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NO. 85583-8

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF MERCER ISLAND,

Petitioner,

v.

SUSAN CAMICIA,

Respondent.

BRIEF OF AMICUS CURIAE, WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS,
IN SUPPORT OF PETITIONER

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COURT RULES

RAP 13.4(b)(2)1

I. INTRODUCTION

Washington State Association of Municipal Attorneys (“WSAMA”) joins in and supports the arguments raised in the City of Mercer Island’s Petition for Review. Division I’s decision limits the scope of the immunity that Recreational Land Use Statute, RCW 4.24.210, provides, and conflicts with established precedent that applies RCW 4.24.210 to bicycle trails. Division I’s decision threatens the protections afforded by statute to landowners across the state, public and private, who provide immeasurable public benefit by gratuitously leaving open their land for recreational purposes. WSAMA urges this court to accept review pursuant to RAP 13.4(b)(2).

II. STATEMENT OF THE CASE

WSAMA incorporates by reference the Statement of the Case contained in Mercer Island’s Petition for Review.

III. ARGUMENT

RCW 4.24.210(1)¹ provides immunity for landowners who open their land free for recreational purposes. There is no limitation placed in

¹ “(1) Except as otherwise provided in subsection (3) or (4) of this section, any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, . . . **bicycling** . . . without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users.” (Emphasis added.)

this statute with respect to the type of recreational use involved. Nor does the statute limit the immunity of owners who make their land available for free recreational uses dependent upon the consistency of the recreational use with the instrument by which the owner came into title to the property, or any limitations upon such owner's fee simple interest.

The Court of Appeals decision presents an anomaly. If Mercer Island had come into a fee interest in the property on which plaintiff was injured with no restrictions, the Court of Appeals would have affirmed summary judgment in Mercer Island's favor. After all, Ms. Camicia was injured during the course of a *designated* recreational use, on a recreational trail. But the Court of Appeals was apparently concerned that Mercer Island's property interests were limited by language in the quit claim deed it received from the Washington State Department of Transportation (WSDOT). The Court found a question of fact as to whether Mercer Island had the right to open this property up for recreational purposes—as Mercer Island admittedly did, bicycling being an obvious recreational use of property.

The Court of Appeals decision places the cart before the horse in at least two ways. First, Ms. Camicia does not have standing to assert that, under the deed from WSDOT to Mercer Island, Mercer Island could not have made the land legally available for the very recreational use she was

making of the property. Second, by virtue of the statute's plain language, immunity depends only upon the fact that the owner *did* make the land on which the injury occurred open for free—the additional requirements imposed by Division I are newly-minted, from whole cloth.

With respect to the first point, it has been held that deed covenants cannot be enforced by a nonparty who has no personal stake in enforcing the covenant. *Lakewood Racquet Club v. Jensen*, 156 Wn. App. 215, 232 P.3d 1147 (2010); *see also Timberland Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 901 P.2d 1074 (1995). In *Donald v. City of Vancouver*, 43 Wn. App. 880, 719 P.2d 966 (1986), the court held that taxpayers do not have standing to enforce deed conditions subsequent that land be used as a public park, when the city attempted to convey a portion of the park to a hotel. While it may be possible that a citizen has standing to assert that he or she *can* use dedicated property, *see Donald v. City of Vancouver*, 43 Wn. App. 880, 885, 719 P.2d 966 (1986) and *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 166, 684 P.2d 789 (1984), it seems doubtful that any person would have standing to argue in court that she did *not* have any rights to recreational use of property.²

² Of note, Camicia never actually made this argument. This argument was both raised and resolved by Division I, with no participation by either party.

With respect to the second point, Division I did a great disservice to the public, landowners, and the legislature by injecting non-statutory criteria into the analysis. No case suggests that chain of title, source of funds, or third party opinions carry weight—indeed, precedent is to the contrary. *See, e.g., Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608, 774 P.2d 1255 (1989) (“We find the proper approach in deciding whether or not the recreational use act applies is to view it from the standpoint of the landowner or occupier.”). This grey area between immunity and endless liability is a strong disincentive to any property owner considering opening land to the public.

To be clear, Division I’s analysis is novel. The cases cited by Camicia are readily distinguishable. *Tennyson v. Plum Creek Timber Co., L.P.*, 73 Wn.App. 550, 872 P.2d 524 (1994), for example, involved a contractor—who was simply doing work on a property—and obviously had no authority to open and close it to the public. *See id.* at 557 (“The ‘possession and control’ requirement clearly indicates a broader, more permanent interest in the land than was present here. As in *Labree*, the agreements between Plum Creek and the contractors were for purposes of excavation.” Additional citations omitted. Here, in contrast, Mercer Island undisputedly owned the property and the evidence one-sidedly proves that it could open and close it as it deemed fit (and the usual

incidents of ownership were present). And in *Cultee v. City of Tacoma*, 95 Wn.App. 505, 977 P.2d 15 (1999), there was a dispute about whether recreational users were allowed on the property in the first place. There was testimony that the land was not actually “open to the public.” There is no similar evidence in this case; the I-90 trail is open and available to the public—a gratuitous benefit reaped by perhaps thousands of people every day, much like Spokane, Washington’s Centennial Trail.³

RCW 4.24.200 states the intention of the legislature in creating recreational immunity:

The purpose of RCW 4.24.200 and 4.24.210 is to encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon.

Making immunity a “question of fact” is tantamount to no immunity at all. The purposes of immunity are not served by forcing the immune party to undertake expensive discovery and trial in order to claim it. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The point here is that immunity does not count for very much if the immune person is not

³ See <http://spokanecentennialtrail.org/>.

immune from harassing and time-consuming discovery and trial, as well as from judgments.

In this case, Ms. Camicia was making use of land made available for her free use for bicycling. Bicycling is a statutorily enumerated recreational use. How Mercer Island came into title to the property, and whether the WSDOT could have prevented Mercer Island from using the property for recreational purposes (or that WSDOT even intended to do so) are not relevant to statutory immunity.

The Court of Appeals decision implies that recreational areas, if used by some for a non-recreational purpose, lose their identity under RCW 4.24.210. In this, Division I errs. RCW 4.24.210 makes no distinction between bicycling as a recreation and bicycling as a healthy choice to get to work. Thus, even though Ms. Camicia was indeed “recreating” at the time of her injury, that fact should make no difference here.

IV. CONCLUSION

Amicus curiae Washington State Association of Municipal Attorneys respectfully requests this Court to accept review, and reverse the decision of the Court of Appeals, and reinstate the trial court’s judgment.

//

RESPECTFULLY SUBMITTED this 28th day of March, 2011.

Milton G. Rowland by
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Petitioner,

CERTIFICATE OF SERVICE
OF MOTION AND BRIEF OF
AMICUS CURIAE WASHINGTON
STATE
ASSOCIATION OF MUNICIPAL
ATTORNEYS

v.

Susan Camicia,

Respondent.

I, Megan Stockdale, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on the date below set forth, I sent, postage pre-paid, a true and correct copy of the Motion for Leave to File Brief of Amicus Curiae and the Brief of Amicus Curiae Washington State Association of Municipal Attorneys in Support of Petitioner, concerning the above entitled matter to:

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at the above addresses, on the 28th day of March, 2011.

SIGNED at Auburn, Washington, this 28th day of March, 2011.

Signature

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