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No. 96263-4

SUPREME COURT
OF THE STATE OF WASHINGTON

CARL W. SCHWARTZ and SHERRY SCHWARTZ, individually
and the marital community composed thereof,

Appellants,

v.

KING COUNTY, a local government entity and
municipal corporation within the State of Washington,

Respondent.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-iv
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	2
(1) <u>Assignments of Error</u>	2
(2) <u>Issues Related to Assignments of Error</u>	2
C. STATEMENT OF THE CASE.....	2
(1) <u>Schwartz Is Rendered Quadriplegic by the County’s Negligently Installed and Unmarked Bollard</u>	2
(2) <u>The RTS Is Part of the County’s Transportation System</u>	7
(3) <u>The GRT Is a Vital Transportation Corridor in the Industrial Heart of South King County</u>	16
(4) <u>Schwartz Presented Other Evidence that Recreational Use Immunity Does Not Apply</u>	20
(5) <u>The Trial Court Erroneously Granted Summary Judgment</u>	23
D. SUMMARY OF ARGUMENT	25
E. ARGUMENT.....	26
(1) <u>Principles of Statutory Interpretation</u>	26
(2) <u>The Trial Court Erred in Granting Summary Judgment Based on the Recreational Use Immunity Statute</u>	27

(a)	<u>Summary Judgment Was Inappropriate Where Schwartz Created a Question of Fact as to Whether Recreational Immunity Statute Applies to an Urban Commuter Bike Path Like the GRT</u>	28
(b)	<u>The Trial Court Erred in Applying Recreational Use Immunity Where Schwartz Created an Issue of Fact Regarding Whether the County Maintained the “Authority to Close” the GRT</u>	35
(c)	<u>The Trial Court Erred in Applying Recreational Use Immunity Where Schwartz Created an Issue of Fact Regarding Whether the County Charged for Using the GRT</u>	38
(3)	<u>Assuming <i>Arguendo</i> that Recreational Use Immunity Applied, the Trial Court Erred in Granting Summary Judgment Where Schwartz Created a Question of Fact as to Whether the Bollard Was a Known Dangerous Artificial Latent Condition, an Exception to Immunity Under the Statute</u>	40
F.	CONCLUSION.....	45

Appendix

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Camicia v. Howard S. Wright Const. Co., 179 Wn.2d 684,
317 P.3d 987 (2014)..... *passim*

Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994).....27

Cerillo v. Esparza, 158 Wn.2d 194, 142 P.3d 155 (2006)..... 26-27

City of Seattle v. Fuller, 177 Wn.2d 263, 300 P.3d 340 (2013)27

Cockle v. Dep’t of Labor & Indus., 142 Wn.2d 801,
16 P.3d 583 (2001).....26

Cregan v. Fourth Member Church, 175 Wn.2d 279,
285 P.3d 860 (2012).....28, 38

Cultee v. City of Tacoma, 95 Wn. App. 505, 977 P.2d 15,
review denied, 139 Wn.2d 1005 (1999).....41

Davis v. State, 144 Wn.2d 612, 30 P.3d 460 (2001).....28

Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1,
43 P.3d 4 (2002).....26

Dot Foods, Inc. v. Wash. Dep’t of Revenue, 166 Wn.2d 912,
215 P.3d 185 (2009).....26

Hisle v. Todd Pacific Shipyards Corp., 151 Wn.2d 853,
93 P.3d 108 (2004).....26

Hively v. Port of Skamania County, 193 Wn. App. 11,
372 P.3d 781, *review denied*, 186 Wn.2d 1004 (2016).....38

In re Stranger Creek & Tributaries in Stevens County,
77 Wn.2d 649, 466 P.2d 508 (1970).....44

Jewels v. City of Bellingham, 183 Wn.2d 388,
353 P.3d 204 (2015).....24, 41, 43

Lockner v. Pierce County, 190 Wn.2d 526,
415 P.3d 246 (2018)..... *passim*

Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780,
108 P.3d 1220 (2005)45

Plano v. City of Renton, 103 Wn. App. 910, 14 P.3d 871 (2000).....38, 39

Potter v. Wash. State Patrol, 165 Wn.2d 67, 196 P.3d 691 (2008).....27

Ravenscroft v. Washington Water Power Co., 136 Wn.2d 911,
969 P.2d 75 (1998)..... *passim*

<i>Restaurant Development, Inc. v. Cananwill, Inc.</i> , 150 Wn.2d 674, 80 P.3d 598 (2003).....	27
<i>State v. McGee</i> , 122 Wn.2d 783, 864 P.2d 912 (1993).....	27
<i>Tennyson v. Plum Creek Timber Co.</i> , 73 Wn. App. 550, 872 P.2d 524 (1994).....	35
<i>Van Dinter v. City of Kennewick</i> , 121 Wn.2d 38, 846 P.2d 522 (1993).....	41
<i>Widman v. Johnson</i> , 81 Wn. App. 110, 912 P.2d 1095 (1996).....	30
<i>Zachman v. Whirlpool Financial Corp.</i> , 123 Wn.2d 667, 869 P.2d 1078 (1994).....	26

Statutes

23 U.S.C. § 134(g)	15
RCW 4.24.210	<i>passim</i>
RCW 4.24.210(1).....	38
RCW 4.24.210(4)(a)	21, 23, 40
RCW 64.01.010	37
RCW 64.04.130	37

Codes, Rules and Regulations

23 C.F.R. § 652.7	34
CR 56(c).....	26

Other Authorities

Karl Leonhardt, RECREATIONAL TRIP CHARACTERISTICS AND TRAVEL PATTERNS: SECOND PHASE OF THE WASHINGTON STATE RECREATIONAL TRAVEL STUDY, (June 1, 1973), https://www.wsdot.wa.gov/research/reports/fullreports/ 011.2.pdf	32
Philip A. Talmadge, “ <i>A New Approach to Statutory Interpretation in Washington</i> ,” 25 Seattle U. L. Rev. 1 (2001)	27

A. INTRODUCTION

Carl W. Schwartz was rendered a quadriplegic after crashing his bicycle into a single, unmarked bollard that had been negligently installed and maintained, in violation of state and federal safety standards and guidelines, by defendant King County (“County”) on its Green River Trail (“GRT”), an urban commuter shared use path which is part of the County’s Regional Trail System (“RTS”). Despite ample evidence showing that the County knew the bollard presented a dangerous hazard to bicyclists like Schwartz, the trial court dismissed his case on summary judgment applying RCW 4.24.210’s recreational use immunity because some users also use the path for recreation purposes.

Dismissal was error where the County failed to show that the GRT, an urban commuter bike path, was merely open for recreational use; rather, the evidence showed it was predominantly used for nonrecreational purposes like transportation and bicycle commuting. The County also failed to show that it owned the entire GRT and had authority to permanently close the trail to the public, necessary requirements to successfully prove immunity authorized by the statute. The evidence also showed that the County charged a fee to some users of the path, thus negating the application of recreational use immunity. Finally, the trail contained a known dangerous latent artificial defect exempting the application of the statute. Reversal is warranted so

Schwartz can have his day in court.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its August 3, 2018 order on summary judgment in favor of the County. CP 2992-94.

(2) Issues Related to Assignments of Error

1. Did the trial court error in finding that recreational use immunity applies as a matter of law to an urban bike path used predominantly for transportation? (Assignment of Error Number 1)

2. Did the trial court error in applying recreational use immunity as a matter of law where Schwartz presented evidence that the County lacked the ability to close the trail at any time and thus was not an exclusive owner of the trail for purposes of recreational use immunity? (Assignment of Error Number 1)

3. Did the trial court error in applying recreational use immunity as a matter of law where Schwartz presented evidence that the County charges a “fee of any kind” to some users of the trail thus negating the application of recreational use immunity? (Assignment of Error Number 1)

4. Did the trial court error in ruling as a matter of law that the bollard was not a latent condition when Schwartz presented ample evidence to create a question of fact on that issue? (Assignment of Error Number 1)

C. STATEMENT OF THE CASE

(1) Schwartz Is Rendered Quadriplegic by the County’s Negligently Installed and Unmarked Bollard

This case arises from a serious bicycle collision that occurred on

the GRT near the Cecil Moses Memorial Park in Tukwila, Washington. On March 13, 2017, Carl Schwartz was riding his bicycle south on the GRT when he struck a single unmarked bollard that had been installed by the County in the middle of the shared use bicycle path. CP 1162-66. As a result of the collision, Schwartz was rendered a complete quadriplegic. *Id.*

Schwartz sued the County for negligently installing the bollard and for its negligent failure to properly mark the bollard to alert and warn users of the path. *Id.* More specifically, his claims were based on the County's failure to comply with state law and its violations of state and federal standards and guidelines concerning the installation and marking of the bollard. *Id.* Such regulations require that bollards, like the one which injured Schwartz, be conspicuously marked. *Id.* This includes diamond shaped striping on the pavement to warn travelers, especially nonmotorized travelers like bicyclists who travel at speed, to avoid them. *Id.*; CP 183-87.

