 5th Affirmative Defense, NOW,
5 THEREFORE, it is hereby

6 ORDERED, ADJUDGED AND DECREED that the 5th Affirmative Defense of Defendant
7 Fourth Memorial Church, alleging immunity under the provisions of RCW 4.24.200-210, is stricken;
8 and it is further

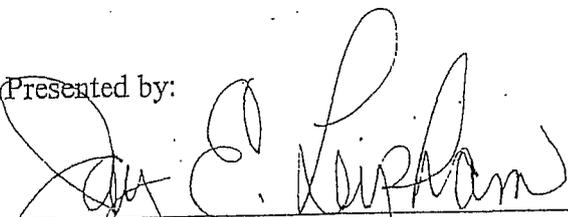
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10 ORDERED, ADJUDGED AND DECREED that Defendant Fourth Memorial Church's
11 cross-motion for partial summary judgment is denied.

12 DONE IN OPEN COURT this 22nd day of October, 2010.

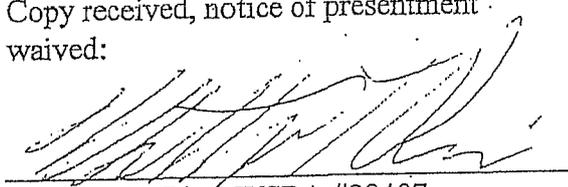
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14 
The Honorable Linda G. Tompkins

LINDA G. TOMPKINS

15 Presented by:

16 
17
18 Jay E. Leipham, WSBA #4961
19 Richter-Wimberley, P.S.
20 Attorneys for Plaintiff

21 Copy received, notice of presentment
22 waived:

23 
24 Matthew T. Ries, WSBA #29407
25 Stamper Rubens, P.S.
26 Attorneys for Defendant Fourth Memorial
27 Church

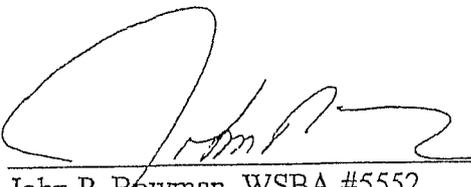
28 
John P. Bowman, WSBA #5552
Keefe, Bowman & Bruya, P.S.
Attorneys for Third-Party Defendant
Beats & Rhythms

EXHIBIT "B"

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

GAVIN J. CREGAN, a married man,

Plaintiff,

vs..

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

Defendant.

No. 10-2-00572-7

COURT' RULING

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

Third-Party Plaintiff,

vs.

BEATS & RHYTHMS, a Washington corporation,

Third-Party Defendant.)

SUMMARY JUDGEMENT MOTION HEARING

The above-entitled matter was heard before the Honorable Linda G. Tompkins, Superior Court Judge, Department No. 10 for the State of Washington, County of Spokane, on October 22, 2010.

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APPEARANCES:

For the Plaintiff:

RICHTER-WIMBERLEY
BY: JAY E. LEIPHAM
Attorney at Law
1000 U.S. Bank Building
422 W. Riverside Avenue
Spokane, WA 99201

For Defendant Fourth
Memorial Church:

STAMPER & RUBENS, P.S.
BY: MATTHEW T. REIS
Attorney at Law
720 West Boone, Suite 200
Spokane, WA 99201

For Defendant Beats &
Rhythms:

KEEFE, KING & BOWMAN, PS
BY: JOHN P. BOWMAN
Attorney at Law
601 W. Main Avenue, #1102
Spokane, WA 99201-0636

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3 THE COURT: Thank you, Counsel, once again for creating
4 the legal environment of briefing, argument and focus on the
5 material aspects of the law. It makes the job of the Judge
6 much more difficult. It is beautiful argument and analysis
7 and they are clashing in credible ways.

8 Having reviewed the entire file, and most of the legal
9 authorities, particularly what I call the boat dock cases,
10 *Plano* and *Nielsen*, the Court is tasked with determining
11 whether there is a dispute as to material facts and whether
12 the moving party is entitled to judgment as a matter of law.
13 The Court would be looking at the facts in the light most
14 favorable to the nonmoving party here.

15 The events in question took place at a time at the camp
16 where only one group was admitted, and was not charged a fee.
17 For that sole fiscal year, if you will, that was the only
18 noted exception to the fee-based use of the facility.

19 The cases really do tell us to focus on the landowner's
20 use and not necessarily the Plaintiff's use. That is somewhat
21 difficult here. One of the queries would be on that same day
22 then, in addition to Beats and Rhythms, if a member of the
23 public had driven in would they have been permitted access to
24 the slide free of charge? The evidence doesn't permit a clear
25 answer to that, but the presumption would be no, that that

1 would fall back into the usual structure of charging fees.

2 The nature of this facility is also a bit problematic
3 in that it is a constructed, unique structure that happens to
4 sit on the land. There is nothing about it that couldn't be
5 provided in an enclosed facility in the middle of a city. The
6 nexus between the structure and the whole public policy of
7 making natural outdoor facilities available to the public is a
8 bit of a stretch. Nonetheless, the Court is confining its
9 analysis to that statute as well.

10 I must impose a very narrow construction on immunity
11 here. Because I cannot negate the fact that the Bible Camp
12 and Fourth Memorial did charge fees, and for the precise same
13 use that these individuals were afforded, that eliminates
14 immunity as a matter of law.

15 The Plano and Nielsen cases do appear to be more
16 closely in line and recognize that those plaintiffs on those
17 days were not charged fees either, but defense was not able to
18 avail themselves of the immunity argument.

19 For those reasons the Court then is granting the
20 Plaintiff's Motion for Partial Summary Judgment to strike the
21 immunity defense, denying Defense Motion applying this
22 statute.

23 Mr. Leipham, I will ask you to draft the Order
24 consistent with the Court's ruling.

25 MR. LEIPHAM: I have prepared an order, Your Honor, and

1 I'm handing a copy to Mr. Ries, Mr. Bowman, and I think we can
2 get this taken care of --

3 THE COURT: All right.

4 MR. LEIPHAM: -- at this point rather than having to
5 schedule a presentation.

6 THE COURT: Thank you. This poor statute is going to
7 be subject to so many fact patterns, has been in the past and
8 will continue to be, quite frankly. I don't think this is
9 going to be a seminal ruling by any means, but we shall see.

10 (Pause in the proceedings.)

11 MR. BOWMAN: Your Honor, I don't have a problem with
12 the proposed order as it has been put forth by Mr. Leipham.

13 MR. REIS: I have signed as well, Your Honor.

14 MR. LEIPHAM: May I approach, Your Honor?

15 THE COURT: You may. All right. I have signed the
16 Order, Counsel. Is there anything that you need of the Court
17 with regard to scheduling or other matters as you move forward
18 in your trial preparation?

