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Elizabeth Olson, Appellant's Opening Brief

For Civil Case No 14-2-18767-0 KNT

Appeals Case No 728 65-2

Dated April 29th 2015

~~FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2015 MAY -1 AM 10:48~~



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Recreational Land Use Immunity Statue RCW 4.24.200

## A. Assignments of Error

[1] The trial court erred in entering of December 5<sup>th</sup> 2014, granting the Order of Defendant's Motion for Summary Judgment due to several key points.

[2] The trial court erred in granting the Defendant's Motion for Summary Judgment that claimed Recreational Land Use Immunity for which it is not entitled to immunity from liability.

## Issues Pertaining to Assignments of Error

Does the Defendant have Immunity of liability via the Recreational Land Use Immunity Statute in this case? If the Defendant cannot claim Immunity via said statute then what is their responsibility to the Plaintiff? Does their charging "occasional fee's" to private persons still grant them immunity? If so, what is the lawful intent of the statute with regard to municipalities or parks who aren't immune for charging fee's all the time rather than just "occasionally"? Does the Plaintiff's claim undermine the intent of the Recreational Land Use Immunity Statute? At what point is there a defining line between "public property" that is "open" for use and "private" property?

## B. Statement of the Case

This is an appeal against the Tukwila School District for a slip and fall personal injury case which the Plaintiff claims was a result of Defendant's negligence. Failure to inspect the facility for dangerous conditions and maintenance per State Safety Standards resulted in an injury to the Plaintiff at the Foster High School track and field facility in Tukwila, WA on April 26<sup>th</sup> 2012. "CP" p.96

The trial court granted Defendant's Motion for Summary Judgment on December 5<sup>th</sup> 2014 after the Plaintiff Motioned to Strike the Motion for Summary Judgment. The Plaintiff seeks reversal of the Judgment dismissing the Plaintiff's Motion. "CP" p. 255

## C. Statement of the Facts

At all times material hereto, Foster High School, located at 4242 S. 144th Street, Tukwila, WA 98168, is a public High School in the Tukwila School District. Foster High School has an athletic facility with features including a football field, running track, walkways, stairs, and bleachers. Access to the facility is restricted to citizens of the City of Tukwila who have been given an access card. Elizabeth Olson, the Plaintiff had been granted an access card before the time of the incident, and was in

possession of her valid access card at the time of the incident. On or around April 26, 2012, Plaintiff visited Foster High School for the purpose of using the running track. At that time and place, there existed a step with a 15-inch rise that separated the bleachers/walkway and the track. The step constituted a known dangerous artificial latent condition, of which the defendant failed to warn. As plaintiff walked from the walkway to the track, the 15-inch step caused her to fall and be injured. Plaintiff's fall was proximately caused by the known dangerous artificial latent condition, of which the defendant failed to warn. Plaintiff's fall was proximately caused by the negligence of the defendant. "CP" p.2, 6

On and prior to April 26, 2012, Defendant reserved the right to exclude trespassers from the athletic facility at Foster High School. The Defendant reserved the right to exclude any members of the public with pets, except for service animals, for wearing cleats, for carrying food or drink, except water, anyone on bicycles, skateboards, or other wheeled devices, except wheelchairs. The Defendant reserved the right to exclude any members of the public carrying weapons or drugs, or carrying alcohol, tobacco, or any members of the public who did not seek prior approval from the athletic facilities at Foster High School. The Defendant reserved the right to exclude any members of the public who were in violation of local, state or

federal law from the athletic facilities at Foster High School. To obtain an access card, members of the public had to prove that they were residents of the City of Tukwila and had to provide photo identification. Defendant reserved the right to exclude all members of the public who did not have an access card. To obtain an access card, members of the public had to provide their home telephone number, their home address, their email address, emergency contact information including the relationship of the emergency contact and that person's telephone number. To obtain an access card, members of the public had to agree in writing by signing a card that they assume responsibility for the safe care of the facility and agree to abide by the rules and regulations of the facility. "CP" p.2, 3, 4

The Defendant reserved the right to charge members of the public or private or public organizations rental fees that were intended to provide compensation to Defendant for the availability and use of the facility. The Defendant's facility included a notice posted in a prominent location near the entrance, which stated in part: "criminal trespass is prohibited."

The Defendant's facility included a notice posted in a prominent location near the entrance, which stated in part: "violators are subject to removal and prosecution by Tukwila School District and the Tukwila Police Department."

The Defendant's facility included a notice posted in a prominent location near the entrance, which stated in part: "Authorized Card Holders Only."