The County has known for years that unmarked bollards, like the one which injured Schwartz, present a serious hazard to bicyclists along its trails because they are very difficult to see even while traveling at a reasonable speed. Schwartz presented evidence that numerous citizens complained that bollards on the RTS were dangerous; one citizen even

reported “catastrophic injuries” as a result of hitting a bollard with her bicycle. *See* CP 1943-44 (complaint in 2016 from a citizen who suffered “catastrophic injuries” after riding her bicycle into a “random bollard”¹ that had been installed on the Issaquah Creek Trail). The citizen warned that without sufficient markings, the bollard “blends in very closely with the asphalt surface of the trail.” CP 1944; *see also*, CP 1972-87 (complaint in 2012 from a citizen warning about hazardous bollards on the RTS, specifically being able to see them or in time to avoid hitting them and referring to a Netherlands study showing that inadequately marked bollards are dangerous because they are difficult to see due to poor contrast with the surrounding environment); CP 2172 (warning from off duty firefighter that the bollards on the GRT are hazardous to cyclists); CP 1971 (complaint from cyclist who suffered injury after striking a bollard on the RTS). As one concerned citizen wrote when advocating that the County remove bollards along RTS paths altogether, “When I weigh the rare danger of a car coming down the trail, and the daily danger of a bollard, I think I’d prefer the former rather than the latter.” CP 1972.

The County was also previously informed by a professional traffic

¹ The randomness of the bollard at issue makes it especially dangerous. It is not placed along a crosswalk or at an intersection with a roadway where a bicyclist would expect to encounter a bollard. Rather, it is placed in the middle of the shared use path at a seemingly random location and is not easily anticipated by a cyclist using the curving path. *See, e.g.*, 1097-98.

engineer, Martin Nizlek, that many of its bollards installed in the RTS were dangerous because they were inadequately marked and not visible in certain conditions. CP 1955-60.

Schwartz provided evidence to the trial court that the particular bollard in question presented was a dangerous hazard. For example, Schwartz presented Google Earth images showing that as early as 2009 a concerned citizen painted yellow or fluorescent warning markings on the pavement and wrote the word “POST” in all capitals on each side of the bollard to alert trail users of its existence. CP 1100-14. On summary judgment, Schwartz’s experts opined that the warnings demonstrated someone had likely hit the bollard and then felt the need to warn other trail users of its existence in the middle of the path. CP 1062-71, 1087-88. Schwartz’s expert also stated that the photographs of the bollard clearly show that it had been hit or impacted on occasions prior to Schwartz’s injury. CP 1079.

Former Parks staffer Stephanie Johnson testified that she recalled working for the County when the painted warnings were still clearly visible on the path. CP 1115-18. Johnson confirmed that her supervisor Sam Whitman, who is still employed by the County, did nothing about the warnings, even though she and another employee believed the warnings demonstrated that the bollard was a dangerous condition on the trail. *Id.*

Although the County had installed hundreds of bollards on its trails, Johnson stated that this was the only bollard in the RTS that that had ever been marked with warnings by members of the public due to the particular hazard it imposed. *Id.* Why those markings were removed or allowed to fade is a mystery.

Aware of the danger its unmarked bollards posed, the County proposed adopting new safety guidelines in 2009 that would have required all bollards to be marked according to federal, national and WSDOT guidelines, with diamond shaped markings around the bollard. CP 1793-95, 1945-54. By the time Schwartz was catastrophically injured, these proposed changes had not been implemented.

Rather than fix the known hazards along the RTS or compensate Schwartz for his catastrophic injuries, the County moved for summary judgment claiming it was immune from liability under RCW 4.24.210 because it alleged the trail was designated for recreational use. CP 929-50. But, as discussed below, summary judgment was inappropriate on that issue because Schwartz presented ample evidence that the GRT is a vital part of the County's transportation system, used predominantly for transportation purposes, and thus the County owed a duty to maintain the pathway in a reasonably safe condition for ordinary travelers such as Schwartz.

(2) The RTS Is Part of the County's Transportation System

Schwartz presented ample evidence below showing that the County's RTS, including the GRT, is used extensively for nonrecreational purposes such as commuting and transportation. According to the County's website:

“[The] Regional Trails System (RTS) is one of the nation's most extensive multi-use networks with more than 175 miles of trails for recreation *and non-motorized mobility and commuting*. The RTS connects communities from Bothell to Auburn and Seattle to the Cascades. And the RTS continues to grow, with an overall vision of 300 miles of trails. If you are looking for alternative ways to get around our region... check out King County's regional trails!”

CP 1169. Indeed, the entire RTS was created in part as a response to the energy crisis in 1974 to encourage more citizens to use bicycles for transportation instead of using their cars. CP 1173. Soon thereafter, the County viewed bicycles as a vehicle and a transportation option in addition to its more familiar role as a recreational device. CP 1202-06.

In 1995, the County requested a survey of some of its oldest trails, which was performed by William E. Moritz, Ph.D. of the University of Washington. CP 2785-87. That survey found that 47% of trail users used the trails for commuting to work and school. *Id.* Thus, Dr. Moritz stated over 20 years ago, “Clearly the trails are relied upon by commuters.” CP

2787.²

In 2004, the County published its Regional Trail Inventory and Implementation Guidelines, where the County stated its goal or vision for regional trails in King County: “To connect the communities within the county, major recreation destinations, and urban centers with a system of trails for recreation *and non-motorized transportation that provides for the widest range of non-motorized travel modes and meets accessibility guidelines to the greatest extent possible.*” CP 1282 (emphasis added). The Guidelines, also stated that “the regional trails are not only very popular recreation attractions themselves, *but also serve a significant number of transportation oriented trips, i.e., commuting, shopping, etc.*” CP 1285 (emphasis added). In 2007, the County’s Director of Parks and Recreation Kevin Brown signed a legal petition stating that the County’s regional multipurpose trails, including the GRT, that make up the RTS are a “critical element of the Puget Sound transportation infrastructure.” CP 1364-67.

In 2012, the County published its *Report of the King County Parks Levy Task Force* where it stated that the RTS “directly touches 30 of our

² The record also contains evidence from daily users of the RTS that the trails are used primarily for transportation. For example, one of the citizens who notified the County about the hazardous bollards indicated that during her commute along the East Lake Sammamish Parkway Trail, she “usually encounter[s] only other commuting cyclists.” CP 1972.

39 cities and serves as an increasingly important alternative to traditional means of commuting...” CP 1624-25. The trails also provide a safe pathway for children when they commute to school, and they provide residents easy access and links to major transit hubs. CP 1627.

On May 16, 2013, the County’s Regional Trails Coordinator Robert Foxworthy wrote a memorandum entitled “ADA Shared Use Path Overview 2013.” CP 1662-68. In that memo, Foxworthy wrote that the trails are considered “shared use paths” that are designed primarily for use by bicyclists and pedestrians for transportation and recreation purposes. *Id.*³ Foxworthy stated that the multi-use nature of the trails for both recreation and transportation made them a *unique facility type* under the ADA. CP 1663. Foxworthy concluded that the trails in the RTS are used for transportation purposes, and their corridors are considered public rights-of-way, defined as “Public land acquired for or dedicated to transportation purposes, or other land where there is a legally established right for use by the public for transportation purposes.” CP 1664. He also concluded that the RTS must comply with the ADA unless the trails are

³ In 2015 Foxworthy wrote an email to a concerned citizen stating that “Regional trails are classified as “shared use paths” by USDOT, and they are designed and signed according to federal and state guidelines and regulations. Signage such as the stop signs on the trail meet Manual of Uniform Traffic Control Devices (MUTCD) signage standards. Use and place of the signs is provided by the MUTCD, and trail design is provided by the American Association of State Highway and Transportation Officials (AASHTO) Guide to the Development of Bicycle Facilities.” CP 2176-80.

strictly or primarily used for recreational purposes, (which they are not).
Id.; CP 1750-52.