19 MR. LEIPHAM: I don't think so at this point, Your
20 Honor. Thank you.

21 MR. BOWMAN: No, Your Honor.

22 THE COURT: Thank you. Be in recess.

23 11/10/2010
24 Date

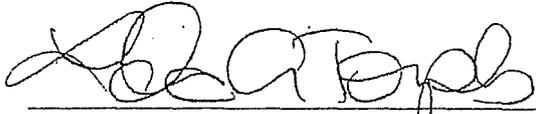

25 HONORABLE LINDA G. TOMPKINS
Superior Court Judge, Dept. 10

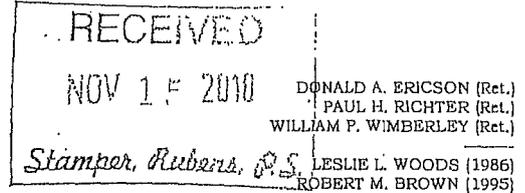
EXHIBIT "C"

RICHTER-WIMBERLEY, P.S.
Attorneys

GARY J. GAINER
F. G. FANCHER
DANIEL E. HUNTINGTON
JAY E. LEIPHAM

U.S. BANK BUILDING
422 W. RIVERSIDE, SUITE 1300
SPOKANE, WASHINGTON 99201-0305

Telephone: (509) 455-4201
Fax: (509) 455-4217
E-mail: r-wlaw@richter-wimberley.com



RULE 408 CORRESPONDENCE

November 11, 2010

VIA FAX to: 326-4891 and MAIL to:

Matthew T. Ries
Stamper Rubens, P.S.
720 W. Boone, Suite 200
Spokane, WA 99201

Re: Cregan v. Riverview Bible Camp

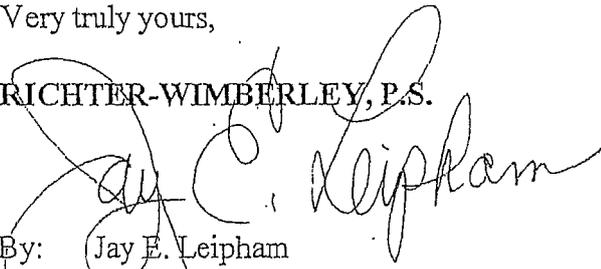
Dear Mr. Ries:

This letter is in response to yours of November 5, 2010. We would oppose any continuance of the trial date, but would otherwise support a summary appellate determination of the propriety of the order striking your client's affirmative defense under the recreational immunity statute. It is clear to us that the statute does not immunize your client under the circumstances of this case. Unfortunately, I doubt that any procedure likely to be followed by the Court of Appeals would allow such a rapid decision, and its granting discretionary review seems highly unlikely.

REDACTED

Very truly yours,

RICHTER-WIMBERLEY, P.S.

By:  Jay E. Leipham

cc: Gavin Cregan
John Bowman

EXHIBIT "D"

COP. 1
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NOV 16 2010

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

COPY RECEIVED
KEEFE BOWMAN BRUYA

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DWK JPB EJB
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RICHTER-WIMBERLEY, P.S.

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

GAVIN J. CREGAN, a married man,)

Plaintiff,)

vs.)

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

Defendant.)

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

Third Party Plaintiff,)

vs.)

BEATS & RHYTHMS, a Washington)
corporation,)

Third Party Defendant.)

No. 10-2-00572-7

DEFENDANT'S NOTICE OF
DISCRETIONARY REVIEW TO COURT
OF APPEALS

Defendant, FOURTH MEMORIAL CHURCH, d/b/a RIVERVIEW BIBLE CAMP ("Riverview Bible Camp") by and through its attorney of record Matthew T. Ries of Stamper Rubens, P.S., seeks review by the designated appellate court of the Honorable Linda G. Tompkins' October 22, 2010, Order Granting Plaintiff's Motion for Partial Summary Judgment Striking the Defendants Riverview Bible Camp's affirmative defense of immunity under the Recreational Use Act of RCW 4.24.200-210. Riverview Bible camp further seeks review of the Honorable Linda G. Tompkins' October 22, 2010, Order Denying Riverview Bible Camp's Cross-Motion for Summary Judgment to dismiss the Plaintiff's lawsuit based upon the immunity

STAMPER RUBENS P.S.
ATTORNEYS AT LAW

DEFENDANT'S NOTICE OF DISCRETIONARY
REVIEW TO COURT OF APPEALS: 1

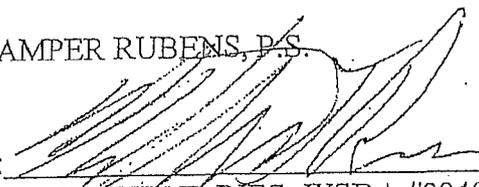
720 WEST BOONE, SUITE 200
SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

1 under the Recreational Use Act of RCW 4.24.200-210.

2 A copy of the decision is attached to this notice.

3 DATED this 16 day of November 2010.

4 STAMPER RUBENS, P.S.

5
6
7 By: 

8 MATTHEW T. RIES, WSBA #29407
9 Attorney for Defendant, Fourth
10 Memorial Church dba Riverview Bible
11 Camp

11 **Attorneys for Petitioner:**

12 Matthew T. Ries, WSBA # 29407
13 Stamper Rubens, P.S.
14 720 W. Boone Ave., Suite 200
15 Spokane, WA 99201
16 Tel. 509.326.4800.
17 Fax 509.326.4891

18 **Attorneys for Respondent:**

19 Jay Leipham, WSBA #4961
20 Richter-Wimberley, PS
21 422 W. Riverside Ave., Ste. 1300
22 Spokane, WA 99201

23 **Attorneys for Third Party Defendant:**

24 John P. Bowman, WSBA #5552
25 Keefe, Bowman & Bruya, P.S.
26 601 W. Main, Ste. 1102
27 Spokane, WA 99201-0613
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STAMPER RUBENS PS
ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

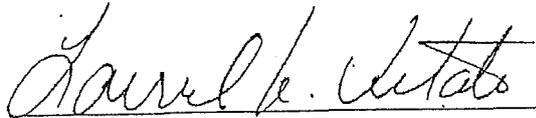
I hereby certify that on the 16 day of November 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Leipham
Richter-Wimberley, PS
422 W. Riverside Ave., Ste. 1300
Spokane, WA 99201

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy (Facsimile)

John P. Bowman
Keefe, Bowman & Bruya, P.S.
601 W. Main, Ste. 1102
Spokane, WA 99201-0613

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy (Facsimile)


LAUREL K. VITALE

H:\Clients\Brotherhood Mutual\Fourth Memorial Church\Pleadings\Appeal\NoticeDiscretionaryReview.doc

STAMPER RUBENS PS
ATTORNEYS AT LAW

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FILED

OCT 22 2010

THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, SPOKANE COUNTY, WASHINGTON

GAVIN J. CREGAN, a married man,)
)
Plaintiff,)

NO. 10-2-00572-7

vs.)