The Defendant restricted access to the athletic facilities at Foster High School for recreational purposes to residents of the City of Tukwila. The Defendant restricted access to the athletic facilities at Foster High School by using a locked gate at the entrance to the track and field. On April 26, 2012 the Defendant excluded non-residents of the City of Tukwila from the athletic facilities at Foster High School. The Defendant restricted access to the athletic facilities at Foster High School for recreational purposes to residents of the City of Tukwila who completed an application for an access card. "CP" p.4, 6

### C. Summary of Argument

To be immune under the Recreational Use Immunity Statute, the landowner must show that the land (1) was open to the public, (2) for recreational purposes, and that (3) no fee was charged. The Plaintiff argues that the Tukwila School District was not open to the public and functioned as a private facility for Foster High School where it allowed residents of Tukwila to obtain permission to use the facility by applying

for a keycard access at the administrative office in the School. The gated entrance and the “no trespassing” and exclusion signs posted next to the gate prove the land was not open to the public. The Tukwila School District did charge fees to private persons, so although the Plaintiff herself did not pay a fee and was able to use the school facility on the day she was injured, the Tukwila School District is still not immune under the Recreational Use Immunity Statute. This is because the Statute is intended to be strictly construed. “CP” p.17, 121, 123

The only question for the court is whether the condition of the step the Plaintiff used was dangerous, known, artificial, or latent which signs had not been conspicuously posted. “CP” p.6

The Plaintiff can prove all four elements and that the step where she fell exemplified those conditions and was hazardous. The Defendant cannot claim Immunity per the Recreational Land Use Statute because the legislature is there to encourage landowners to open their land, and not to allow some public facilities an advantage over others. The Plaintiff finds that the Defendant should have known about the condition of the facility because it is a place where residents of Tukwila exercise daily and because it is where young children go to play. Defendant's failure to provide a safe facility for recreational use posed a foreseeable risk to the Plaintiff. The

arguments in Plaintiff's claim are sufficient to prove common law negligence and a licensee status. "CP" p.95

## D. Argument

### **I. The Tukwila School District is not entitled to Summary Judgment because the facility was not open to the public.**

To be immune under Wash. Rev. Code § 4.24.210(1) (2003), a landowner must establish that the land in question (1) **is open to members of the public** (2) for recreational purposes and that (3) no fee of any kind is charged.

1.1 The fact that some people (Tukwila Residents and students) used that facility for recreational purposes does not mean it was "open to the public for recreational use." See *Camicia vs Howard*. "The focus is on the landowner's intent, not the user's intent." "CP" p.6

The landowner's intent in Ms. Olson's case was to provide a recreational facility for the school, and the residents of Tukwila.

Furthermore, not all residents of Tukwila were allowed to recreate there, they had to show proof of identity and apply for a keycard to access the facility. The Defendant restricted access to that facility which also proves it was not open to the public. There is signage in bold red, which shows the signs clearly posted at the entrance to the Foster High School track and field. One of the signs even says the facility is only open for “Authorized Card Holders Only”. This includes exclusions as to who is allowed in the facility. This indicates that this facility is not a public facility and is indeed a private facility. “CP” p.6

1.2 With regard to the Tukwila School District Rules “Violators are subject to removal and prosecution by Tukwila School District and the Tukwila Police Department”. “CP” p.66

1.3 There is an additional sign that indicates that Tukwila Residents who are interested in using the facility must obtain a keycard to access the facility through the locked gate. “CP” p.66

If the facility at Foster High School was open to the public, the general public would be allowed to use the facility and the Residents of Tukwila would not need to obtain permission to use the facility, as well as

there would not be a gated entrance and such limiting signage to keep people off the facility grounds.

1.4 There is a video surveillance camera recording the activity at that entrance to the facility. This piece of evidence alone strengthens the “privacy” of the facility, and weakens the Defendants argument that the facility is open to the public.

1.5 There is a “No Trespassing” sign right above the gated entrance area to the facility, which also indicates that the facility was a private facility and therefore was not open to the public. If the statute’s meaning was indeed “open to the general public with limitations and exceptions,” then it should have said so in a clear, concise manner.

1.6 The locked gate at the entrance to the facility additionally shows that the facility was not open to the “general public”. The gate itself where the alternative to opening the gate is that the user would need to use a key. On the day of the site inspection by Joellen Gill, the gate was open and there was a key to open the gate hanging overhead. If the facility was truly “open”, the Tukwila School District would not bother adding a key to

open the gate. There would also not be a locked gate at all with a “key only” access.