The County characterizes the RTS as being very similar to a roadway system that is used for motor vehicle traffic. CP 1764. Both systems require safe sight lines, appropriate lane size, and safe speed limits; they both have signage requirements. CP 1764-65. The County also expects to comply with federal traffic control safety standards, the Manual on Uniform Traffic Control Devices (“MUTCD”), for both systems. CP 1700-01, 1765-66. With respect to the development and management of the RTS, the County also expects to comply with national transportation safety guidelines from the American Association of State Highway and Transportation Officials (“AASHTO”). CP 1403-04. The County even acknowledged that it faces a liability risk if it does not comply with AASHTO guidelines and an accident should occur as a result. *Id.*

According to the 2016 King County Open Space Plan, the County has developed the RTS based on safety standards and guidelines used for transportation facilities, not park facilities. “The development of the County’s RTS is based on AASHTO guidance and other professionally-recognized guidelines such as the Washington State Department of Transportation (“WSDOT”) local roadway standards.” CP 2181-2277.

The RTS will continue to be developed in accordance with these same standards and guidelines, including those issued by the United States Department of Transportation (“USDOT”). *Id.* The latest version of the County’s roadway design standards also applies to the development of the RTS, and they specify that all county trails (including shared use paths) must comply with MUTCD and AASHTO. CP 2286-89.

As early as 2010, the County’s Parks Department entered into an annual “letter of understanding” with the Sheriff’s Office to conduct police emphasis patrols on the RTS to address the substantial increase of users on the trails and ongoing safety concerns. CP 2315-34. This agreement between the two agencies states that the RTS is one of the nation’s most extensive multi-use trail networks with over 175 miles of trails that the County compares to “a regional road system.” CP 2329. The purpose of the trails in many instances was to “augment the region’s existing roadways and trails by intersecting and paralleling roads.” CP 2317.

In 2016 and 2017, County Parks formalized this understanding by entering into an annual “Service Level Agreement” with the County Sheriff’s Office. CP 2325-33. In those agreements the County again asserted that the RTS operates “much like a regional road system” because the RTS provides “alternative commuting options” that “operate as public

thoroughfares for human-powered travel and mobility.” *Id.* The agreements further stated that “[i]n many instances, regional trails augment the region’s road system and close proximity between trail/road intersections are common.” *Id.* The section of the GRT where Schwartz was injured is one of these types of trails because it parallels Highway 99 and intersects with this state highway at the intersection of S. 102nd Street, a few hundred feet north of the bollard. CP 1762-63.

Schwartz presented evidence below that the County receives a benefit from commuters using the trail. It encourages more people to use nonmotorized transportation options to alleviate traffic congestion and reduce carbon emissions, and the RTS helps the County achieve these goals. CP 1313-25. RTS Coordinator Foxworthy believes that the portion of current trips on the trail that are for transportation or commuting purposes is “significant.” CP 1721-29. The County also promotes the transportation-oriented or nonrecreational use of the RTS in press releases to help it gain financial support to expand the RTS and build new trails. CP 1729-30.

The County estimates that currently there are 12 million bicycle and pedestrian trips made on trails in the RTS annually. CP 2341. The RTS is also “classified as shared use paths by the Federal Highway Administration (FHWA) and are a component of the federally designated

regional transportation plan administered by the Puget Sound Regional Council” and that the “King County government stewards some 175 miles of the overall network.” *Id.*⁴ The County’s goal is to expand the RTS to connect to more cities and communities throughout the County and increase nonmotorized transportation. CP 1718.

Chapter 8 of the County’s 2016 Comprehensive Plan focuses on its plans for transportation. CP 1730-31, 2379-2420. The chapter states that “King County also plays a countywide role in nonmotorized transportation through its Regional Trail System and transit services” and the RTS “is an essential component of the County’s multimodal transportation system.” CP 2398. The County considers the RTS to function as “*the spine of the County’s nonmotorized transportation system.*” CP 2399 (emphasis added). Beginning in 2012, the RTS was also considered the “centerpiece” of the nonmotorized transportation system in rural areas and on natural resource lands. CP 2400.

To strengthen and expand the transportation or “utilitarian”⁵ purpose of the RTS, the County has established, and continues to

⁴ Notably, the FHWA recommends against the routine use of bollards on shared use paths like the GRT, but if they are used, they should be appropriately marked in accordance with federal safety standards, which this bollard was not. CP 1097-98.

⁵ The County uses the terms mobility and utilitarian interchangeably to describe RTS’s intended use as primarily one involving transportation instead of recreation. CP 1721-22.

establish, more “mobility connections”⁶ between the RTS and various destinations throughout King County, like with other civic centers, transit centers and Puget Sound Regional Council (“PSRC”)-designated manufacturing and industrial centers. CP 2422-55. In furtherance of that goal, RTS Coordinator Foxworthy wrote a lengthy memo discussing the importance of RTS’s transportation aspect:

As non-motorized travel modes grew to become important methods of transportation both in the Puget Sound region and nationally, the regional trails in King County began to be recognized as potentially valuable transportation assets for the region...The Network Vision described the benefits already provided by the RTS as a non-motorized transportation network and also described the many potential opportunities available to expand and create a well-connected transportation network using the RTS.

...

By creating these connections from the RTS, people traveling to and from these destinations will have increased non-motorized transportation options as their mode choice. This can lead to benefits that include decreased traffic congestion, increased health benefits, improved air quality, and decreased infrastructure costs at the destinations due to decreased parking needs for automobiles...These connections can also help to encourage economic development by bringing additional people into these activity centers and can lead to increased property values as well.

CP 2423.

The PSRC, the regional planning organization for the four-county

⁶ The County considers RTS’s “mobility” purpose to be any nonrecreational purpose like transportation and commuting from point A to point B. CP 1383-85.

(King, Kitsap, Snohomish and Pierce) central Puget Sound region, CP 2466, oversees the Puget Sound Metropolitan Transportation System, of which the County is a member. That system follows federal metropolitan planning organization planning requirements imposed by 23 U.S.C. § 134(g). CP 2467-68. The system, including nonmotorized transportation, consists of regionally significant multimodal facilities that are crucial to the mobility needs of the region. CP 2472. The nonmotorized transportation system focuses on linking communities at the regional level, substituting nonmotorized trips for vehicle trips and providing intermodal connections at rail, ferry and other transit stops. CP 2576. The regional nonmotorized network, like the RTS, is based on County nonmotorized plans and is designed to link and provide access to urban centers and major destinations. CP 2477. Bicycle and pedestrian transportation play a key role in achieving the transportation goals in the Puget Sound region, including in King County. CP 2469-70. The GRT is one of the primary regional bicycle trails that is part of the County's Active Transportation Plan. CP 2505.

Since 1991 a major source of funding for the acquisition and development of the RTS has come from the federal appropriation for the national transportation programs. CP 1290-91, 1737-39. The GRT is one of the trails that has received federal funding from the PSRC, including

the award of two federal transportation grants. CP 1738-40, 1941. When funds are received or awarded, they come from USDOT and must be earmarked for projects that are used for public transportation. CP 1741-42. The County has plans to apply for and/or use federal funds to build and/or expand the GRT in the future. CP 1755-56, 1941.

(3) The GRT Is a Vital Transportation Corridor in the Industrial Heart of South King County

Schwartz presented voluminous evidence that in addition to the RTS as a whole, the GRT in particular is a vital piece of the County's transportation system, used predominately for transportation purposes.

The GRT is one of two major nonmotorized corridors in the industrial heart of south King County linking Tukwila, Kent, and Auburn. CP 2498. Long stretches of the paved trail run adjacent to major streets such as SR 99, Interurban Avenue, and SR 167, effectively acting as a bicycle lane in those urban/industrial areas. Riders can use the trail for easy access to many businesses and venues, including Boeing Field, the Museum of Flight, Southcenter Mall, IKEA, BECU and REI's corporate headquarters, the ShoWare Center, the Maleng Regional Justice Center, and Starfire Sports (the training facility for the Seattle Sounders), to name just a few. Commuters also enjoy easy access to several park and ride lots adjacent to or nearby the trail. *See, e.g.*, CP 423. The County's website

boasts that the GRT is “[i]deal for recreational journeys *and nonmotorized commuting.*” CP 1304 (emphasis added).

