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SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 63787-8-1)
(King County Superior Court Cause No. 07-2-29545-3 SEA)

CITY OF MERCER ISLAND,

Petitioner,

vs.

SUSAN CAMICIA,

Respondent.

**ANSWER TO BRIEFS OF AMICI CURIAE CITY OF SEATTLE
AND WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS**

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I. ANSWER TO ARGUMENTS OF AMICI CURIAE

Plaintiff/Respondent Susan Camicia files this Answer to the City of Seattle's and Washington State Association of Municipal Attorneys' ("WSAMA") amici curiae memoranda on behalf of petitioner City of Mercer Island.

A. The Court Of Appeals Properly Analyzed Both The Plain Language Of RCW 4.24.210 And Its Express Statutory Purpose.

Amici incorrectly claim the Court of Appeals "read into RCW 4.24.210 terms and conditions that are not there", *Seattle Brief*, p. 10, "inject[ing] non-statutory criteria into the analysis." *WSAMA Brief*, p. 4. To the contrary, Division One carefully analyzed the plain language of RCW 4.24.210 with reference to the express statutory purpose of RCW 4.24.200, to encourage those "in lawful possession and control of land . . . to make them available to the public for recreational purposes. . ." *Opinion at 10*. This Court has repeatedly held that in interpreting a statute the court's primary purpose is "to determine and enforce the intent of the legislature . . . by giv[ing] effect to . . . plain meaning as an expression of legislative intent." *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn. 2d 525, 536, 199 P.3d 393 (2009); *City of Spokane v. County of Spokane*, 158 Wn.2d

661, 673, 146 P.3d 393 (2006). Amici's hyperbole aside, the Court of Appeals correctly engaged in precisely this analysis in holding that whether or not the WSDOT in its conveyance and agreements gave the City continuing authority to open or close the I-90 trail to the public was a question of fact for the jury.

B. The Court of Appeals Correctly Ruled That the City Was Not Entitled to Judgment as a Matter of Law Because There Were Issues of Fact as to Immunity.

It is well-settled that recreational use immunity can be a question of fact. *Cultee v. City of Tacoma*, 95 Wn. App. 505, 508, 977 P.2d 15 (1999). While Amici argue that the City "gratuitously [left] open [its] land for recreational purposes," *Seattle Brief*, p. 1; *WSAMA Brief*, p. 1, the Court of Appeals properly held that on this record this question presented a disputed issue of fact. That record included that the I-90 trail was built exclusively with state and federal highway funds, with no recreation funds, CP 749; WSDOT's determination, as the "controlling authority" agency, that the I-90 trail is a non-motorized public transportation route, not a public park or recreation land, CP 748-49; WSDOT's quitclaim deed, which granted the City authority to use the trail for "road and street purposes only....", CP 624; WSDOT's annual payments to the City under the Turnback Agreement to maintain the trail in a reasonably safe condition for non-motorized transportation, CP 508-510; the

City's concurrence in the NEPA Environmental Assessment that the site of Camicia's accident "is not a publicly owned public park [or] recreation area...", CP 772, 774; and City officials' testimony that the City lacked authority to close the I-90 trail. CP 777-78, 844-45. The Court of Appeals correctly ruled that at a minimum, there were fact issues as to whether the City had "continuing authority to determine whether the land should be open to the public..." for outdoor recreation purposes. *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 558, 872 P.2d 524 (1994).

WSAMA argues that, unlike the excavation contractor in *Tennyson*, 73 Wn. App. at 557, 558, the City had a "broader, more permanent interest in the land" that met RCW 4.24.210's "possession and control" requirement. *WSAMA Brief*, p. 4. But the issue under RCW 4.24.210 is whether the City had the "lawful possession and control"—i.e. authority to designate the I-90 trail as recreation land and to close the trail permanently to bicycling and other outdoor recreation. If, as the evidence showed, the City lacked authority to close the trail to non-motorized transportation, it could not prevent the public from bicycling on the trail or otherwise entering the land for the purpose of outdoor recreation.

Moreover, when it wanted to develop the Mercer Island Park & Ride lot without preparing an Environmental Impact Statement the City originally concurred that the site of Camicia's accident was *not* park or recreation land, and City officials initially admitted that the City could *not* unilaterally close the I-90 trail. A jury as a consequence could find as a matter of fact that "from any *objective measure* of the [landowner's] standpoint," recreational use immunity does not apply. *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 668, 27 P.3d 1242 (2001) (emphasis added).

Division One correctly concluded that RCW 4.24.210 does not abrogate a city's duty to keep its roads and streets in a reasonably safe condition for bicycling and other ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 254, 44 P.3d 845 (2002). While "[t]he statute applies equally to everyone who enters a recreational area", *Riksem v. City of Seattle*, 47 Wn. App. 506, 512, 736 P.2d 275 (1987), a jury could reasonably find that Camicia did not enter a recreational area, but instead was injured on a poorly maintained public transportation route. Since the City failed to prove "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," under CR 56(c) and *Keller*, the summary judgment was properly reversed.

C. Amici Fail To Address The Restrictions On The City's Authority And Control In The Quitclaim Deed And Turnback Agreement.

