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NO. 85583-8

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SUPREME COURT OF THE STATE OF WASHINGTON

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(Court of Appeals No. 63787-8-I)

(King County Superior Court Cause No. 07-2-29545-3 SEA)

CITY OF MERCER ISLAND

Petitioner,

vs.

SUSAN CAMICIA,

Respondent.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ANSWER TO PETITION FOR REVIEW

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I. SUMMARY OF ARGUMENT AGAINST REVIEW

Plaintiff/Respondent Susan Camicija files this Answer to defendant City of Mercer Island's Petition for Review. The Court of Appeals' unpublished decision properly reversed the trial court's summary dismissal because "there are material issues of fact as to whether the City has the authority to designate the I-90 trail [on Mercer Island where Susan Camicija's injury occurred] as recreational land and assert immunity under RCW 4.24.210." *Petition Appendix (App.) 24*. The Court of Appeals also properly rejected the City's sweeping thesis that every owner of any "land used for 'bicycling' [is] explicitly protected by the recreational use immunity statute." *Petition at 1*. The Court of Appeals' fact-specific decision does not conflict with any of this Court's decisions or other decisions from the Court of Appeals, RAP 13.4(b)(1), (2), and the City's arguments for review have no valid basis in policy or law. RAP 13.4(b)(4)

II. COUNTERSTATEMENT OF THE CASE

A. The State Conveyed The I-90 Trail, Including The Section Where Susan Camicija Was Injured, To The City For Road and Street Purposes Only.

The I-90 trail is a regional, non-motorized, public transportation route which is the only direct way for bicyclists and pedestrians to commute over

Lake Washington from Bellevue across Mercer Island to Seattle and back. CP 703, 747-750. In the 1980s, the Washington State Department of Transportation (WSDOT) built the I-90 trail exclusively with federal and state highway funds. CP 749. No recreation funds were used to construct the trail. CP 749. WSDOT had jurisdiction over the trail which "can be used for recreational purposes", but was "developed and exists primarily for transportation, and serves as an integral part of the local transportation system" and as "an important link in the regional transportation system." CP 749.

In 1987, WSDOT and the City entered into an "I-90 Turnback and Landscape Maintenance Agreement," which provided that the City would accept maintenance responsibility of the section of the I-90 trail involved here in exchange for WSDOT paying the City \$68,000.00 per year, to be adjusted for inflation annually. CP 508-510. In 1991, the City prepared a Comprehensive Parks, Recreation, Open Space, Arts and Trails Plan, which referred to I-90 trail as being in a "regional park." CP 159.

In April 2000, WSDOT quitclaimed to the City the section of the I-90 trail where Susan Camicia was later injured, limiting 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. The quitclaim deed did not authorize the City to re-designate or use the I-90 trail as recreation land. WSDOT has never given the City written approval to re-designate or use the I-90 trail as park or recreation land.

In 2002, WSDOT reaffirmed its jurisdiction over the I-90 trail, and requested Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) “concurrence with the determination that the I-90 bicycle and pedestrian path is not a §4(f) [park or recreation land] resource” under the USDOT Act of 1966 §4(f), 49 U.S.C. §303(c), CP 749, but instead was a transportation facility:

While the path can be used for recreational purposes, it was developed and exists primarily for transportation, and serves as an integral part of the local transportation system.

CP 749. WSDOT made this request to avoid §4(f)’s environmental approval requirements for projects on “park or recreation land.” CP 748-749.

The City in its petition contends that the portion of the I-90 trail involved here was recreation land. But in September 2004, the Federal Transit Administration and Sound Transit, “in coordination with the City of Mercer Island,” prepared an Environmental Assessment that concluded that the Park & Ride lot and “the adjacent sidewalks”—*i.e.* the exact location

where Camicia was later injured, CP 772, "is not a publicly owned public park, recreation area, or wildlife and waterfowl refuge, or an historic site." CP 774. *See also* CP 769, 775.

B. The City Authorized The Installation of Fencing That Protruded Into The Public Right Of Way, Gravely Injuring Susan Camicia.