When the County created the 1988 Green River Trail Master Plan it specifically stated that “the trail will be used for daily commuting as well as for recreation.” CP 1264. The plan also stated that “[t]he trail will draw a significant amount of daily commuting...and *therefore should be designed for safe travel during high-water conditions.*” CP 1275 (emphasis added). In 1993, the County started to encourage more of its citizens to use bicycles for transportation and it recognized that the development of the GRT was important to creating an effective nonmotorized transportation system throughout South King County. CP 1182-83, 1192.

Colleen Sheehan, a 22-year veteran of the County’s Parks Department, testified that the predominant use of the GRT at the place at which Schwartz was injured was “by people using this trail for transportation and/or commuting purposes given the trail’s proximity to the city of Seattle and Boeing to the north, and to the cities of Tukwila and Renton to the south.” CP 1143-46. She testified that traffic along the trail increases significantly during rush hour and it is common to see bicyclists on the trail in “suits and ties” or other work clothes. CP 1145. County Parks’ Stephanie Johnson performed routine maintenance on or near the

GRT where Schwartz was injured. CP 1115-18. Johnson testified that “the predominate use of this section of the GRT [where Schwartz was injured] is used by the public for transportation and commuting.” *Id.*

County leadership confirmed this testimony. Parks Director Brown admitted that the GRT is a core component of the County’s RTS, and it is classified as a critical transportation corridor for the region where it is located. CP 1370-72. RTS Coordinator Foxworthy specifically stated that the Tukwila portion of the GRT, where Schwartz was injured, is “popular with bicyclists, runners and walkers” and that “much of the trail threads through office-commercial and industrial land uses, and many employees use the trail on a daily basis.” CP 1621. Foxworthy further testified that the GRT is an important commuter link for bicyclists and pedestrians. CP 1762-63. Foxworthy considers the GRT a “primary trail” which is defined as “active transportation facilities that meet regional trail development guidelines for size, grade, and other characteristics.” CP 1901-02. Due to its importance as a transportation route, the County sought to expand the GRT after conducting a feasibility study, precisely because it is an important transportation corridor in the region. CP 1762-63.

According to the PSRC’s 2018 Regional Transportation Plan, there are a number of planned or requested projects for the GRT that will

receive or require federal transportation funding to further PSRC's goal of achieving more nonmotorized transportation options. CP 2469-70, 2508-11. One project involves the extension of the GRT to the north at S. 102nd Street (just a few hundred feet north of where Schwartz was injured by the bollard) at a cost of \$21,000,000. CP 2509. There are also three (3) more projects to develop and/or improve the GRT at various sections (Phase 3, 4 and 5) and costing more than \$75 million. *Id.* The PRSC updated its Transportation 2040 plan in 2014 by showing that there are another five (5) projects involving the GRT that will receive \$18 million in federal transportation funding. CP 2553. Importantly, Schwartz presented evidence that a condition to receiving federal funds from the PSRC is that they be used for projects geared primarily towards transportation. CP 2625-34.

The County confirmed much of the evidence above in its pleadings. It answered Schwartz's complaint by admitting that the RTS and GRT are used for nonrecreational purposes, like transportation and commuting. CP 2635-50. The County has also been encouraging the public to use more nonmotorized transportations options, and specifically the RTS, to fulfill the County's goal of reducing traffic and congestion and improving the environment. CP 1895-96. Schwartz propounded requests for admissions to the County concerning the nonrecreational use and

purpose of the RTS and GRT. CP 2651-77. In response, the County admitted that the RTS and GRT serve nonrecreational purposes and uses like nonmotorized transportation and bicycle commuting. CP 2656-58.

(4) Schwartz Presented Other Evidence that Recreational Use Immunity Does Not Apply

In addition to the evidence above that the GRT is used predominately for transportation, not recreation, Schwartz presented other evidence in response to the County's motion for summary judgment to show that recreational use immunity was inapplicable to his case.

First, the County admitted that its right to control the GRT is limited. According to Robert Nunnenkamp, property agent for King County, the County does not own or manage the entirety of the GRT. CP 303-06. For example, a section of the GRT just 360 feet south of where this incident occurred is actually owned by Seattle Public Utilities ("SPU"). *Id.*; CP 2950. The County entered into an agreement with SPU concerning GRT's use just south of the bollard. *Id.* Among various provisions, the agreement provides that: (1) the County shall not schedule certain events, like marathons, on the GRT without obtaining SPU's written permission; (2) the County is not allowed to issue exclusive use permits regarding the GRT to any third party; and (3) SPU reserves the right to permit other entities or individuals to use any or all portions of the

GRT at any time. CP 2682. Although the County is permitted to restrict the public's use or access of the GRT during daylight hours, the agreement with SPU does not contain any language or clause that would allow the County to permanently close the GRT to members of the public. CP 2681-98. In fact, the County has known for years that the public regularly uses the RTS at all times during the day and night (24 hours a day) and it does nothing to restrict this use. CP 1835-36. Schwartz argued that absent the ability to close the trail, it could not be considered an exclusive landowner capable of asserting recreational use immunity. CP 1057-58.

Second, County employee Sam Whitman also testified that the County leases out portions of the GRT for races. CP 2840-43. He testified that the specific segment of the GRT where Schwartz was injured was leased for races, and that other segments of the GRT are leased by the County "many times." *Id.* Schwarz argued that because the County "charged a fee of any kind" it could not assert immunity under the statute. CP 1054.

Finally, Schwartz presented evidence that even if recreational use immunity applied to the path generally, RCW 4.24.210(4)(a) creates an exception to recreational use immunity where a person is injured by "a known dangerous artificial latent condition" on the premises and no sign is "conspicuously posted" to warn of it. In addition to the Google Earth

images, citizens' complaints, and other evidence discussed *supra*, Schwartz presented the un rebutted testimony of two experts who testified that the bollard presented a dangerous latent condition which would not have been visible to a user like Schwartz.

Schwartz's well-qualified engineering, optics, and visibility expert James S. Sobek, P.E. reviewed documents and pertinent safety standards and guidelines and conducted an on-site inspection of the GRT and the bollard. CP 1072-91. Sobek opined among other things that (1) the contrast or conspicuity of the bollard as measured against its background drops off considerably (to zero or near zero conspicuity) in weather and lighting conditions that are common in Washington (*e.g.*, rain, overcast skies, wet pavement); (2) when the conspicuity of the bollard drops to zero or near zero it will not be noticeable or readily apparent to someone approaching the bollard that doesn't know it exists; (3) when the County installed the bollard it did not comply with state and federal safety standards and recommendations (*e.g.*, MUTCD and AASHTO) concerning markings that would have made the bollard noticeable and readily apparent to trail users in the conditions that existed at the time of Schwartz's injury; (4) the bollard therefore constituted a known artificial dangerous latent condition on the trail under the conditions that existed at the time; and (5) the County knew, or should have known, that the bollard

was dangerous because it received prior notice that the bollard presented an unreasonable risk of harm to trail users as evidenced in photographs of the site published by Google in 2009. *Id.*

Likewise, Schwartz's well-qualified human factors expert JoEllen Gill, MS, CHFP, CXLT, CSP, also opined that the single bollard was a latent condition caused by the lack of visual markers to make the bollard conspicuous against the trail's backdrop, and because a trail user does not expect to encounter this bollard in the location where it has been installed (in the middle of a trail with no intersections or other geographic warnings). CP 1062-71.