1.7 Refer to *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 285

*P.3d 860 (2012)*, The *Cregan* case held that a landowner can restrict use of the property without losing recreational immunity. The court explicitly held that an owner could impose restrictions on land without losing immunity (*Cregan*, p.864). However, **the court noted that so long as the land was open to ALL members of the public, immunity would be retained** (See also *Katti Hofstetter vs City of Bellingham.*) “CP” p.115

The Plaintiff argues that since the land at the Foster High School track and field facility was not open to ALL members of the public, then the Tukwila School District cannot impose restrictions (i.e. the big bold red signs that say “if you wish to enter please apply”, “no trespassing”, exclusions, and keep a locked metal gate at the entrance) without forfeiting their immunity. “The Washington State Legislature did not intend to penalize a landowner for attempting to restrict use in one specific area of a park or other open area” (See RCW 4.24.200.). The Plaintiff would also argue that this facility was not open to the public area, because

people had to apply for a keycard to get in; it was not a specification of restriction of one area of the facility, but it was for the entire facility. If the Plaintiff was still “allowed” usage of the facility under the assumption she was a licensee, there were still several factors that made it a private facility. Therefore, the Defendant cannot claim immunity, and all the evidence including the gated entrance, application for keycard, limitation and warning sign restrictions further strengthen the Plaintiff’s case. “CP” p.115

A landowner can restrict the use of the property without losing immunity, but to what extent? At what point or what fine line is crossed between what defines “public property” that is “open” for use, and a “private one”? Per the constitution, “private property” refers to the owner’s right to use their possessions that are enforceable against all non-owners. Essentially, even if you are a licensee on a “private property” there still are rules and restrictions that are enforced by the owner for specific reasons. On private property, a landlord may do what he wishes because it is his property. A bold red sign implies “stay off my land, this land is for private use.” On public property, the land belongs to the people, essentially “everyone” so therefore it would not make sense for finger pointing at who is liable for injuries. On private property, however, the

owner has a responsibility for any hazardous conditions that may cause injury. “CP” p.97

1.8 At the Summary Judgment hearing the Defense and The Court mentioned a key point regarding the use of The Recreational Land Use Immunity Statute, and the *Nielson* case. “RP” p.10, The Court said, “Would you agree that as stated by the court in the *Nielson* case that Immunity Statutes are in derogation of common law rules of liability of landowners and are to be strictly construed?” Interestingly, the Defense argued against this point “RP” p.10, saying the “primary purpose is to interpret the statute in a manner that effectuates its purpose.” The Plaintiff points out that anyone who believes that the legislature is open to flexible interpretation, would therefore possibly have much to gain or benefit greatly from such interpretations. If the law was meant to be interpreted as flexible, then it would have added each exception to the rule and be specific, what was allowable, fee’s, private groups, purposes etc. Already, the legislature delineates what is allowed, and fee’s are not. If the facility is to be immune, the Defense’s main point regarding the *Home* case clearly shows a belief that the law is meant to be flexible, and open to interpretation. “RP” p. 22, Mark O’Donnell says, “And I submit that under *Home* if you can use the road for different purposes at different times, then

that includes you can charge a fee for use of a facility to a private group at different times without losing your immunity for those times when you are making the facility available to members of the public without charging a fee.” The Plaintiff argues that if the Statute is to be strictly construed, and it doesn’t mention the exceptions of how to get around the rule, then the Defense needs to agree they are not immune under the Statute. Why would the Statute bother to make exceptions, such as how a public facility can get away with not being fair to everyone and still follow the rules? If the legislature had the exceptions, or the ways a public facility could get away with charging fees to the public, or make exceptions by only charging “certain private groups at certain times,” there would certainly be a backlash. There would be no point or incentive to landowners opening up their property for public use to begin with, and there would not be fairness across the board. The Court also brings up the fine line of where the law begins and ends. “RP” p. 35, The Court says, “So my question is the landowner slips, they charge for this soccer team, this track and field meet, whatever. It is only maybe \$5,000, \$6,000 over five years, but they do it. Does that kill the immunity and if so, why? Why should we not make the distinction that counsel is suggesting, which is that those people who are charged were not members of the public and then people who are engaged in the activity that plaintiff was in, these are private activities, Seattle

Christian School meets, whatever, should that make a difference and if not, why?”