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

ORDER GRANTING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
STRIKING AFFIRMATIVE
DEFENSE OF IMMUNITY
AND DENYING DEFENDANT
FOURTH MEMORIAL CHURCH'S
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT

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

Third Party Plaintiff,)

vs.)

BEATS & RHYTHMS, a Washington)
corporation,)

Third-Party Defendant.)

THIS MATTER came on regularly for hearing before the undersigned judge of the above-captioned Court, upon the motion of Plaintiff for an order granting Plaintiff's motion for partial

ORIGINAL

1 summary judgment striking the fifth affirmative defense of Defendant Fourth Memorial Church,
2 wherein the Defendant alleges immunity under RCW 4.24-200-210, and upon the Defendant's cross-
3 motion for an order ruling as a matter of law that such statutes apply to the matter. The court
4 considered the following documents:
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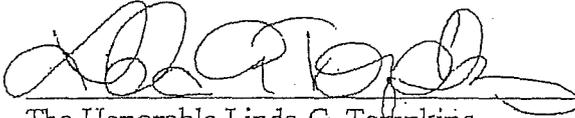
- 6 1. Plaintiff's Motion for Summary Judgment Striking Affirmative Defense of Immunity;
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- 8 3. Declaration of Jay E. Leipham in Support of Plaintiff's Motion for Partial Summary
9 Judgment, including the Exhibits thereto, the Deposition of Tim Mason excerpts and the
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- 18 9. Affidavit of Matthew T. Ries in Support of Defendant's Response to Plaintiff's Motion for
19 Partial Summary Judgment and Memorandum in Support of Defendant's Cross-Motion for
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ORDERED, ADJUDGED AND DECREED that the 5th Affirmative Defense of Defendant Fourth Memorial Church, alleging immunity under the provisions of RCW 4.24.200-210, is stricken; and it is further

ORDERED, ADJUDGED AND DECREED that Defendant Fourth Memorial Church's cross-motion for partial summary judgment is denied.

DONE IN OPEN COURT this 22nd day of October, 2010.


The Honorable Linda G. Tompkins

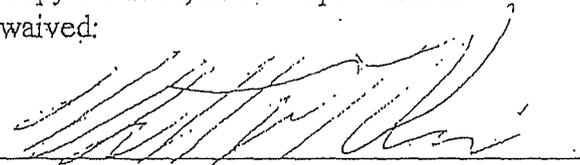
LINDA G. TOMPKINS

Presented by:



Jay E. Leipham, WSBA #4961
Richter-Wimberley, P.S.
Attorneys for Plaintiff

Copy received, notice of presentment waived:



Matthew T. Ries, WSBA #29407
Stamper Rubens, P.S.
Attorneys for Defendant Fourth Memorial Church



John P. Bowman, WSBA #5552
Keefe, Bowman & Bruya, P.S.
Attorneys for Third-Party Defendant Beats & Rhythms

EXHIBIT "E"

Renee S. Townsley
Clerk/Administrator

(509)456-3082
TDD #1-800-833-6388

*The Court of Appeals
of the
State of Washington
Division III*



December 2, 2010

Jay E. Leipham
Richter-Wimberley PS
422 W Riverside Ave Ste 1300
Spokane, WA 99201-0305

Matthew Thomas Ries
Stamper Rubens PS
720 W Boone Ave Ste 200
Spokane, WA 99201-2560

CASE # 295109
Gavin J. Cregan v. Fourth Memorial Church
SPOKANE COUNTY SUPERIOR COURT No. 102005727

Counsel:

We received the motion for discretionary review and have forwarded this file to the Commissioners' office for setting on their docket.

Argument will be before Commissioner Wasson on the docket of Wednesday, January 5, 2011, at 11:30 a.m., by telephone conference call initiated by the Court. Argument is limited to 10 minutes per side pursuant to RAP 17.5(d).

An answer to the motion should be received in this Court no later than December 29, 2010. Counsel should file the original and one copy of the answer along with proof of service upon opposing counsel.

Should you have any questions, please do not hesitate to contact Bridget-Anne Lochelt, Commissioners' administrative assistant, at 456-3095.

Sincerely,

Renee S. Townsley
Clerk/Administrator


Bridget-Anne Lochelt
Commissioners' Administrative Assistant

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DEC 03 2010
500 N Cedar ST
Spokane, WA 99201-1905
Stamper, Rubens, P.S.
Fax(509)456-4288
<http://www.courts.wa.gov/courts>

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THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

RICHTER-WIMBERLEY, P.S.

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SUPERIOR COURT
ADMINISTRATORS OFFICE

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

GAVIN J. CREGAN, a married man,)
)
 Plaintiff,)

vs.)

No. 10-2-00572-7

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

[PROPOSED]
ORDER GRANTING CERTIFICATION
OF OCTOBER 22, 2010 ORDER

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

vs.)

BEATS & RHYTHMS, a Washington)
 corporation,)
)
 Third Party Defendant.)

On December 17, 2010, the Court considered Defendant's Motion for Certification of the October 22, 2010 Order, and heard the Defendant's argument that the application of RCW 4.24.200-210 is a question of law, and that the Superior Court's October 22, 2010 Order should be certified to allow for Discretionary Review by the Court of Appeals. The Defendant argues that the application of RCW 2.24.200-210 and its interpretation is dispositive in this case; that there is substantial ground for differing opinion; and immediate review could resolve and terminate the need for further litigation.

Having reviewed the pleadings pertaining to Defendant's motion, and having considered oral argument of counsel for the parties, the Court hereby

STAMPER RUBENS PS
ATTORNEYS AT LAW

[PROPOSED] ORDER GRANTING CERTIFICATION OF
OCTOBER 22, 2010 ORDER: 1

720 WEST BOONE, SUITE 200
SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

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CERTIFICATE OF SERVICE

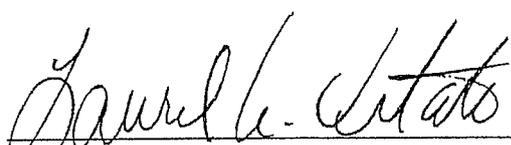
I hereby certify that on the 3rd day of December, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Leipham
Richter-Wimberley, PS
422 W. Riverside Ave., Ste. 1300
Spokane, WA 99201

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy (Facsimile)

John P. Bowman
Keefe, Bowman & Bruya, P.S.
601 W. Main, Ste. 1102
Spokane, WA 99201-0613

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy (Facsimile)


LAUREL K. VITALE

H:\Clients\Brotherhood Mutual\Fourth Memorial Church\Pleadings\OrdGrantCertofJudgeRuling.doc

STAMPER RUBENS PS
ATTORNEYS AT LAW

DEC 10 2010

DWK JPB EJB
BY _____ TIME _____

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DEC 10 2010

STAMPER, RUBENS,

SUPERIOR COURT, SPOKANE COUNTY, WASHINGTON

GAVIN J. CREGAN, a married man,

Plaintiff,

vs.