(5) The Trial Court Erroneously Granted Summary Judgment

Despite the ample evidence discussed *supra* that the GRT is predominantly used for transportation, the trial court granted summary judgment for the County, finding as a matter of law that RCW 4.24.210's recreational use immunity applied because the trail is also used for recreation. CP 2997-99. The trial court rejected Schwartz's argument that RCW 4.24.210 did not apply because the County lacked the "authority to close the trail" to recreational users and charged a fee to some users, despite evidence creating a question of fact on those issues. *Id.* And the trial court found, as a matter of law, that the negligently installed bollard was not a "latent" condition for purposes of RCW 4.24.210(4)(a)'s

exception to recreational use immunity. *Id.*

In granting summary judgment, the trial court, the Honorable Susan Serko, recognized the need for clarification in the law on recreational use immunity, due to potential inconsistencies in recent Supreme Court cases dealing with the issue.⁷ The trial court indicated its confusion over whether the holding in *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 700, 317 P.3d 987 (2014), is still valid that recreational use immunity may not apply to a commuter bike bath used primarily for transportation purposes, in light of *Lockner v. Pierce County*, 190 Wn.2d 526, 529, 415 P.3d 246 (2018). It also expressed confusion over whether *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 969 P.2d 75 (1998), is still valid in light of *Jewels v. City of Bellingham*, 183 Wn.2d 388, 353 P.3d 204 (2015), regarding the true test for determining whether a hazard is latent for purposes of the statutory exception to recreational use immunity and whether that question is an

⁷ The trial court expressed the need for clarification in the law by this Court:

Well, this case is going up obviously. It probably didn't matter what decision I made; but I think *Lockner* governs...I'll be curious to know the outcome because whether it's Justice Gonz[á]lez or Justice Stephens or perhaps Justice Madsen that reconcile *Camicia* and *Lockner*, someone's got to do it, I think...I would hope that this might bypass Division II...I only say that because I think ultimately it would have to be decided by the Supreme Court, given *Lockner* and *Camicia* and *Jewels*.

ROP (8/3/18) at 31-32.

issue of fact for the jury to determine. *See supra*, n.7.

Schwartz timely appealed and moved for direct review by this Court. CP 2995-96.

D. SUMMARY OF ARGUMENT

The trial court erred in ruling as a matter of law that recreational use immunity statute applied to an urban commuter bike path, where Schwartz presented evidence that the path is used predominately for transportation purposes. It is a key part of County and regional transportation plans, and it receives a bulk of its funding from transportation sources. The trial court also erred in applying recreational use immunity where Schwartz created material issues of fact over whether the County actually owned and had the authority to close the GRT and whether it charged some users a fee for using the path, two questions of fact which preclude the application of recreational use immunity.

The trial court also erred determining as a matter of law that the exception to RCW 4.24.210 did not apply because the inadequately marked bollard was not a “latent” hazard. Schwartz presented ample evidence that a biker traveling along the GRT would be unable to see the inadequately marked bollard under normal conditions. Reversal is warranted so a jury can determine the significant issues of fact which permeate every aspect of this case.

E. ARGUMENT⁸

(1) Principles of Statutory Interpretation

This case is classically one of statutory interpretation, and in analyzing statutory provisions, courts employ well-developed construction principles and tools. The primary goal of statutory interpretation is to carry out legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington, this analysis begins by looking at the words of the statute. In the absence of a statutory definition, courts give words their common and ordinary meaning. *Zachman v. Whirlpool Financial Corp.*, 123 Wn.2d 667, 671, 869 P.2d 1078 (1994). “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself. *Id.* Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature’s intent is plain. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language is plain, that ends the courts’ role. *Cerillo v. Esparza*, 158 Wn.2d 194, 205-06, 142

⁸ This case was resolved on summary judgment by the trial court. Summary judgment was appropriate only if there was no genuine issue of material fact and judgment was appropriate as a matter of law. CR 56(c). This Court reviews that decision *de novo*, viewing all the facts, and reasonable inferences from them, in a light most favorable to Schwartz. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004).

P.3d 155 (2006).

If, however, the language of the statute is ambiguous, courts must then construe the statutory language. A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993). In construing an ambiguous statute, a court may consider its legislative history and the circumstances surrounding its enactment to arrive at the Legislature's intent. *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003); *City of Seattle v. Fuller*, 177 Wn.2d 263, 269-70, 300 P.3d 340 (2013). See generally, Philip A. Talmadge, "A New Approach to Statutory Interpretation in Washington," 25 Seattle U. L. Rev. 1 (2001).

Specifically, when it comes to changing the common law, the Legislature is presumed to be aware of the common law and any statute purporting to abrogate a common law principle requires the Legislature to do so *expressly*. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008). Any statute overriding the common law is *strictly construed*. *Carson v. Fine*, 123 Wn.2d 206, 214, 867 P.2d 610 (1994).

(2) The Trial Court Erred in Granting Summary Judgment Based on the Recreational Use Immunity Statute

RCW 4.24.210 modifies common law principles of premises liability where public or private landowners allow members of the public

to use their land for free for purposes of outdoor recreation, barring liability for unintentional injuries to such users. *Camicia*, 179 Wn.2d at 694; *Davis v. State*, 144 Wn.2d 612, 615-16, 30 P.3d 460 (2001). Such landowners must show that the land at issue is (1) open to the public; (2) for recreational purposes; and (3) no fee “of any kind” is charged for its use. *Camicia*, 179 Wn.2d at 695-96.

Because recreational use immunity is an affirmative defense, the County carries the burden of proving entitlement to immunity under the statute. *Cregan v. Fourth Member Church*, 175 Wn.2d 279, 283, 285 P.3d 860 (2012); *Camicia*, 179 Wn.2d at 693. Significant fact questions associated with the applicability of the statute and the exception to RCW 4.24.210 immunity should have precluded summary judgment.

(a) Summary Judgment Was Inappropriate Where Schwartz Created a Question of Fact as to Whether Recreational Immunity Statute Applies to an Urban Commuter Bike Path Like the GRT

The County is not entitled to the statute’s immunity if the GRT is not a recreational facility. Where the use of the land involves mixed recreational and nonrecreational in nature, it is difficult to discern if the land use is truly “recreational” in nature, as the County itself admitted internally. CP 2763-69. In *Camicia*, a bicyclist was severely injured after colliding into a bollard on a portion of a bicycle trail running through the

City of Mercer Island. This Court reversed summary judgment in favor of the City, holding that there were genuine issues of material fact concerning whether the recreational use immunity statute applied when evidence showed that the trail also served nonrecreational purposes like transportation. The Court indicated that if the land is open for some other nonrecreational use, then recreational immunity cannot apply:

Where land is open to the public for some other public purpose – for example as part of a public transportation corridor – the inducement of recreational immunity is unnecessary. It would make little sense to provide immunity on the basis of recreational use when the land would be held open to the public even in the absence of that use.

179 Wn.2d at 697. “Extending the reach of [the Recreational Use Statute] to land that is open to the public for purposes other than recreation simply because some recreational use occurs not only undermines the statute’s plain language and the legislature’s intent but would also unjustly relieve the government of its common-law duty to maintain roadways in a condition reasonable safe for ordinary travel.” *Id.* at 699. Furthermore, the Court held that recreational use immunity does not depend on the plaintiff’s activity at the time of injury. *Id.* at 701. The proper focus is on the landowner’s intent for use of the land and not the injured invitee’s use of the land at time of injury. *Id.*

The Court indicated that there are degrees of recreational versus

transportation use which create a factual question as to whether the statute applies. For example, the Court compared the case to *Widman v. Johnson*, 81 Wn. App. 110, 111-12, 912 P.2d 1095 (1996), where a private company opened its forest land for recreational purposes only and posted signs stating, “The Forest Land Behind This Sign Is Open For RECREATIONAL USE ONLY.” In contrast, the Court determined that reasonable minds could differ over whether Mercer Island’s portion of the I-90 trail – which runs adjacent to a major highway – served “recreational purposes rather than transportation purposes.” *Camicia*, 179 Wn.2d at 699-700.