The Plaintiff here will take a moment to address this question and comment: If the law IS the law, and we are looking at what is there, without flexible interpretations, exceptions, further twists, without turning it into something it is not, then Recreational Immunity is “killed” when a landowner charges a private group at a separate private time to use the facility. Even if a fee is not charged at the time of the injury to the Plaintiff. If such flexible interpretations were allowed then the law would have specified such allowed exceptions, and it does not, which is most certainly for a reason; the reason being: fairness. It would be like bending the rules, for instance. It is simply someone finding a way around the rules for personal benefit and gain. This is not fair to the private groups, nor is it fair to the rest of the public, nor is it fair to those facilities following the strict adherence to the Statute and not charging anyone at all and opening up their land for free. It is not fair for the private groups, because the private group is still part of the public and they are getting charged when the public group is not. It is not fair to the facilities that do not make profits while other facilities make profits and are immune as well. It is simply another way for a landowner to make a profit, even if it is not much, and still stay “within the rules.” “CP” p.118

## **II. The Tukwila School District is not entitled to Summary Judgement because they charged Fees.**

To be immune under Wash. Rev. Code § 4.24.210(1) (2003), a landowner must establish that the land in question (1) is open to members of the public (2) for recreational purposes and that (3) **no fee of any kind is charged.**

2.1 The Tukwila School District charged fees. “CP” p.115

2.2 On or prior to April 26, 2012 Defendant charged members of the public or private or public organizations rental fees. “CP” p.19, 87

2.3 On or prior to April 26, 2012 Defendant reserved the right to charge members of the public or private or public organizations security fees, which were intended to cover opening and closing costs of the facility or the costs to cover district provided supervision during rental periods. “CP” p.19

2.4 On or prior to April 26, 2012 Defendant charged members of the public or private or public organizations security fees. “CP” p.19

2.5 On or prior to April 26, 2012 Defendant reserved the right to charge members of the public or private or public organizations custodial fees. These fees were intended to reimburse Defendant for expenses associated with securing custodial services to ensure the facility is returned to the sanitary condition and level of cleanliness in which it was found. “CP” p.19

2.6 On or prior to April 26, 2012 Defendant charged members of the public or private or public organizations custodial fees. “CP” p.19

2.7 On or prior to April 26,2012 Defendant reserved the right to charge members of the public or private or public organizations utility fees which were intended to recapture the expenses incurred by Defendant associated with heating, cooling, and/or lighting the facility. “CP” p.115

2.8 On or prior to April 26, 2012 Defendant charged members of the public or private or public organizations utility fees. “CP” p.115

2.9 On or prior to April 26, 2012 Defendant reserved the right to charge members of the public or private or public organizations administrative fees. These fees were necessary to pay for the services of a representative of Defendant assigned to an event to ensure the interests of Defendant are maintained and property interests are protected. “CP” p.115

2.10 On or prior to April 26, 2012 Defendant charged members of the public or private or public organizations administrative fees. “CP” p.115

2.11 On or prior to April 26,2012 Defendant reserved the right to charge members of the public or private or public organizations other additional charges or fees as necessary or appropriate at the discretion of Defendant. “CP” p.19

2.12 On or prior to April 26, 2012 Defendant charged members of the public or private or public organizations other additional charges or fees. “CP” p.19

2.13 See *Coleman vs. Oregon Parks & Recreation Department*, 347 Or. 94, 217 P.3d 651 (2009). With regard to legislative history ruling on immunity if there was any fee charged, this case is a prime example of where the Supreme Court stands. It ruled that if a fee was charged for any use, the Defense would **not be** immune via the Recreational Land Use Immunity Statute. Written in an online publication by Dunn et al, LLP Attorneys at law detailed the case, “An Oregon Supreme Court ruled that the state was not immune from a personal injury lawsuit arising from a biking accident in an Oregon park because the bicyclist paid a fee to camp in a separate area of the park. At trial, the state argued that park users did not need to pay a fee to use the trails where plaintiff was injured. Instead, the park only charged fees to camp and use a gazebo facility. The trial court agreed and dismissed the case. The Oregon Court of Appeals affirmed. On appeal to the state high court, the plaintiff argued that any charge imposed for recreational purpose bars immunity under the statute. The state contended that a prohibited charge only meant a charge for using the specific property where the injury occurred. Because the park did not charge for use of the trail where plaintiff was injured, the state reasoned, it should be immune from liability. The Oregon Supreme Court disagreed. **Here are some key points from the decision: Oregon’s recreational immunity statute is**

**strictly construed – any charge for “permission to use” property may forfeit immunity.** The ruling turned on the lack of a factual record about how the park was divided into separate fee and no-fee areas with distinct boundaries. The majority opinion could lead to inconsistent results: For example, if two people were injured in a no-fee area of a park but only one of them paid to camp in a separate area of the property, it is possible that only the camper would be able to sue. Landowners who charge fees to use part of their property should post their land to show which areas require a fee and what uses are permitted. Attorneys addressing Oregon’s recreational immunity statute should ensure that the trial record includes details about fees charged and recreational uses permitted.”