Neither amici addresses the restrictions the quitclaim deed and Turnback Agreement place on the City's "lawful possession and control", *i.e.* its authority to "allow" members of the public to use the I-90 trail for transportation or outdoor recreation. Amicus City of Seattle never mentions these contracts. WSAMA dodges this issue by arguing that Camicia lacks "standing" to assert that the City was not in "lawful possession and control" within the meaning of RCW 4.24.210, incorrectly stating that "no case suggests that chain of title" is relevant. *WSAMA Brief, pp. 2-4.*

Amici cannot contest the established principle that recreational use immunity under RCW 4.24.210 is an affirmative defense, which the City had the burden to plead and the initial burden to establish on summary judgment. *See Robinson v. City of Seattle*, 119 Wn.2d 34, 65, 830 P.2d 318 (1992)(characterizing qualified immunity as affirmative defense). Camicia surely had "standing" to assert the City's breach of its duty of reasonable care; she was not "enforcing" the WSDOT's quitclaim deed to the City. Once the City raised the defense of RCW 4.24.210, Camicia cited the quitclaim deed

and the Turnback Agreement to show that the City was required to keep the I-90 trail open for "road/street purposes."

The Ninth Circuit has rejected WSAMA's argument and held that "chain of title" can be relevant to recreational use immunity. In *Power v. Union Pac. Railroad Co.*, 655 F.2d 1380 (9th Cir. 1981), the Ninth Circuit looked to the terms of railroad's lease, holding that Union Pacific had "lawful possession and control" over the railroad tracks where the plaintiff was killed because the lease conferred "equal joint possession and use" of the railroad tracks that could not be impaired by the lessor, including an implied right to "fenc[e] the right of way." *Power*, 655 F.2d at 1377.

The City of Seattle cites *Power* for the proposition that land can have both commercial and recreational uses. *Seattle Brief*, pp. 7-8. But the issue here is not whether the I-90 trail can be used for outdoor recreation as well as transportation, but whether the City had "continuing authority to determine whether the land should be open to the public...." *Tennyson, supra*. In contrast to the broad delegation of control under the lease in *Power*, WSDOT's quitclaim deed limited the City's use of the property conveyed to "road/street purposes only" unless WSDOT gave "prior written approval" for any other use. CP 624. This limitation and the obligations under the

Turnback Agreement deprived the City of any authority to “allow” members of the public to use the I-90 trail for transportation or outdoor recreation.

WSAMA and the City of Seattle mischaracterize the Court of Appeals decision as holding that recreational use immunity depends on whether a landowner “designates... its land as ‘recreational.’” *Seattle Brief*, p. 3; *See also WSAMA Brief*, p. 2 (arguing that Division One held there was a question of fact as to whether the City “had the right to open this property up for recreational purposes.”) The opinion says nothing of the kind. Because the City lacked authority to close the trail under the quitclaim deed and Turnback Agreement without WSDOT’s “prior written approval,” CP 624, Division One correctly held that “there are material issues of fact as to whether the City has the *authority* to designate the I-90 trail as recreational land and assert immunity under RCW 4.24.210.” *Opinion 14*. (Emphasis added)

D. Recreational Use Immunity Is Strictly Construed And Limited To Its Statutory Purpose.

Amici argue that “the purposes of immunity are not served by... harassing and time-consuming discovery and trial, as well as... judgments,” *WSAMA Brief*, pp. 4-5, or by making cities answer for their tort liabilities when they would rather attend to “overwhelming, competing and more emergent demands.” *Seattle Brief*, p. 10. Amici ignore the fact that the

Legislature in abolishing sovereign immunity has decreed that municipalities shall be held liable “to the same extent as if they were a private person or corporation.” RCW 4.96.010. This Court should reject amici’s attempt to establish by judicial fiat the very sovereign immunity that the Legislature has rejected with respect to a municipality’s duty to exercise reasonable care over its roads and highways. *See Keller v. City of Spokane*, 146 Wn.2d 237, 254, 44 P.3d 845 (2002).

There is no judicial or legislative policy to endorse “the purpose of immunity” for its own sake, or to encourage landowners, be they public or private, to ignore or de-prioritize their liabilities in tort. To the contrary, our courts have ruled that “As statutes such as RCW 4.24.210(1) are in derogation of common law rules of liability of landowners, they are to be strictly construed,” *Nielsen*, 107 Wn. App. at 666-67, and that “no intent to change that law will be found unless it appears with clarity.” *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 824 P.2d 541 (1992), *citing McNeal v. Allen*, 95 Wash.2d 265, 269, 621 P.2d 1285 (1980).

The purpose of RCW 4.24.200—“encourag[ing] owners and others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes”—is not implicated here

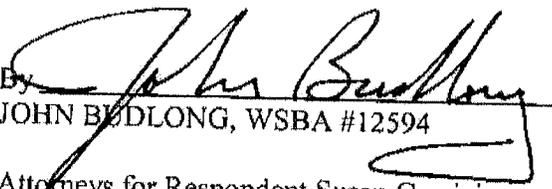
because the I-90 trail would "otherwise be open to the public" for vocational or recreational bicycling free of charge without regard to recreational use immunity. Immunity would not "encourage [the City]... to make [the trail] available to the public for recreational purposes" because WSDOT already made it available for recreational purposes through the quitclaim deed and Turnback Agreement, and the City had no authority to close this state-controlled public transportation route or re-designate it as "recreation land." Amici's desire to evade liability in tort that the Legislature has concluded as a matter of public policy it should have is not a basis for acceptance of review.

II. CONCLUSION

The issues raised by Amici present no grounds for review by this Court, which should deny the City of Mercer Island's petition for review.

RESPECTFULLY OFFERED this 8th day of April, 2011.

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I hereby certify under penalty of perjury under the laws of the State of Washington that on this date an original and/or copy of Respondent's Answer to the Briefs of Amici Curiae City of Seattle and Washington State Association of Municipal Attorneys was sent via e-mail for filing with the court identified below and delivered via e-mail, legal messenger and/or first class mail to the following attorneys:

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The following documents are attached for filing with the court -

1. Answer to Briefs of Amici Curiae City of Seattle and Washington State Association of Municipal Attorneys; and,
2. Certificate of Service.

Thank you.

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