The Court further reasoned that imposing immunity to any route which is used for any degree of recreation would extend immunity to “every street and sidewalk” that is open to the public free of charge. *Id.* (noting, for example, that Pioneer Square is both a street and a historic tourist site open for recreational sightseeing). Rather, depending on the specific characteristics of the pathway itself, the owner of a bike route may have a “duty to maintain [the] roadway[] in a condition reasonably safe for ordinary travel.” *Id.* at 699. Even the dissent authored by Justice Madsen echoed this approach, noting that “[w]hen land is held available for mixed public uses, the immunity does not apply in case of every injury that might occur on the land.” *Id.* at 707 n.9. Rather, “nonrecreational

activity” like transportation and commuting on mixed use paths may impose liability on an operator of the path depending on the facts of the case. *Id.*

In this case, the trial court largely ignored *Camicia*, choosing instead to rely on another case interpreting recreational use immunity, *Lockner v. Pierce County*, 190 Wn.2d 526, 529, 415 P.3d 246 (2018). In *Lockner*, this Court held that recreational use immunity applied as a matter of law to an injury that occurred on the Foothills Trail, a rural trail owned by Pierce County. After determining that “sole recreational use is not required” for immunity to apply, the Court did not analyze *the degree of recreational versus transportation use* and merely asked “whether the Foothills Trail was opened for recreation” at all. *Id.* at 535-36. Finding that it was, the Court stopped its inquiry and held that immunity applied as a matter of law. *Id.*

At first glance, this ruling seems to undermine *Camicia*. However, even the *Lockner* court expressly distinguished *Camicia* with the observation that the path at issue in *Camicia*, *i.e.* the I-90 trail, “was used primarily for transportation.” *Id.* at 534.

This observation makes sense because a broad holding that immunity applies to *any land* open to recreational users of *whatever degree* will lead to absurd results. In addition to the Pioneer Square

example offered by the Court in *Camicia*, any city operating a roadway with a bike lane could claim immunity under the trial court’s ruling for road design liability when an accident occurs on its road for which it was at fault. For example, on Harbor Avenue Southwest in West Seattle where the undersigned’s office is located, there are markings authorizing the use of the roadway by bicyclists. No doubt, certain bicyclists use the roadway recreationally. However, under the trial court’s interpretation of the statute, the City of Seattle could claim immunity from roadway design defects in a personal injuries case because Harbor Avenue has *some* recreational uses.

Likewise, under the trial court’s extreme interpretation of *Lockner*, recreational use would even extend to the State’s highways. For example, according to one 1973 WSDOT study, “driving for pleasure and sightseeing...accounted for almost 50 percent of all participations in rural outdoor recreation activities” which utilized Washington highways. *See* Appendix.⁹ In these purely recreational trips, “driving itself and the route were the attractions” rather than any transportation goal. *Id.* According to the trial court, which merely asked whether the land was open to

⁹ Attached in the Appendix to this brief are excerpts from the 1973 WSDOT study. The entire study is publicly available on WSDOT’s website. *See* Karl Leonhardt, RECREATIONAL TRIP CHARACTERISTICS AND TRAVEL PATTERNS: SECOND PHASE OF THE WASHINGTON STATE RECREATIONAL TRAVEL STUDY, (June 1, 1973), <https://www.wsdot.wa.gov/research/reports/fullreports/011.2.pdf>.

recreational users at all, the State may assert recreational use immunity for *any accident* that occurs on its highways because they are also open to the public for these recreational uses.

These absurd results cannot be the standard. *See Camicia*, 179 Wn.2d at 699 (“We avoid any reading of the statute that would result in unlikely, absurd, or strained consequences.”). *Camicia* and *Lockner* can be reconciled by preventing application of recreational use immunity when a pathway is used “primarily for transportation,” as even the *Lockner* Court recognized. 190 Wn.2d at 534. At the very least, this Court should clarify that some minor degree of recreational use cannot confer complete immunity to the owner of an urban, commuter bike path. Any more than *some* transportation use may transform a recreational facility as in *Lockner* into a non-recreational facility exempt from RCW 4.24.210. This would square with the observations in *Camicia* that bicycle paths are evaluated “on a case by case basis.” *Id.* at 700. Sometimes they are treated as recreational and sometimes they are treated as “part of the transportation system.” *Id.*

Here, Schwartz created an issue of fact as to whether the GRT is “used primarily for transportation,” and the County failed to meet its burden of proof to show otherwise. As discussed above, the County admitted in response to requests for admission that its RTS and GRT are

used for nonrecreational purposes like transportation and bicycle commuting. CP 2656-58. The County's website and planning documents repeatedly state that the RTS are used for transportation and commuting purposes, and that the RTS is an important component of the County's nonmotorized transportation plan.

Over the years the County has received and/or applied for millions of dollars in federal transportation funds for its regional trails, including the GRT. *See, e.g.*, CP 1738-40, 1941. Funding applications make it clear that the County considers the RTS and the GRT important nonmotorized transportation corridors. In fact, a condition of receiving federal funds for transportation projects involving bicycles is that the project must be principally for transportation and not recreation. 23 C.F.R. § 652.7. These facts alone should have precluded summary judgment.

Additionally, the declarations of Colleen Sheehan and Stephanie Johnson, former County Parks staffers, only confirm that the predominant use of the GRT where Schwartz was injured was not recreational. According to this, and other, testimony, most people using the pathway in that section used it for transportation purposes. Viewed in a light most favorable to Schwartz, a question of fact existed as to whether the GRT was used predominantly for nonrecreational purposes, thus negating the

application of RCW 4.24.210 immunity. Reversal is warranted, with proper guidance by this Court that when an urban bike path is used “primarily for transportation purposes,” the recreational use immunity statute does not apply.

(b) The Trial Court Erred in Applying Recreational Use Immunity Where Schwartz Created an Issue of Fact Regarding Whether the County Maintained the “Authority to Close” the GRT

Summary judgment was also unwarranted, where Schwartz created a question of fact over whether the county had authority to close the trail.¹⁰ The *Camicia* court established the rule that absent continuing “authority to close the land to the recreating public” “a landowner cannot assert recreational use immunity.” 179 Wn.2d at 696. This rule makes sense, because extending recreational immunity to landowners who lack the authority to permanently close the land to the public would not further the purposes behind the statute, namely to encourage landowners to open land that would not otherwise be open. *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 557-58, 872 P.2d 524 (1994). Whether such authority exists is a question of fact. *Camicia*, 179 Wn.2d at 697.

Here, the County could not prove that it had the legal authority to

¹⁰ As discussed in Schwartz’s Statement of Grounds for Direct Review, the *Lockner* court was asked to revisit the “authority to close test” but the Court decided to leave that issue open for “another day.” 190 Wn.2d at 535 n.2 (noting that amici urged the Court to consider the issue).

permanently close the trail. It lacked that authority. A right to restrict access to the trail during nighttime hours is not authority to *permanently close* the trail to the public at all times. Only the latter suffices when it comes to furthering the intended purpose of RCW 4.24.210 – to encourage landowners to open land that normally would not be open. The County’s ability to restrict access of the trail at night does not encourage it to leave the trail open during the day. The County believed that under federal law it had to keep the trail open at all times for transportation purposes; the trail had to be open during the day to comply with the Federal Highway Administration’s regulatory requirements for the Puget Sound Regional Council’s transportation plan. CP 2770. The right to restrict access at night, but not close the trail during all times during the day, does not meet the requirements set forth in *Camicia*.

Moreover, the County’s own contract with SPU confirmed that the authority to restrict access or use to portions of the GRT belongs to SPU. The terms of the agreement state that *only SPU* could decide who used the trail and during which times. CP 303-06. In fact, only SPU had the authority to decide who could use or not use the GRT at any time, even at night when the County restricted access. *Id.* The County’s own documents also state that it was merely a “steward” of the RTS because the trails were part of the Federal Highway Administration’s

transportation plan. *E.g.*, CP 178. A “steward” is a manager or caretaker, not a legal owner.

The County’s only counter below was a proffered “survey” of the section of the GRT, but this “survey” was not proper evidence of legal ownership of land and any restrictions thereto. CP 276. A survey is not sufficient to allow a court to reasonably understand or infer that King County has all fee simple rights with respect to the GRT on its real property, including the right to permanently close the trail to the public. *See* RCW 64.04.130 (ownership rights must be conveyed by proper instruments to convey land); RCW 64.01.010 (proper conveyance of real property is by deed). Notably, the County has refused to produce a statutory warranty deed or other proper form of conveyance which would specify and describe all of its legal rights concerning the property in question. Although the County could show that it had rules in place concerning the public’s permitted use of the trail, this was insufficient to successfully assert recreational immunity when the landowner must have authority to permanently close the trail according to *Camicia*. At the very least, the trial court was obligated to view conflicting evidence in the light most favorable to Schwartz and send the issue to a jury. Its failure to do so is reversible error.

In sum, Schwartz presented a question of fact as to whether the

County exclusively owned the GRT to the extent it could assert statutory immunity. Reversal on this issue is warranted.