2.14 The Recreational Land Use Immunity Statute is there to encourage land owners to open up their property, but the limits it has are there to make it so it is fair to the public, as well as fair to other parks and municipalities and not carte blanche of liability for all facilities. The Statute is actually allowing it so that there is only immunity for the facilities that do not charge a fee. Why would it be okay for some landowners opening up their land for public use to make profits and still be immune? “CP” p.120, 121

2.15 If the Statute was not there, then there would be immunity for all public recreational facilities. It does not undermine the intent of the statute when the statute does not give protection to all public recreational facilities who occasionally charge the public fees. In fact, any statute that did give protection of liability to all public recreational facilities who occasionally charged fees would undermine the public, the very people that make the demand for a free place to exercise, rather than paying to join the local gym. Then some “private groups” would have more benefits than one of the residents that workout at the facility. If the Plaintiff had been part of a private group that had been charged a fee, then the Defense is saying they would not be immune and therefore take responsibility for the damages from the injury. That is like giving the “private groups” coverage on an insurance policy and not the “residents of Tukwila” coverage because they do not “belong” to the private group. It is especially unfair since the Plaintiff here had no knowledge of the private groups prior to her injury. To be fair, the public should have at least the option to be covered under such an insurance policy by becoming part of one of the “private groups.” The statute does not specify that the public recreational facilities that occasionally charge fees are immune, so therefore the statute only applies to facilities that do not charge **any fees**.

Furthermore, if a municipality or park can be safe via Recreational Land Use Immunity by only charging “occasional fees” it would therefore be unlawful to give penalty (not allow immunity) to those who charge fees year round or every day. “CP” p.120

### **III. The Material issues of Fact in question- Dangerous, Known, Artificial, Latent Condition of the site of the injury.**

3.1 The four elements in question, i.e. whether or not the condition at Foster High School was dangerous, known, artificial, or latent, pose questions of material fact that would be best decided at trial.

3.2 The step itself is concrete and therefore artificial.

3.3 The argument about whether the condition was “latent” had not been made in Summary Judgment, and Ms. Olson, the Plaintiff considers it an important piece of the argument of this case.

3.4 With regards to the step being “latent” and “dangerous”, the Plaintiff had gone to use the facility before but she was not aware of the danger to

that step because she had not gone off the step before and did not have the “awareness” necessary to realize the depth and height of that step. “CP”  
p.91

The following is an excerpt from the Joellen Gill report:

“It is noted that Ms. Olson had some familiarity with the subject athletic facility; she had utilized the track on prior occasions however she had only ascended the subject step, never descended prior to this occasion (i.e. she accessed the track through an alternate gate where the level was the same on both sides of the gate). It is also my understanding that Ms. Olson was “aware” that the concrete apron was elevated above the track level (i.e. a common design feature). However, that does not mean that Ms. Olson was “aware” of the excessively high drop-off. One reason is the difference between “knowledge” and “awareness”. “Knowledge” refers to a person’s long-term memory, or in computers: the information on one’s hard drive. Whereas “awareness” refers to what is in one’s consciousness at any given moment in time, or in computers: what is displayed on their computer monitor at any given moment. Clearly, people “know” far more information than they are “aware” of at any given moment in time. There is no reason to believe that Ms. Olson would have, much less should have, been “aware” of the excessively high drop-off as she stepped down onto the track level. Even if one assumes that Ms. Olson “knew” there was an

area with such an excessively high drop-off, since there were no warning signs and no alerting cues (i.e. safety paint, handrails, etc.) there would still be no reason for Ms. Olson to have been “aware” of the hidden hazard that laid before her. In short, Ms. Olson was completely unaware of the hidden hazard (i.e. the unmarked and unexpected excessively high drop-off in the area where she stepped down from the concrete apron onto the track level). Based on the information available to date, I do not see anything that concerns me with regard to any comparative fault on behalf of Ms. Olson.” “CP” p. 90, 91, 92

3.5 The condition of the step itself is latent because the concrete “blends in” to the track below without any safety warning such as sign, rail, marking. Even on a clear day, any innocent person would not be able to tell how deep and how tall that step was if they were in the process of exercising and planning several steps ahead in their workout routine, until it was “too late” in which they discovered how far down the pavement below actually is. Another example of this is when you come to the edge of a cliff, you do not really “know” how far down it is when you are looking at it from a distance, it may seem like the drop is not far down at all, when in fact it could be hundreds of feet down. The implications here prove that even if the step itself was “open” it was not “apparent” and

therefore hidden. From the side of the track it was open, but from the perspective of the bleachers and the walkway ramp where the Plaintiff was when she stepped off it was “hidden.” “CP” p.87, 90, 91