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

Defendant.

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

Third Party Plaintiff,

vs.

BEATS & RHYTHMS, a Washington
corporation,

Third Party Defendant.

NO. 10-2-00572-7

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION FOR
CERTIFICATION FOR
IMMEDIATE APPEAL

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I. BACKGROUND

This court granted Plaintiff's motion to strike Defendant's affirmative defense under the recreational immunity statute on October 22. Defendant has asked the court to certify the matter for immediate appeal, pursuant to RAP 2.3(b)(4).

II. ISSUES

Does the court's order involve a controlling question of law as to which there is substantial ground for a difference of opinion and would immediate review of the order materially advance the ultimate termination of the litigation?

III. ANALYSIS

The issue has significant implications for the parties. If discretionary review is granted, the August 2011 trial date on Plaintiff's claim will be lost. Unless the appellate court reverses the trial court and grants dismissal of Plaintiff's action, the timetable for review would delay resolution of the case for as long as two years, at which time trial would still be necessary and may provide Defendant with other grounds for yet further appeal. With this issue on appeal, settlement becomes less likely, as Defendant is encouraged to continue its search for complete immunity from the consequences of its negligence.

Defendant has added a third party defendant, Beats and Rythms, seeking indemnity. Will its claim against that third-party be tried next August, while Plaintiff's claim is in appellate limbo? Will Plaintiff be forced to trial twice, once on Defendant's third party claim, and again on his own?

Interlocutory appeals should not be encouraged. Division I Commissioner James Verellen, writing for the WSBA Bar News last March, noted that the "final judgment rule" sensibly prohibits most piecemeal appeals during any ongoing case: "If parties routinely

1 appealed every issue, the cost and complexity of litigation would spiral out of control and our
3 appellate courts would be overwhelmed.” Verellen, Feldman and Swedlow, *Partial Appeals in*
4 *Multiple-Party and Multiple-Claim Cases*, Washington State Bar News, March, 2010, p. 15. As
5 noted by Division III, Court of Appeals in its recent decision in *Mineheart v. Morning Star Boys*
6 *Ranch, Inc.*, 156 Wn. App. 457; 232 P.3d 591 (2010), “Interlocutory review is disfavored.
7 [citation omitted] ‘Piecemeal appeals of interlocutory orders must be avoided in the interests of
8 speedy and economical disposition of judicial business.’ *Ibid.*, p. 462. Judge Korsmo went on to
9 note:

11 Interlocutory review is available in those rare instances where the alleged error is
12 reasonably certain and its impact on the trial manifest. . . Under [RAP 2.3(b) (1) and (2)],
13 there is an inverse relationship between the certainty of error and its impact on the trial.
14 Where there is a weaker argument for error, there must be a stronger showing of harm.
Ibid., p. 462-63.

16 Other than the bare language of the appellate rule for certification, Defendant’s briefing
17 provides no citation of authority to guide the court in deciding whether the subject order justifies
18 certification for immediate appeal. There are no reported Washington cases explicating
19 RAP2.3(b)(4), but the rule’s wording is taken from 28 U.S.C. §1292(b), and therefore federal
20 authority may provide helpful guidance. *See* 2A Karl Tegland, *Washington Practice*, at 161-62
21 (6th ed. 2004). As the federal courts have explained with respect to § 1292(b):

22 It is quite apparent from the legislative history ... that Congress intended that
23 section 1292(b) should be sparingly applied. It is to be used only in exceptional
24 cases where an intermediate appeal may avoid protracted and expensive litigation
and is not intended to open the floodgates to a vast number of appeals from
interlocutory orders in ordinary litigation.

25 *Milbert v. Bison Laboratories*, 260 F.2d 431, 433 (3rd Cir. 1958); *see also Deepwater*
26 *Exploration Co. v. Andrew Weir Ins Co.*, 167 F. Supp. 185, 188 (E.D. La. 1958) (“The legislative
27 history of the Act clearly shows that in passing this legislation Congress did not intend that the

28 I:\EL-PLF\Cregan\Pleadings\CertificationResponseJEL.pld.doc

**PLAINTIFF’S RESPONSE TO DEFENDANT’S
MOTION FOR CERTIFICATION FOR IMMEDIATE
APPEAL - PAGE 3**

RICHTER-WIMBERLEY, P.S.
ATTORNEYS AT LAW
U.S. BANK BUILDING
422 W. RIVERSIDE, SUITE 1300
SPOKANE, WASHINGTON 99201-0305
(509) 455-4201
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1 courts abandon the final judgment doctrine and embrace the principle of piecemeal appeals. The
3 danger of disruptive interlocutory appeals was recognized by the legislative committee and
4 provided against.”).

5 The trial court is the first line of defense against unnecessary appeals. Certification
6 should not be made lightly or simply to accommodate losing counsel’s desire for an immediate
7 re-argument of the matter in the appellate court. Certification should be granted sparingly, and
8 only in exceptional cases. It should be made only in cases where there is substantial likelihood
9 that the trial court committed error, not merely where the losing party made a creditable
10 argument. By certifying the order for immediate appeal, the trial court is essentially telling the
11 appellate court that there is a substantial risk the court’s decision was wrongly made.
12

13 As the federal courts have explained, “A mere claim that the district court's ruling was
14 incorrect does not demonstrate a substantial ground for difference of opinion” for purposes of
15 justifying an interlocutory appeal. *Wausau Business Ins. Co. v. Turner Constr. Co.*, 151 F.
16 Supp.2d 488, 491 (S.D.N.Y. 2001). “Interlocutory appeal was not intended as a ‘vehicle to
17 provide early review of difficult rulings in hard cases.’” *German v. Federal Home Loan*
18 *Mortgage Corp.*, 896 F.Supp. 1385, 1398 (S.D.N.Y. 1995). Rather, existence of a “substantial
19 ground for a difference of opinion” within the meaning of the rule “has been construed to be
20 ‘synonymous with a substantial likelihood that appellant's position would prevail on appeal.’”
21 *Bennett v. Southwest Airlines Co.*, 2006 WL 1987821, *1 (N.D. Ill. July 13, 2006) (quoting
22 *Seven-Up Co. v. O-So Grape Co.*, 179 F.Supp. 167, 172 (S.D.Ill.1959)), *rev'd on other grounds*,
23 484 F.3d 907 (7th Cir. 2007).
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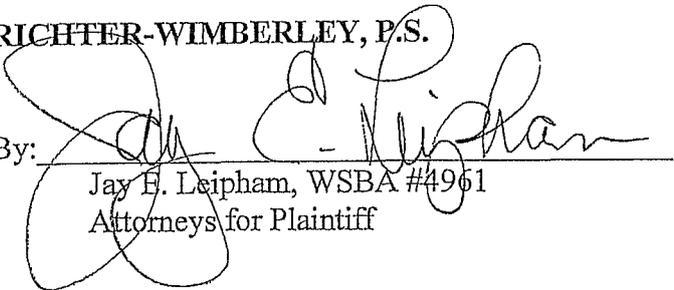
26 Such is not the case at bar. This was not a matter of first impression, nor was it so close a
27 call that the matter should be put on hold for two years for a side trip to the Court of Appeals.