On March 30, 2006, the City issued a Right of Way Use Permit to defendant Howard S. Wright Construction Company that required "A chain link fence, gate and signage shall be installed on the [I-90] trail [next to the Park & Ride lot] to prevent public access during construction." CP 61-65. With the City's knowledge, Howard S. Wright installed a fence on the I-90 trail. One of the fence footings protruded 30" into the public right-of-way. CP 294.¹ The City's wood bollard post was positioned in the middle of the I-90 trail about 15 feet away from the protruding fence footing. CP 186, 298. The City did not paint the bollard in a contrast color, or reflectorize it, or put any warning stripes on the trail leading up to it. CP 292, 298, 730-732.

On June 19, 2006, Susan Camicia was riding her bicycle on her way home from work on the I-90 trail alongside the Mercer Island Park & Ride

¹The Commissioner's Ruling Denying Motion to Transfer, upon which the City relies in its Petition, says the fence footing "jutt[ed] out several inches into the sidewalk." *App.* 9. That significantly understates the size and nature of the fence obstruction.

lol. CP 842. As Susan steered to the left to avoid the protruding fence footing, her bicycle turned into the path of the City's bollard in the middle of the trail. She fell head-first over her handlebars onto the pavement and sustained a C-6 spinal cord injury which has left her paralyzed. CP 712.

C. **The Court of Appeals Reversed The Dismissal Of Camicia's Claim Against The City On Summary Judgment Because The City's Authority To Redesignate The I-90 Trail Recreational Land Presented An Issue Of Fact.**

In 2007, Camicia filed this personal injury lawsuit in King County Superior Court alleging the City was negligent in granting the right-of way use permit to construct a fence on the I-90 trail, in failing to maintain the trail in a reasonably safe condition, and in violating applicable safety standards. CP 6-7. In August 2008, Judge McBroom denied the City's motion for summary judgment based on RCW 4.24.210 because there were issues of fact or law "as to whether or not the City has the power to close this [I-90 trail] transportation corridor, whether the City is actually the owner, and whether this is recreational use land at all." RP 54-55.

On summary judgment, City Development Director Lancaster testified the City lacks authority to close the I-90 trail because WSDOT is the "controlling authority" over the trail and closing the trail would require WSDOT and/or federal government approval. CP 844-845. City Engineer

Yamashita also testified that the City lacks authority to close the I-90 trail permanently across Mercer Island. CP 777-778. The City's agreement "to accept maintenance responsibility" for the I-90 trail on Mercer Island under the I-90 Turnback Agreement with WSDOT further prevented the City from unilaterally closing off its sections of the trail. CP 508-510.

In April 2009, the City renewed its motion for summary judgment before Judge Inveen. The City submitted a supplemental declaration from City Engineer Yamashita now claiming the City "could unilaterally shut [the trail] down...." CP 498-99. In June 2009, Judge Inveen granted the City's motion to dismiss and certified her ruling as final under CR 54(b). CP 862-868, 884-891, 919-924.

On November 8, 2010, Division One in an unpublished decision reversed the summary judgment and remanded for trial on the grounds 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." *App. 24, 26.*

The City seeks review of this unpublished decision.

III. ARGUMENT WHY THE SUPREME COURT SHOULD DENY DISCRETIONARY REVIEW

A. The Court Of Appeals Unpublished Decision Is Wholly Consistent With Decisions From This Court And The Court Of Appeals That Limit Recreational Immunity To Owners Who Can Choose To Open Their Lands To Public Recreation.

The Court of Appeals followed settled law in holding that the recreational immunity statute, RCW 4.24.210, applies only to landowners who have the discretion and authority to open, or to close, their lands to the public, free of charge, for recreational purposes. The Court of Appeals' unpublished decision comports with the plain language of the statute and is wholly consistent with decisions from this Court and the Court of Appeals.

RCW 4.24.210, by its terms, applies to owners in "lawful possession and control of any lands . . . who allow members of the public to use them for the purposes of outdoor recreation . . . , which term includes, but is not limited to . . . bicycling." The City argues that since "bicycling" is listed as a recreational activity in RCW 4.24.210(1), every owner of any "land used for 'bicycling' [is] explicitly protected by the recreational use immunity statute," regardless of whether the injury occurs on a public roadway or recreation land. *Petition at 1*. Under the City's sweeping view, recreational use immunity bars all roadway hazard claims against a public or private

landowner so long as the injured person was doing any of the activities listed in RCW 4.24.210, including, for example, “pleasure driving... of other vehicles” or “viewing or enjoying... scenic...sights,” regardless of whether the accident occurred on a city street or state highway or outdoor recreation land.