3.6 According to *Steven Jewels vs. City of Bellingham*, the court rejected Plaintiff’s Steven Jewels latency argument and held the condition was patent because it was in plain sight and "readily apparent to anyone who examined the gravel mound as a whole." Id. at 555, 872 P.2d at 527. The fact that some users (those who ride up the non-excavated side) may fail to recognize the condition does not render it latent under the recreational land use statute. Id. at 555-56, 772 P.2d at 527. The Plaintiff, Ms. Olson, argues there is no difference between “failing to recognize the condition” and “not seeing it” because it was latent or “hidden”. If a person “fails to recognize the condition” and “doesn’t see it”, they end in the same result which is not discovering the “hidden” danger before it is too late and injury is the result. The Plaintiff, Ms. Olson, does argue that the condition is latent and therefore the Recreational Land Use Immunity statute does not apply in this case. “CP” p.87, 90, 91

3.7 Plaintiff argues that because she was injured at a School recreational facility, that 15 inch step may have been hazardous to her at 5 ft 4 inches

tall, but would be doubly hazardous to a 12 or 13 year old girl or boy, who may fail to take notice of the 15 inch depth. According to *Jewels*, "The "dispositive question is whether the condition is readily apparent to the general class of recreational users, not whether one user might fail to discover it." (*Ravenscroft v. Washington Water Power Co.*, 136 Wash.2d 911, 969 P.2d 75, 1998). If a park user can take "visual reference" of the condition, it is not latent (*Swinehart* at 853, 187 P.3d at 351). The Plaintiff, Ms. Olson, argues that it depends on who is visually referencing the step. She visually referenced the step and fell; the drop was not visually or readily apparent to her. The facility was built as part of a School with the intention of that facility was not meant for "general recreational users" it was meant for both the students in that High School and the residents of Tukwila, therefore the Plaintiff in this case can argue the condition of the step was latent especially when applied to those it was built for.

3.8 The condition of the step itself, the Plaintiff argues, is latent as well as dangerous because you cannot tell that it is 15 inches in depth until you step off of it. The danger it poses is that an individual may not be prepared to take a step that big. "CP" p.87, 90

3.9 See *Titus Preston vs. Pierce County*, 48 Wn. App. 887, 741 P.2d 71, (1987). In this example, Titus Preston like the Plaintiff in this case appealed the Summary Judgment Order, where they dismissed his claim for injuries against Pierce County. They reversed the Order holding that the trial court erred in granting the Summary Judgment because the Plaintiff presented material issues of fact with regard to whether or not The Recreational Land Use Immunity applied to his claim. In the *Titus* case, there was no argument as to whether or not there a fee was charged. Similarly, in the case with Ms. Olson as the Plaintiff, she argues the fact that there were fees the facility charged to private groups, which only furthers her point about why the Order should be reversed in her favor. In addition, the issue in the *Titus* case was whether the boy's injuries were caused by a dangerous, known, artificial, and latent condition for which warning signs were not conspicuously posted; those same issues can be proven in the case with the Plaintiff, Ms. Olson.

3.10 See *Titus Preston vs. Pierce County*, 1987. "Here, the record presented to the trial court contained the following evidence with regard to whether the merry-go-round's defect was "latent": (1) Titus Preston's mother testified that when the cover was off, the internal area was in plain view; (2) she also testified that she continued to allow her son to play on

the merry-go-round despite the missing cover; and (3) Titus Preston testified that he had played on the defective merry-go round several times before his accident. **Therefore, although the merry-go-round's internal mechanism was clearly visible, indicating a patent condition, the evidence suggests that its injury causing aspects were not readily apparent or were "latent" to both Titus Preston, the recreational user, and his mother. Thus, given that the evidence must be construed in favor of the nonmoving party, the trial court erred in finding that the defect was not latent as a matter of law.** “CP” p.87

3.11 As in the *Titus* case, Ms. Olson, the Plaintiff, makes the point that the injury causing aspects of the step where she fell were not readily apparent and were therefore “latent”. Additionally, “The *MORGAN* court found that "known" refers to the landowner's mental state while "latent" refers to a condition not readily apparent to the recreational user” (*MORGAN v. UNITED STATES, 709 F.2d 580 9th Cir. 1983*). “CP” p.91

3.12 The deposition completed by Scott Carness, (Plaintiff’s former attorney) with Ron Young, (a Tukwila School employee) is a prime example of how the Defendant did in fact “know” about the condition of the facility and is proof. According to the deposition record, the facility

had been renovated; specifically the bleachers. The bleachers had been replaced at the site of the incident, in that part of the facility in 2003. In order for the renovation to take place there would had to have been an inspection of the facility to determine what needed upgrading. Comparing details of the inspection would be best done at trial and is another key component to this case that was not presented at Summary Judgment. “CP”p.78

3.13 The maintenance employee Ron Young had been working at that facility for the past 14 years, and he had used that step many times which proves the fact that the Defendant knew about that step. For them to have students, residents of Tukwila, and maintenance crew all walking through that area daily, they would have likely been very much aware of the safety of that facility. “CP” p.80

3.14 The Plaintiff can establish that the Tukwila School District owed her a duty of care with respect to her injuries because the Tukwila School District owes the children and public an **extra** duty of care because the premises was a High School.