1 While defense counsel made a creditable argument, there is little risk that the trial court's careful
3 judgment was made in error. The statute at issue is in derogation of common law, and must be
4 strictly construed. Two Washington appellate cases have been decided directly on point, in
5 Plaintiff's favor. Defendant failed to cite any controlling Washington case law overruling or
6 distinguishing either of the cases relied upon by Plaintiff and by the trial court in its ruling.

7 There is no substantial likelihood that Defendant will succeed on the merits in the Court
8 of Appeals. There is no substantial likelihood that the trial court's ruling was wrong.
9 Certification for immediate appeal will result in unnecessary delay and additional expense.
10 Plaintiff will lose his right to have his case tried by his choice of counsel. Declaration of Jay
11 Leipham in Response to Defendant's Motion for Certification.
12

13 Certification should be denied.

14 Respectfully submitted this 10th day of December, 2010.

15 RICHTER-WIMBERLEY, P.S.
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17 By: 
18 Jay E. Leipham, WSBA #4961
19 Attorneys for Plaintiff
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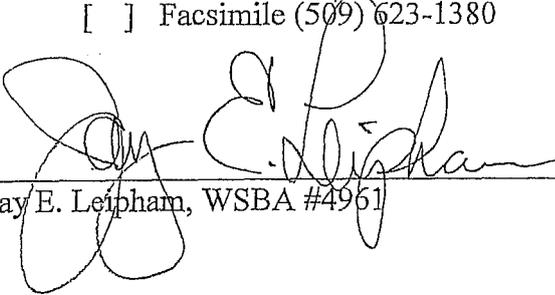
I hereby certify that on the 10th day of December, 2010, I caused to be delivered the foregoing Plaintiff's Response To Defendant's Motion For Certification For Immediate Appeal to the following counsel of record in the manner indicated:

Matthew T. Ries
Stamper Rubens, P.S.
720 W. Boone, Suite 200
Spokane, WA 99201

[] U.S. Mail
[] Certified Mail
[x] Hand Delivered
[] Facsimile (509) 326-4891

John P. Bowman
Keefe, Bowman & Bruya, P.S.
601 W. Main, Suite 1102
Spokane, WA 99201

[] U.S. Mail
[] Certified Mail
[x] Hand Delivered
[] Facsimile (509) 623-1380



Jay E. Leipham, WSBA #4961

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KEEFE BOWMAN BRUYA

DEC 10 2010

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BY _____ TIME _____

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DEC 10 2010

CAMPER, RUBENS,

SUPERIOR COURT, SPOKANE COUNTY, WASHINGTON

GAVIN J. CREGAN, a married man,

Plaintiff,

vs.

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

Defendant.

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

Third Party Plaintiff,

vs.

BEATS & RHYTHMS, a Washington
corporation,

Third Party Defendant.

NO. 10-2-00572-7

DECLARATION OF JAY E.
LEIPHAM IN RESPONSE TO
DEFENDANT'S MOTION FOR
CERTIFICATION

JAY E. LEIPHAM, hereby declares, upon penalty of perjury, as follows:

I am attorney of record for the plaintiff herein. I make this declaration based on my
personal knowledge. Defendant has improperly provided the court a settlement offer (marked

COPY

1 "Rule 408 Correspondence") I made by letter on November 11, 2010, redacting all the text but
3 the prelude to the settlement offer and claiming it constituted a "seeming" agreement to stipulate
4 to discretionary review. Defendant essentially accuses me of renegeing on the "agreement."

5 Defense counsel made no effort to contact me about this "seeming agreement" nor made
6 any response to it for more than a week after receiving it. When I left the state on a scheduled
7 vacation November 20, I left word that I would be monitoring my email. Defense counsel did
8 not contact me regarding any proposed stipulation until he emailed an approval draft after 5:00
9 pm the evening before Thanksgiving.

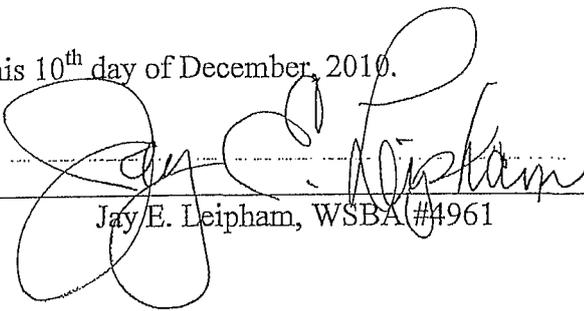
11 I did not see Defendant's proposal, which in effect was a stipulation that the court's order
12 be reversed, until November 26, and immediately emailed counsel that he had mischaracterized
13 and misunderstood my letter of November 11, and that I could not sign the proffered stipulation
14 in that form in any event. My letter of November 11 states that I would support a summary
15 process in the Court of Appeals, if there were no continuance or loss of the existing August trial
16 date, but notes that I know of no such procedure available.

18 Defendant is urging that the Court of Appeals accept discretionary review, which would
19 largely terminate the trial court's jurisdiction under RAP 7.2, and would certainly result in a loss
20 of the existing trial date, given the probable two years currently required for a Division III Court
21 of Appeals review. I have never told Defendant I would stipulate to discretionary review of the
22 court's order at the cost of the existing trial date.

24 As I have told defense counsel, I plan to retire next year. If the matter were tried as
25 scheduled, I would retire after the trial. I am not in a position to delay retirement another two
26 years. If the case ends up in the appellate court on discretionary review for the next two years,
27

1 and the court's order is upheld as expected, Plaintiff will have lost the chance to have his case
3 tried by the lawyer of his choice.