Division One properly rejected the City’s argument that RCW 4.24.210 swallows a municipality’s “duty to exercise ordinary care in the repair and maintenance of its public roads, streets and highways to keep them in a reasonably safe condition for ordinary travel,” *Keller v. Spokane*, 146 Wn.2d 237, 254, 44 P.3d 845 (2002), any time a person is doing any of the activities listed in RCW 4.24.210(1). First, it properly held that RCW 4.24.210 is strictly construed because it is in derogation of the common law. *Mathews v. Elk Pioneer Days*, 64 Wn. App. 433, 437, 824 P.2d 541 (1992) (statute did not immunize negligent conduct of organizers of community festival held on church premises). Second, it interpreted the language of RCW 4.24.210 in light of its stated purpose to “encourage owners or others in lawful possession and control of land . . . to make them available to the public for recreational purposes.” RCW 4.24.200. *App. 22*. Third, it properly interpreted the statutory requirement that the landowner have “possession or control” of the land by determining whether under these

specific facts, the landowner has “continuing authority” to open, or to close the land to the public. *Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 557-58, 872 P.2d 524 (1994).

Division One’s unpublished decision is not based on the primary or secondary uses of the I-90 trail, but on the City’s lack of authority to re-designate or use the I-90 trail as recreation land. The Court of Appeals decision is therefore consistent with this Court’s decision in *McCarver v. Manson Park & Recreation Dist.*, 92 Wn.2d 370, 373, 597 P.2d 1362 (1979), where the parties stipulated that RCW 4.24.210 applied because the situs of the accident was a water area that the defendant allowed the public to use for outdoor recreation without charging a fee. *See also Widman v. Johnson*, 81 Wn. App. 110, 912 P.2d 1095 (1996), (defendant landowner allowed the public to use its logging road for outdoor recreation without charging a fee and had “continuing authority to determine whether the land should be open to the public....”)

As Division One noted in its opinion, its decision does not conflict with *Chamberlain v. Dep’t of Transp.*, 79 Wn. App. 212, 901 P.2d 344 (1995) because the State of Washington, who owned the scenic overlook where the injury occurred in that case, had authority to designate it as a

recreation area. *App. 26*. For the same reason the decision does not conflict with *Riksem v. City of Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987) because Seattle's Burke-Gilman trail, unlike the I-90 trail, is "a former railroad track which was converted (improved) by the City [of Seattle] to an asphalt trail for walkers, joggers, and bicyclists." See *Partridge v. City of Seattle*, 49 Wn. App. 211, 214, 741 P.2d 1039 (1987). Seattle could close the Burke-Gilman trail to outdoor recreation use because its ownership, unlike the City's ownership of the I-90 trail, was not limited to "road/street purposes only, and no other use...." *App. 26*.

It is possible that but for RCW 4.24.210, the Burke-Gilman trail "might not otherwise be open to the public." *Riksem*, 47 Wn. App. at 511. In contrast, there was evidence in this case that the I-90 trail is open to the public, with or without RCW 4.24.210, as a regional, non-motorized, public transportation route. Contrary to the City's claim, Division One properly "look[ed] to the perspective of the landowner" in determining whether the recreational use immunity statute applies" and found issues of material fact as to whether the City could close the trail. *App. 23*. See *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 608, 774 P.2d 1255 (1989); *Cultee v. City of Tacoma*, 95 Wn. App. 505, 514, 977 P.2d 15 (1999).

There was also evidence that the site of Camicia's injury was a "necessary and integral part" of the I-90 trail. Division One's unpublished decision thus was also consistent with *Plano v. City of Renton*, 103 Wn. App 910, 14 P.3d 871 (2000), where the plaintiff was injured on a walkway that connected a city park to a floating dock for which Renton charged moorage fees. Division One held the plaintiff's claim was not barred by RCW 4.24.210 because the walkway was a "necessary and integral part of the moorage." *Plano*, 103 Wn. App. at 915. Thus, even if the City was authorized to re-designate its own quitclaimed sections of the I-90 trail as recreation land, under *Plano* it could not create a "patchwork" recreational use immunity for sections of the trail that are "necessary and integral" to the trail's purpose as a non-motorized public transportation route.