(c) The Trial Court Erred in Applying Recreational Use Immunity Where Schwartz Created an Issue of Fact Regarding Whether the County Charged for Using the GRT

The trial court also erred in granting summary judgment where Schwartz presented evidence that the County charged a fee to some GRT users. As discussed above, recreational use immunity does not apply where a landowner charges “a fee of any kind” for the use of the land at issue. RCW 4.24.210(1); *Camicia*, 179 Wn.2d at 695-96; *see also*, *Cregan, supra* (statute inapplicable where landowner generally charged for access but allowed a group access at no charge).

Here, Schwartz presented evidence that the County charges for the GRT’s use. As County employee Sam Whitman testified, the County periodically rents out the GRT for races, charging a fee for its use. CP 2841-42. That fact alone bars the County from claiming the statute’s application. *Plano v. City of Renton*, 103 Wn. App. 910, 14 P.3d 871 (2000); *Hively v. Port of Skamania County*, 193 Wn. App. 11, 372 P.3d 781, *review denied*, 186 Wn.2d 1004 (2016).

In *Plano*, the Court of Appeals considered the case of a dock in a public park owned by the City of Renton. A plaintiff who moored her

boat sued the City alleging that she was injured by the dock which did not meet building codes. 103 Wn. App. at 911. The City charged a moorage fee for overnight users of the dock, even though the rest of the park was open for recreational use. *Id.* The evidence showed that the plaintiff did not pay the moorage fee. *Id.* Nevertheless, the Court of Appeals held that recreational use immunity did not apply because the City charged a fee “of any kind” for using the land. *Id.* at 914. The court reasoned that the statutory phrase “without charging a fee of any kind” is unambiguous and must be strictly construed. *Id.* at 911-13. It did not matter “whether [the plaintiff] actually paid a fee for using the moorage, or whether Renton actually charged a fee to the person injured. The question is whether Renton charges a “fee of any kind” for using the moorage.” *Id.* at 913.

Here, too, the County charges a “fee of any kind” when it collects a fee to lease out the GRT for races. It benefits economically from such an arrangement, and just as the City of Renton did in *Plano*, it voluntarily waives application of the recreational use immunity statute and undertakes a duty to maintain the premises in a safe condition to all invitees, whether they are part of the fee-paying crowd or not. This is appropriate given the Court’s observation in *Camicia* that it does not matter the purpose for which the invitee uses the land at the time of injury, but rather courts must look to landowner’s use of the land (*i.e.* whether or not the landowner

charges a fee “of any kind”) to determine whether recreational use immunity applies. 179 Wn.2d at 701-02.

In sum, viewed in the light most favorable to Schwartz, this material issue of fact should have precluded the application of RCW 4.24.210.

(3) Assuming *Arguendo* that Recreational Use Immunity Applied, the Trial Court Erred in Granting Summary Judgment Where Schwartz Created a Question of Fact as to Whether the Bollard Was a Known Dangerous Artificial Latent Condition, an Exception to Immunity Under the Statute

Summary judgment was also inappropriate, where Schwarz created a material issue of fact as to whether the statutory exception to immunity applies. Assuming *arguendo* that immunity applies to the GRT, RCW 4.24.210(4)(a) creates an exception to recreational use immunity where a person is injured by “a known dangerous artificial latent condition” on the premises and no sign is “conspicuously posted” to warn of it. Here, the trial court erred in ruling as a matter of law that the bollard was not a latent condition where the other elements are met.¹¹

Washington courts treat the terms at issue here in their plain and ordinary meaning unless a contrary legislative intent is involved. *Ravenscroft*, 136 Wn.2d at 920. The words in the statute modify

¹¹ At oral argument, the County conceded that all the elements except for latency were met. ROP (8/3/18) at 9.

“condition,” not each other. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993); *Jewels*, 183 Wn.2d at 397.

For a condition to be “latent,” it must not be “readily apparent” to the recreational user of the land. *Jewels*, 183 Wn.2d at 398. This “apparency” must be for the general class of reasonable users and does not mean the particular plaintiff. *Id.*¹² As for the condition, it is the actual condition itself and not the risk of harm that is at issue. *Ravenscroft*, 136 Wn.2d at 924-26.

In *Ravenscroft*, this Court held that summary judgment was inappropriate on the issue of latency where a boater hit a submerged stump in the Spokane River. The plaintiff offered his own affidavit that the stumps were not visible to him as he rode in his boat, as well as affidavits from other persons declaring that boaters had hit the stumps in the past, thus showing their latent nature. 136 Wn.2d at 926. The Court held that the “question of whether this particular condition is latent is one of fact and, therefore, an order of summary judgment is not appropriate on that issue.” *Id.* at 926.

Here, the bollard was not readily apparent to the general class of

¹² Thus, submerged trees in a man-made lake in *Ravenscroft* or muddy water on a road hiding an eroded edge and drop off into deep adjacent water in *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15, *review denied*, 139 Wn.2d 1005 (1999) met the requirement.

recreational users, as is evidenced by the 2009 Google Earth photos showing that a concerned citizen who presumably used the trail regularly, spray-painted warning markings around the bollard. Thus, *people actually using the GRT could not readily see the bollard*. The record also contains evidence from other users of the RTS, who warned that the County's inadequately marked bollards present a latent hazard to cyclists. *See* CP 1944 (cyclist who suffered catastrophic injuries warning of a bollard which "blends in very closely with the asphalt surface of the trail and the gravel along the side of the pathway"); CP 1972 (another cyclist relaying a study on the dangerousness of inadequately marked bollards and warning that the County "can't just put one lame little reflector on the bollard and think 'good enough'").

Furthermore, the unrebutted expert opinions of Sobek and Gill establish that the bollard was not readily apparent to normal trail users due to lack of expectancy and visual markers to make the bollard conspicuous, especially in conditions common to the Pacific Northwest (wet pavement and cloudy skies). Both experts opined that the bollard was an unforeseen, dangerous latent condition for trail users, and that this fact was compounded or made worse by King County's failure to comply with federal and state safety standards and recommendations that require conspicuous markings on and around the bollards to make them visible to

trail users in most, if not all, weather conditions. CP 1062-71, 1072-91.

The trial court ignored these significant issues of fact and granted summary judgment largely relying on *Jewels*. In that case, this Court considered whether a water diverter running alongside a bicycle path was a latent condition. The Court analyzed three Court of Appeals cases and one Supreme Court case to “derive the...principle[]” that: “if an ordinary recreational user standing near the injury-causing condition could see it by observation, without the need to uncover or manipulate the surrounding area, the condition is obvious (not latent) as a matter of law.” 183 Wn.2d at 400. In its 5-4 majority decision, the Court did not distinguish or even cite *Ravenscroft*.

This lack of discussion is confusing, considering a recreational user standing (or treading water) next to the stumps at issue in the Spokane River could readily see it. *Id.* at 403 (Gordon McCloud, J., dissenting). It is only when traveling at speed that the condition becomes latent (or even hazardous for that matter). That is exactly the case here where Schwartz presented evidence from well-qualified experts who opined that the bollard was placed, painted, and left unmarked in a way that made it functionally *invisible* to bicyclists. Literally standing next to the bollard might have permitted observers to detect it, but that is little consolation for invitee bicyclists actually using the trail for its intended

use and encountering a functionally invisible hazard under normal conditions. The bollard simply did not conform to relevant transportation safety standards, which require painted markings warning of such a hazard to prevent this exact type of harm. The County knew it was dangerous to cyclists traveling at speed because it was inadequately marked, yet it failed to take any action. Like the submerged stump in *Ravenscroft*,¹³ it was not visible to a typical user of the land under typical conditions.

This Court needs to resolve the question of how to determine “latency” under RCW 4.24.210. A literal application of the term that plunks the observer next to the hazard and ignores whether the hazard is actually visible in real world conditions only condones landowners making property available that will inevitably result in harm, even to recreational users.