4 SIGNED in Spokane, Washington, this 10th day of December, 2010.

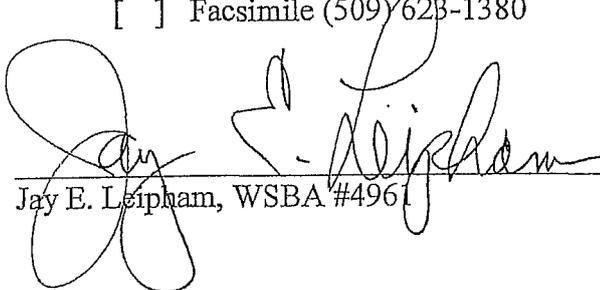
5 
6 Jay E. Leipham, WSBA #4961

7
8
9 **CERTIFICATE OF SERVICE**

10 I hereby certify that on the 10th day of December, 2010, I caused to be delivered the
11 foregoing Declaration of Jay E. Leipham in Response to Defendant's Motion for Certification to
12 the following counsel of record in the manner indicated:

13 Matthew T. Ries [] U.S. Mail
14 Stamper Rubens, P.S. [] Certified Mail
720 W. Boone, Suite 200 [x] Hand Delivered
Spokane, WA 99201 [] Facsimile (509) 326-4891

15 John P. Bowman [] U.S. Mail
16 Keefe, Bowman & Bruya, P.S. [] Certified Mail
601 W. Main, Suite 1102 [x] Hand Delivered
17 Spokane, WA 99201 [] Facsimile (509) 623-1380

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19 
20 Jay E. Leipham, WSBA #4961

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RICHTER-WIMBERLEY, P.S.
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KEEFE BOWMAN BRUYA
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

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SUPERIOR COURT
ADMINISTRATORS OFFICE

DEC 15 2010

BY DWK JPB EJB
TIME

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

GAVIN J. CREGAN, a married man,)
)
)
) Plaintiff,)

vs.)

No. 10-2-00572-7

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

REPLY MEMORANDUM IN SUPPORT
OF DEFENDANT'S MOTION FOR
CERTIFICATION OF JUDGE TOMPKINS'
RULING OF OCTOBER 22, 2010

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

vs.)

BEATS & RHYTHMS, a Washington)
corporation,)
)
) Third Party Defendant.)

Defendant, Fourth Memorial Church, d/b/a Riverview Bible Camp, by and through its attorney, Matthew T. Ries of the law firm of Stamper, Rubens, P.S., hereby files this Reply Memorandum in Support of Certification of Judge Tompkins' October 22, 2010 ruling.

I. ARGUMENT

A. AN ANALYSIS OF DISCRETIONARY REVIEW IS INNAPPROPRIATE WHEN DETERMINING IF CERTIFICATION OF SUPERIOR COURT'S JUDGEMENT IS NECESSARY.

STAMPER RUBENS P.S.
ATTORNEYS AT LAW

1 The Superior Court's decision to certify should focus on the standard for certification,
2 outlined in RAP 2.3(b)(4), and not on whether discretionary review by the Court of Appeals is
3 appropriate. Under RAP 2.3(b)(4), the petitioning party can request that the Superior Court
4 certify that its judgment involves a controlling question of law as to which there is substantial
5 ground for a difference of opinion and whether immediate review of the order materially
6 advances the ultimate termination of the litigation. RAP 2.3 does not discuss nor reference the
7 duty of the Superior Court to determine in advance whether discretionary review of the certified
8 judgment is appropriate, or whether the policy of the Court of Appeals encourages or
9 discourages interlocutory appeal. The decision regarding certification is left solely to the
10 discretion of the Superior Court, and the decision to grant review is left to the Court of Appeals.
11 RAP 2.3 provides in pertinent part that discretionary review is appropriate if:

- 12 (1) The superior court has committed an obvious error which would render
13 further proceedings useless;
- 14 (2) The superior court has committed probable error and the decision of the
15 superior court substantially alters the status quo or substantially limits the
16 freedom of a party to act;
- 17 (3) The superior court has so far departed from the accepted and usual course
18 of judicial proceedings, or so far sanctioned such a departure by an inferior court
19 or administrative agency, as to call for review by the appellate court; or
- 20 (4) **The superior court has certified, or that all parties to the litigation
21 have stipulated, that the order involves a controlling question of law as to
22 which there is substantial ground for a difference of opinion and that
23 immediate review of the order may materially advance the ultimate
24 termination of the litigation.**

25 RAP 2.3(emphasis added).

26 Riverview Bible Camp agrees that there is a dearth of Washington case law interpreting
27 the analysis need by the Superior Courts when determining whether to grant certification of an
28 order. Therefore, it is appropriate to look to Federal Court opinions for guidance on the issue. In
29 Primavera Familienstifung v. Askin, 139 F.Supp.2d 567 (2001) the court laid out a three part test
30 for analyzing when certification was appropriate under the similar federal statute, 28 U.S.C.
31 §1292(b). The "court may certify an interlocutory order for appeal if it is of the opinion that (1)
32 the order 'involves a controlling question of law'; (2) 'as to which there is substantial ground for
difference of opinion,' and (3) an immediate appeal 'may materially advance the ultimate
termination of the litigation.'" Primavera Familienstifung v. Askin, 139 F.Supp.2d 567 (2001).

STAMPER RUBENS P.S.
ATTORNEYS AT LAW

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR CERTIFICATION OF JUDGE TOMPKINS'
RULING OF OCTOBER 22, 2010: 2

720 WEST BOONE, SUITE 200
SPOKANE, WA 99201
TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

1 The first condition, whether the matter involves a controlling question of law, is met if “reversal
2 could result in dismissal or could significantly affect the conduct of the action.” Wassau
3 Business Insurance Co. v. Turner Const. Co., 151 F.Supp.2d 488, 491 (2001). A substantial
4 difference of opinion, the second factor, is met if the petitioner can show a “strong arguments in
5 opposition to the challenged ruling”. Max Daetwyler Corp. v. Meyer, 575 F.Supp. 280, 283
6 (1983). Finally, the third element is satisfied if the appeal might avoid extended and costly
7 litigation. Teletronics Propriety, Ltd. v. Medtronic, Inc., 690 F. Supp. 170, 172 (1987).

8 Plaintiff fails to address the merits of Defendant’s argument for certification in its
9 response memorandum, and only attacks the proposition and request for certification on the basis
10 that discretionary review is rarely accepted. Plaintiff is confusing apples with oranges. Despite
11 lack of authority, Plaintiff asserts that certification should be “made only in cases where there is
12 substantial likelihood that the trial court committed error, not merely where the losing party
13 made a creditable argument.” (*Plaintiff’s Response to Defendant’s Motion for Certification for*
14 *Immediate Appeal*, pg. 4, line 8-11.) This assumption incorrectly merges two of the four methods
15 that allow for discretionary review, and misstates the analysis that the court must engage in. As
16 noted above, certification is an entirely alternate method, distinct from any assertion that the
17 Superior Court committed error. Plaintiff even more alleges that a Superior Court’s decision to
18 certify essentially tells “the appellate court that there is a substantial risk the court’s decision was
19 wrongly made.” (*Plaintiff’s Response to Defendant’s Motion for Certification for Immediate*
20 *Appeal*, pg. 4, line 11-12.) Regardless of Plaintiff’s effort to compel the court to deny
21 certification with the prospect of the Court of Appeals reaching a different conclusion, the only
22 question that the Court must answer in deciding whether to certify its judgment is whether
23 immediate review of a substantially disputed controlling question of law would materially
24 advance the termination of the litigation. If so, the order should be certified.