3.15 According to premises law the Defendant has a legal obligation to provide a safe facility for children or those of a tender age. According to *Jarvis v Howard*, 310 Ky.38 (Ky.1949), “One who maintains upon his premises a condition, instrumentality, machine, or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril therein, and which may reasonably be expected to attract children of tender years to the premises, is under a duty to exercise reasonable care to protect them against the dangers of the attraction.” The Plaintiff, Ms. Olson, in this case acknowledges that she is of adult age, and not invoking the stance that she was drawn to the attraction of that step in the facility. Rather, that the Tukwila School District had the extra responsibility to the children recreating there to provide a safe environment, which further adds to the Defendants “knowledge” of the conditions of the premises.

3.16 Even if the Defendant claims to not have “known” about the step, they should have known about the safety and standards of the facility given that it is a track and field where residents of Tukwila go to run, jog and walk. If the facility was a park for instance, and not a track and field, it might be understandable if they hadn’t inspected the step where the

Plaintiff fell, but the track and field at Foster High School is a recreational facility meant for students to run and play on. “CP” p.95, 96

3.17 The Plaintiff can provide expert witness with regards to proving that the step where she fell was a dangerous condition. The Plaintiff also argues that Joellen Gill specifically discusses how the condition of the step was hidden, and not open and obvious, which is not what the Defense submitted to The Court at Summary Judgment. The record transcript page 25, Mr. O’Donnell says, “So we, we submit what, what Ms. Gill does is basically support the notion that this was an open and obvious condition that was there to be seen. And under traditional liability standards, you know, landowner’s duty is exercise reasonable care.” Joellen Gill discusses the condition as being a hazard, which as a hazard poses an obvious threat to the public recreating at the facility. The following sections of the Joellen Gill Report below, *Violations of Safety Guidelines and Standards*, state that:

“It is emphasized that the hazard encountered by Ms. Olson was even more subtle (i.e. hidden) in that a step between the concrete apron and the track level was expected, just not one so high. In 1979 the National Bureau of Standards (NBS) published "Guidelines for Stair Safety" in an effort to reduce falls on steps. There are a number of specific

recommendations set forth in the NBS text that are applicable to Ms. Olson's incident. For example:

Section 2.2.1 notes the importance of distinct tread nosing. In particular, the NBS recommends marking the edge of the tread nosing and/or providing a directional light source to illuminate the tread nosing. Yet in this case there was no distinctive nosing; the concrete above and below the step was the same gray. There was nothing atypical in the concrete apron edge to alert users to the excessively high drop-off. "CP" p.93

Section 2.5.1 specifically warns that "if the stair treads and handrails are not the most conspicuous features in the user's field of vision" then the treads should be made more salient and the lighting on them should be increased while decreasing the surrounding lighting. "CP" p.93

It is noted that at the time of Ms. Olson's incident, there were no handrails/guardrails anywhere to identify the excessively high step down/drop-off. Nor was there any distinctive markings on the edge of the concrete (i.e. such as yellow and black diagonal striping), nor was there any localized or focused illumination or even warning signs to call attention to the unexpected excessively high drop-off.

Section 2.5.6 warns against single and dual riser stairs and provides a number of safety recommendations, such as improved lighting, enhanced visibility for tread nosing, and the use of handrails on both sides. Again, it is noted that Ms. Olson was paying attention in that she was “aware” that there was a single step down between the concrete apron and the track level. What was hidden to Ms. Olson was the excessively high step down/ drop-off.

Without question, the excessively high sidewalk/curb drop-off of over 15 inches violated these recommendations and guidelines set forth by the 1979 NBS publication.

Additionally, in 1983 Dr. Rosen published the text “The Slip and Fall Handbook” wherein he identifies various factors that cause fall-at-elevation accidents and discusses how to safely design and maintain walkway surfaces to minimize such accidents. Within his text, Dr. Rosen identifies features he calls “high risk stair characteristics”. Included within that relatively short list is 1, 2, or 3 riser steps. Dr. Rosen specifically warns against the use of single step designs and notes that “where a single step is found, the proper physical arrangement would be a ramp”. The point to be made is that if people cannot reliably detect the height difference of a 3 riser step, they cannot be expected to detect that a single step is 15 inches high vs. only 6 to 7 inches high.” “CP” p.94

3.18 The condition being a hazard creates questions of fact that would be great for a jury to think on. However, it is important to argue even if the Defense ignores that it was a hazard, they should have known about it because it was a place where the residents of Tukwila, as well as young children played and recreated on. The Defense argued at Summary Judgment that the expert witness Joellen Gill did not make enough of a statement regarding evaluating the risk management of the School.