Here, the County receives federal funding and relief from traffic congestion on its streets due to bicyclists using the land for transportation purposes. It owes a duty to protect these invitees and maintain bollards – *which it concedes are known artificial hazards* – in a reasonably safe condition for bicyclists invited to use the trail. That duty is no different

¹³ *Ravenscroft* has not been overruled, and this Court’s precedent generally remains good law absent an express showing that it is “incorrect and harmful.” *In re Stranger Creek & Tributaries in Stevens County*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). *Ravenscroft* is not incorrect and harmful, especially as applied to this case where the County specifically invites bicyclists to use the GRT and benefits from their presence on the trail through increased federal funds and reduced traffic on its streets.

than the duty it owes to people using its roads, as the Court in *Camicia* recognized. 179 Wn.2d at 699 (describing the “common-law duty to maintain roadways in a condition reasonable safe for ordinary travel.”).¹⁴ That is precisely why state and federal guidelines mandate that bollards on pathways used for transportation be avoided or properly marked, with diamond pattern striping to warn nonmotorized travelers of their presence.

In sum, latency is a question of fact, and Schwartz presented ample evidence to defeat summary judgment and permit a jury to determine whether the bollard was a latent hazard, thus negating the application of the recreational use immunity statute. Reversal is warranted.

F. CONCLUSION

Significant issues of fact should have precluded summary judgment as to whether RCW 4.24.210’s recreational use immunity applies in this case. Schwartz asks that the Court reverse the trial court’s order granting summary judgment to the County. Costs on appeal should

¹⁴ As this Court has noted, the County has a “duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition.” *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787-88, 108 P.3d 1220 (2005). “[A]s the danger becomes greater, the actor is required to exercise caution commensurate with it.” *Id.* (quotation omitted). Here, the bollard was an inherently dangerous and misleading condition, and the County knew this. As discussed above, the County knew from *multiple* complaints that bollard such as the one which injured Schwartz are misleading and hard to see for bicyclists. One of these reports detailed the great danger posed by these bollards, as the citizen reported “catastrophic injuries” and her goal to “never have anyone suffer what our family has had to go through.” CP 1944. It should not escape liability for its careless inaction, especially where it actively invites bicyclists onto its trails knowing that these dangerous hazards exist.

be awarded to Schwartz.

DATED this 27th day of December, 2018.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Philip A. Talmadge", with the number "#47670" written to its right.

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APPENDIX

210

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RECREATIONAL TRIP CHARACTERISTICS
AND TRAVEL PATTERNS

Second Phase of the Washington State
Recreational Travel Study

Prepared for
Washington State Highway Commission
State Department of Highways
in cooperation with
U.S. Department of Transportation
Federal Highway Administration

Prepared by
Karl Leonhardt, Principal Investigator

San Diego, California

June 1973

RESEARCH AND SPECIAL ASSIGNMENTS

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TABLE OF CONTENTS

<u>Chapter</u>		<u>Page</u>
	SUMMARY AND CONCLUSIONS	1
I	INTRODUCTION	4
	1. Objectives of the Study	4
	2. The Study Area and Study Methodology	5
II	RECREATIONAL TRIP CHARACTERISTICS	8
	1. Spatial Distribution of Outdoor Recreational Attractions	8
	2. Time Distribution of Recreational Trips	12
	3. Arrival Pattern of Campers in Washington State Parks	21
	4. Trip-Length Frequency Distribution of Recreational Trips	22
	5. Number of People in Recreational Trip Party	24
	6. Recreational Trip Purposes	24
III	TRAVEL PATTERNS OF CAMPER TRIPS	27
	1. Analysis of Washington State Park Data	27
	2. Simulation of Trip Distribution for Washington State Parks in 1969	29
	3. Simulation of Trip Distribution for Washington State Parks in 1971	36
	4. Analysis of California State Park Data	36
	5. Simulation of Trip Distribution for California State Parks in 1962/63 and 1969	39
	6. Comparison of Trip Distributions for Washington and California State Parks	42
IV	TOWARD A PREDICTION MODEL FOR RECREATIONAL TRIPS	44
	1. The Trip-Generation Model	44
	2. Decision and Simulation Models	46

SUMMARY AND CONCLUSIONS

The objectives of this research are two-fold: 1) to identify characteristics of recreational trips, and 2) to identify factors influencing the distribution of recreational trips. Characteristics of recreational trips have been identified on the basis of data collected from different state agencies in the State of Washington.

Seven recreational trip purposes which are characteristic for the State of Washington have been identified in this study: 1) camping trips, 2) hunting trips, 3) fishing trips, 4) visiting beaches and clamming, 5) snow skiing, 6) driving for pleasure and sightseeing, and 7) others.

The analysis has been performed basically for the spatial and temporal distribution of recreational trips. Spatial distribution relates to the location of the recreation opportunities which can clearly be distinct for each of the trip purposes and is further characterized by the trip-length frequency connected with each of these trip purposes. Temporal distribution is related primarily to the seasons within which the activity corresponding to the trip purpose can be pursued.

A further reason for classifying recreational trips into these seven purposes is the difference in travel behavior that can be observed in connection with the trip purposes. For example, hunting, fishing and snow skiing are trips with a distinct destination, and the trip maker tends to select the shortest route to his destination in order to minimize the travel time. Travel to the trip destination is not, therefore, an essential part of the recreation experience. On the other hand, driving for pleasure and sightseeing creates different travel behavior. The trip to

5. Number of People in Recreational Trip Party

In several prior studies on recreational travel, it has been found that the party size or vehicle occupancy was between three and four people. This observation was confirmed by the camper visitation data collected for this analysis. Beyond this general observation, certain trends in vehicle occupancy have been observed.

The party size tended to be slightly larger in summer than during the rest of the year. The difference was between 20 and 30 percent and can be observed for all six parks in both time periods, 1969 and 1971. This trend was consistent regardless of the type of park or of the year in which the observation took place. The most probable explanation is that during the summer months, the portion of family recreation trips was relatively large because of school vacations. During spring, fall and winter, family trips made up a smaller portion of the total recreational trip volume.

6. Recreational Trip Purposes

From the previous discussion, six trip purposes have been proposed. A seventh category, "others" included all the activities not particularly mentioned, or approximately 15 percent of all participation in rural outdoor recreation activities. Table 2 depicts the trip volume and percent corresponding to all seven trip purposes, which have been established on the basis of distinct differences in three characteristics: 1) season distribution of trips, 2) spatial distribution of trip attractions which is also inherent in the trip-length frequency distribution, and 3) trip volume.

A last criterion was cited for the creation of these seven trip purposes and dealt with the activity pursued and the consequences it had for the trip itself. Camping, hunting, fishing, visiting beaches, clamming, and snow skiing all had distinct trip destinations at which the activities took place. The traveler was therefore inclined to reach his destination as

TABLE 2

Weekend Recreational Trip Purposes and
Corresponding Trip Volumes

	<u>Trip Purpose:</u>	<u>Trip Volume %</u>
1)	Camping	5.4%
2)	Hunting	2.4
3)	Fishing	12.0
4)	Visiting Beaches and Clamming	11.8
5)	Snow Skiing	4.0
6)	Driving for pleasure and sightseeing	49.0
7)	Other	<u>15.4</u>
		100 %

These trip purposes have been selected on the basis of:

- 1) Geographical distribution of attractions
- 2) Time distribution of trip occurrence
- 3) Trip length frequency distribution
- 4) Trip volume distribution
- 5) Point attraction, linear attraction and combination thereof

quickly as possible. If the prime purposes of the trip was to pursue the activity, the shortest route to the destination would most likely be chosen. Driving for pleasure and sightseeing, which accounted for almost 50 percent of all participations in rural outdoor recreation activities, had no distinct point attraction, but rather a linear attraction; that is, driving itself and the route were the attractions. For these trips there was no shortest route, and the one selected was perhaps determined on the basis of attractions along the route.

A number of trips to point attractions, such as camping, visiting beaches, et cetera, can be conceived as a combination of sightseeing, pleasure driving and a distinct-activity pursuing trip. This complicates the matter of characterizing the individual trip purposes. For the present, trips with such a combination of attractions (point attractions and linear attractions) are not accounted for because sufficient data to analyze this type of trip behavior are not available.

In conclusion, it can be said that the seven trip purposes developed represents a rational selection on the basis of the five criteria used, that is: seasonal distribution of trips, spatial distribution of attractions, trip-length frequency distribution, trip volumes of each purpose, and type of trip attraction, namely point attraction or linear attraction.

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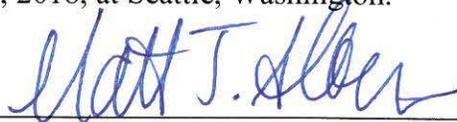
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 27, 2018, at Seattle, Washington.



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