25
26 **B. CERTIFICATION IS APPROPRIATE UNDER RAP 2.3.**

27 The Superior Court’s refusal to certify would prohibit the Defendant the prospect of seeking
28 discretionary review; foreclose a legitimate option under RAP 2.3; and prevent judicial economy.
29 The question of whether RCW 4.24.200-210 applies in this case is a question of statutory
30 interpretation, and the application of the statute is dispositive and controlling. Certification
31 would allow the parties to avoid protracted and expensive litigation.
32

STAMPER RUBENS PS
ATTORNEYS AT LAW

1 **a. A Determination that the Recreational Use Act is Application is a**
2 **Controlling Question of Law Would Result in Dismissal of the Lawsuit.**

3 The parties are not disputing that the issue is dispositive. Reversal of Superior Court's
4 Judgment would result in dismissal of the entire case against Riverview Bible Camp. Plaintiff
5 has concluded that there are no questions of fact that would prevent the dismissal of the lawsuit
6 if RCW 4.24.200-210 is found to be applicable.

7 **b. A Substantial Difference of Opinion Exists Regarding the Application of**
8 **RCW 4.24.200-210.**

9 "It is the duty of the district judge faced with a motion for certification to analyze the
10 strength of the arguments in opposition to the challenged ruling when deciding whether the issue
11 for appeal is truly one on which there is a substantial ground for dispute." Max Daetwyler Corp.
12 v. Meyer, 575 F.Supp. 280, 283 (1983). "The mere fact that the appeal would present a question
13 of first impression is not, of itself, sufficient to show that the question is one on which there is a
14 substantial ground for difference of opinion." Max, 575 F.Supp.2d, 283 (quoting 16 C. Wright,
15 A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 3930 n. 6 (1977 &
16 Supp.1983).

17 The Court indicated in her ruling that the arguments and analysis of either side clashed in
18 credible ways and that RCW 4.24.200-210 has, and will continue to see numerous tests.
19 (*Summary Judgment Motion Hearing*, p. 3-5). Here, a strong argument against the Superior
20 Court's ruling exists in this case because, first, the cases cited by Plaintiff are distinguishable
21 from the present case. Although the Superior Court pointed out that they "were more closely in
22 line" with the facts of the present case, they are not directly on point. *See Summary Judgment*
23 *Motion Hearing*, p. 3.) In the same vein, no Washington court has addressed the issue of a
24 private landowner changing the use of the land from commercial to recreational or vice versa, at
25 the time of the injury. Applying the facts of this case to the plain wording of the statute leads to
26 the conclusion that RCW 4.24.200-210 is applicable. Fourth, and finally, legislative history
27 surrounding the recreational use statute supports Defendant's theory of the case. For these
28 reasons, it is clear that there is a substantial difference in opinion, sufficient to establish the
29 second element for certification.
30
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32

STAMPER RUBENS PS
ATTORNEYS AT LAW

CERTIFICATE OF SERVICE

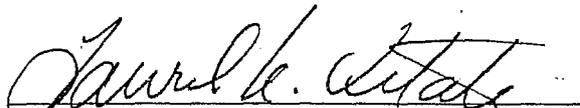
I hereby certify that on the 15 day of December 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jay Leipham
Richter-Wimberley, PS
422 W. Riverside Ave., Ste. 1300
Spokane, WA 99201

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy (Facsimile)

John P. Bowman
Keefe, Bowman & Bruya, P.S.
601 W. Main, Ste. 1102
Spokane, WA 99201-0613

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy (Facsimile)


LAUREL K. VITALE

H:\Clients\Brotherhood Mutual\Fourth Memorial Church\Pleadings\MtnCertofJudgeRuling.doc

STAMPER RUBENS PS
ATTORNEYS AT LAW

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FILED
DEC 17 2010
THOMAS R FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

GAVIN J. CREGAN, a married man,)
)
 Plaintiff,)

vs.)

No. 10-2-00572-7

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

ORDER GRANTING CERTIFICATION
OF OCTOBER 22, 2010 ORDER

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

vs.)

BEATS & RHYTHMS, a Washington)
corporation,)
)
 Third Party Defendant.)

On December 17, 2010, the Court considered Defendant's Motion for Certification of the October 22, 2010 Order, and heard the Defendant's argument that the application of RCW 4.24.200-210 is a question of law, and that the Superior Court's October 22, 2010 Order should be certified to allow for Discretionary Review by the Court of Appeals. The Defendant argues that the application of RCW 2.24.200-210 and its interpretation is dispositive in this case; that there is substantial ground for differing opinion; and immediate review could resolve and terminate the need for further litigation.

Having reviewed the pleadings pertaining to Defendant's motion, and having considered oral argument of counsel for the parties, the Court hereby

ORDER GRANTING CERTIFICATION OF
OCTOBER 22, 2010 ORDER: 1

STAMPER RUBENS P.S.
ATTORNEYS AT LAW

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TELEFAX (509) 326-4891
TELEPHONE (509) 326-4800

ORIGINAL

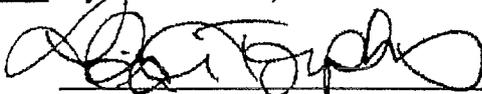
1 **ORDERS, ADJUDGES and DECREES:**

2 1. Defendant's Motion for Certification of the Superior Court's October 22, 2010
3 Order is GRANTED.

4 2. The Superior Court's October 22, 2010 Order Granting Plaintiff's Motion for
5 Partial Summary Judgment Striking Affirmative Defense of Immunity and Denying Defendant
6 Fourth Memorial Church's Cross-Motion for Partial Summary Judgment involves a controlling
7 question of law as to which there is substantial ground for a difference of opinion and that
8 immediate review of the order may materially advance the ultimate termination of the litigation.
9

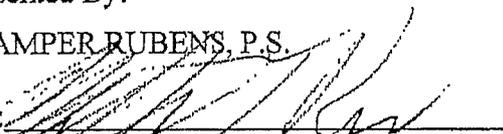
10 3. The Superior Court certifies that the legal question of whether RCW 4.24.200-210
11 applies to this case is appropriate for Discretionary Review by the Court of Appeals pursuant to
12 RAP 2.3(b)(4).