“RT” p. 27

The Plaintiff will point out here, that it is a given, if you are managing a school facility, to act with extra care at evaluating and managing risk, because failure to do so means endangering children. Managing and evaluating risk comes with the territory of owning a school property.

**IV. The Tukwila School District is not entitled to the protections of the Recreational Land Use Statute because it was a private facility where the Residents had to apply for access and the Plaintiff was a licensee status**

“The recreational use immunity statute, Wash. Rev. Code § 4.24.210(1) (2003), creates an exception to Washington’s premise liability law regarding public invitees. At common law, a landowner’s duty depends upon a plaintiff’s status as an invitee, a licensee, or a trespasser. While Washington traditionally recognizes only business invitees, Washington broadens an invitee classification in 1966 to include a “public invitee” defined as one invited to enter or remain on land as a member of the public or a purpose for which the land is held open to the public” (See *Camicia vs. Howard*). “CP” p. 97

4.1 The Plaintiff was a licensee while on the premises of Defendant and as such, was entitled to the protection of Washington law due licensees from Defendant. Defendant failed its duty to provide plaintiff such protection. The Plaintiff was a licensee because of the locked gate, signage of exclusions, limited key and keycard access to the facility, and those who wished to enter the facility needed to get permission from the Tukwila School District to enter. “CP” p.87

4.2 The Plaintiff was an invitee while on the premises of Defendant and as such, was entitled to the protection of Washington law due invitees from

Defendant. Defendant failed its duty to provide plaintiff such protection.

“CP” p.96,97

4.3 Such failures were a proximate cause of Plaintiff's injuries. “CP” p.96

4.4 In an online publication by Stephen W. Hansen, Attorney at Law, says  
“An owner or occupier of premises owes to a business or public invitee a  
duty to exercise ordinary care for his/her safety. This includes the exercise  
of ordinary care to maintain in a reasonably safe condition those portions  
or the premises that the invitee is expressly or impliedly invited to use  
(WPI 120.06.01). The upshot of these rules of law, as expressed in the  
WPI Jury Instructions, is that the owner or occupier of the property must  
inspect for dangerous conditions on the premises and to make repairs,  
safeguards, warnings, as may be reasonably necessary for the protection of  
the invitee under the circumstances (*Tincani v Inland Empire Zoological  
Society*, 124 Wn.2d at 139, 1994). As one Washington Court stated, this  
duty of reasonable care includes an “affirmative duty to discover  
dangerous conditions” (*Egede-Nissen v Crystal Mountain*, 93 Wn.2<sup>nd</sup> at  
127, 132, 1980).

He goes on to say, “Washington State Law requires an owner or occupier of property to conform to a standard of care with respect to a licensee that is described as follows:

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

- a) The possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensee, and should expect that he/she will not discover or realize the danger, and
- b) The possessor fails to exercise reasonable care to make the condition safe, or to warn the licensee of the condition and the risk involved, and
- c) The licensee does not know or have reason to know of the condition and risk involved.

In addition the owner or occupier of the property has a duty to exercise “ordinary care” in conducting activities on the property in order to avoid injuring licensees on the property.” (See WPI 120.03; *Potts vs Amis*, 62 Wn.2d 77 (1963); *Egede-Nissen vs Crystal Mountain*, 93 Wn.2d 127, 1980).

4.5 The licensee as the Plaintiff had no knowledge or reason to know of the hazard of that 1 step, nor should she have since there were no warnings to make her aware of it, and that it was not part of her regular work out routine. "CP" p.87

4.6 The Tukwila School District failed (1) to realize the risk involved with that step in the facility, (2) it failed to warn the Plaintiff of that steps dangerous condition, (3) and the Tukwila School District had every reason to know of the condition given that it was a High School facility with kids who recreated there on a daily basis. "CP" p. 95, 96

## **E. Conclusion**

For the foregoing reasons, the trial court's decision should be reversed, the Defendant to be liable for the Plaintiff's injuries, for her to be given her due as protected by common law as a licensee status in the State of Washington, and for the Plaintiff to be awarded all attorney's fees, costs, disbursements for this suit, and for Judgment for money damages including money for pain and suffering and other such relief, to be proven at the time of trial.

Respectfully submitted,

 4-29-15

Elizabeth Olson, Plaintiff, Appellant

April 29th 2015