13 DONE IN OPEN COURT this 17th day of December, 2010.

14
15 
16 _____
17 LINDA G. TOMPKINS

18 Presented By:

19 STAMPER RUBENS, P.S.

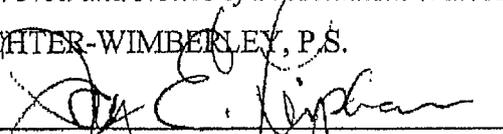
20 BY: 

21 MATTHEW F. RIES, WSBA # 29407

22 Attorney for Defendant

23 *in the forum*
to the forum
to the forum
Approved and Notice of Presentment Waived:

24 RICHTER-WIMBERLEY, P.S.

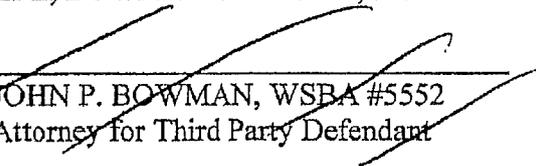
25 By: 

26 JAY LEIPHAM, WSBA #4961

27 Attorney for Plaintiff

28 Approved and Notice of Presentment Waived:

29 KEEFE, BOWMAN & BRUYA, P.S.

30 By: 

31 JOHN P. BOWMAN, WSBA #5552

32 Attorney for Third Party Defendant

STAMPER RUBENS ps
ATTORNEYS AT LAW

ORDER GRANTING CERTIFICATION OF
OCTOBER 22, 2010 ORDER: 2

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A223

1 SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

2
3 GAVIN J. CREGAN, a married man,) No. 10-2-00572-7
4 Plaintiff,) COURT'S RULING
5 vs.)
6 FOURTH MEMORIAL CHURCH, a non-)
7 profit Washington corporation,)
8 d/b/a RIVERVIEW BIBLE CAMP,)
9 Defendant.)
10 FOURTH MEMORIAL CHURCH, a non-)
11 profit Washington corporation,)
12 d/b/a RIVERVIEW BIBLE CAMP,)
13 Third-Party Plaintiff,)
14 vs.)
15 BEATS & RHYTHMS, a Washington)
16 corporation,)
17 Third Party Defendant.)

18 MOTIONS HEARING - COURT'S RULING

19 The above-entitled matter was heard before the
20 Honorable Linda G. Tompkins, Superior Court Judge, Department
21 No. 10 for the State of Washington, County of Spokane, on
22 December 17, 2010.
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APPEARANCES:

For the Plaintiff:

STAMPER & RUBENS, P.S.
BY: MATTHEW T. RIES
Attorney at Law
720 West Boone, Suite 200
Spokane, WA 99201

For the Defendant:

RICHTER-WIMBERLEY
BY: JAY E. LEIPHAM
Attorney at Law
1000 U.S. Bank Building
422 W. Riverside Avenue
Spokane, WA 99201

1 These parties made very credible arguments. The court
2 reporter, bless her heart, was probably recognizing in the
3 original draft that it was also "incredible "arguments -- in a
4 good way. It was quality.

5 The Court's intent was to recognize that this is
6 credible. It is a solid piece of litigation that has
7 reasonable grounds to differ, if you will, from the
8 perspectivea of the parties.

9 The federal case is illuminating in giving more detail
10 into how to go about examining the substantial grounds for
11 difference of opinion standard, suggesting there is usually a
12 dearth of precedence within the controlling jurisdiction. We
13 have searched high and low, all of us, and have not been able
14 to find a case on all fours that answers this question with
15 these types of facts for this particular statute.

16 The case and, again, I am specifically referring to
17 Stuart vs. Radioshack, this is a Lexis Nexis document,
18 citation on the document is 2009 U.S. District Lexis 57963,
19 Judge Edward Chen, the District of Northern California.

20 Additionally, the discussion in the case points to
21 whether there are other circuits with conflicting decisions.
22 My review did not find that the parties had argued that there
23 are other states and other jurisdictions that have conflicting
24 decisions, but on these facts and on this type of immunity
25 statute that would not be helpful.

1 However, I will note that this case does have
2 particular nuances. I outlined those at the very beginning of
3 my oral decision as it relates to the nature of this facility.
4 This is unique in that ordinarily when we look at these land
5 use cases they are involving traditional hunting, fishing,
6 recreating, using the natural bounty of Mother Earth, if you
7 will.

8 This case involves an artificial structure that was
9 constructed and placed out in this beautiful surrounding of
10 the camp, much like one would see inside in a Silver Mountain
11 Resort, for example. This could be constructed virtually
12 anywhere. This particular one happens to be out in nature.
13 Is there something about the natural setting that contributes
14 to the actual workings and the risk or absence of risk of use
15 of this? That is the unique part here.

16 MR. RIES: Your Honor, if I may?

17 THE COURT: Yes.

18 MR. RIES: I didn't brief this, but there is a case
19 dealing directly on point dealing with a slide. No one really
20 brought it up in the underlying Motion for Summary Judgment.

21 THE COURT: Was it a water park kind of thing?

22 MR. RIES: No, it's we are talking about the Red Wagon
23 here in downtown Spokane. It is Swineheart (phonetic), I
24 can't think of the last name, but it has been applied
25 traditionally to playground equipment, slides in particular.

1 It has been established, and that is why no one really briefed
2 that.

3 THE COURT: All right. That underscores, I think, the
4 Court's concern here that that issue remains needing to be
5 analyzed. It wasn't here, but certainly as a matter of law
6 that is something that should be looked at.

7 MR. RIES: I'm sorry, Your Honor.

8 THE COURT: Don't lose that. Put it in your pocket
9 because the Court is ultimately, as you can probably tell,
10 getting to the point where I can find here that there is, in
11 fact, substantial ground for differences of opinion given
12 uniqueness.

13 The other factor was somewhat similar to the boat dock
14 cases. On this particular day and time for this use in that
15 area there wasn't a fee charged, but what if someone had come
16 that same day and seen cars in the parking lot and had asked
17 to join the fun? Would they have been permitted? Probably
18 not. They probably would have been charged a fee. So again,
19 that makes it unique.

20 That is why I am comfortable with granting the
21 certification. I can find that there is a likely substantial
22 ground for difference of opinion based on unique features
23 here. For the reasons otherwise given on the first and third
24 prong, I will grant the motion.

25 MR. RIES: Thank you, Your Honor.

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THE COURT: This is somewhat akin to Civil Rule 54 where the Court is also needing to say there is no just reason for delay, but that is usually when the Court grants a claim. Here I am denying, but again, I see that the Court of Appeals very likely has the ability to put this on a fast track and won't unnecessarily delay our ultimate litigation.

That was another gratuitous finding, but it happens to be all part of that mix.

Date

HONORABLE LINDA G. TOMPKINS
Superior Court Judge, Dept. 10