B. The City Misapprehends and Mischaracterizes the Court of Appeals' Fact-Specific Decision.

The City's petition does not present a significant question of constitutional law, or, as this Court's Commissioner ruled in denying Camicia's motion to transfer, an issue of substantial public interest. *App. 10*. Instead it involves material factual disputes, which Division One properly recognized should be decided by a jury, whether "the City did not have the authority to either open or close the I-90 trail for public recreation," and

whether "the evidence . . . support[s] the City's claim that the I-90 trail was recreation land." *App.* 20. The City argues that the Court of Appeals erred in failing to resolve these factual questions as a matter of law on the basis of the summary judgment record, but does not argue that the Court of Appeals misstated the bedrock principle that recreation use immunity applies only to landowners who can choose to open or close their land to the public for recreational use. *See Tennyson v. Plum Creek Timber Co.*, 73 Wn. App. 550, 558, 872 P.2d 524 (1994) (recreational use immunity only available to landowners or occupiers who have "continuing authority to determine whether the land should be open to the public..."); *Riksem v. City of Seattle*, 47 Wn. App. at 511 ("The manifest object of the Recreational Use Statute is to provide free recreational areas to the public on land and in water areas that might not otherwise be open to the public.")

The Court of Appeals properly held that the terms of the conveyance from the State of Washington, which limited the use of the property conveyed "for road/street purposes only, and no other use shall be made of said property without obtaining prior written approval" of WSDOT, raised a material issue of fact as to whether the City could designate the trail as recreation land or close it to public use. This Court has consistently held that "the primary

objective of deed interpretation is to give effect to the parties' intent." *Niemann v. Vaughn Community Church*, 154 Wn. 2d 365, 374, 113 P.3d 463 (2005). That intent is a "factual question," that can be derived not just from the language of the deed itself, which in this case is ambiguous, but also from "the situation and circumstances of the parties at the time of the grant . . ." *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 739, 844 P.2d 1006 (1993).

Those surrounding circumstances in this case, including the contradictions between City employee Yamashita's and Lancaster's deposition testimony that the City did not have continuing authority to close off the I-90 trail and their later declarations that the City did have such authority, fail to resolve the ambiguity contained in the deed. The City's contradictory positions in concurring during the EIS process in 2002-2004 that the I-90 trail was *not* park or recreation land, then claiming the opposite in this lawsuit, raise additional issues of fact. Since there were material, disputed issues of fact whether the City had or lacked authority to "allow [or disallow] members of the public to use [the I-90 trail] for the purposes of outdoor recreation," RCW 4.24.210(1), the Court of Appeals correctly ruled that the City did not meet its burden of proving on summary judgment that the statute applies.

Contrary to the City's claims in its Petition, the quitclaim deed with the City was the subject of briefing and extensive discussion at oral argument. The City offered no explanation, then or now, how the quitclaim deed gave it authority to re-designate or use the I-90 trail as recreation land or why WSDOT would grant it such authority, since that would have undermined WSDOT's objective to avoid the §4(f) approval process and, according to the City, also would have been unconstitutional or unlawful. Nor could the City explain how the I-90 trail's 8-10 foot width, or asphalt surface, or distance from adult entertainment establishments, transformed it from a non-motorized public transportation system into recreation land. *Petition at 3, 4.*

The City asserts the Court of Appeals' decision was based on the "unstated but faulty premise that a regional transportation system cannot have an important recreational use," *Petition at 14*, that Division One "assume[d] that [WSDOT's quitclaim conveyance for "road/street purposes only"] was mutually exclusive with recreation," *Petition at 5-6*, "concluded that the bike path's potential 'transportation use' created an issue of fact," "did what no court has ever done: weighed primary and secondary uses of recreational land to find an issue of fact," *Petition at 8*, and "took for granted that a recreational bike trail could never be a 'highway purpose.'" *Petition at 17.*

Nothing in the appellate court's unpublished decision remotely supports the City's characterizations. The decision does not assume that transportation and recreation are mutually exclusive. Nor does it weigh their relative importance on the I-90 trail. It merely holds there are material fact issues as to whether the City had or lacked "the authority to designate the I-90 trail as recreational land and assert immunity under RCW 4.24.210." *App.* 24, 26.

That decision presents no grounds for review by this Court.

C. **The Court of Appeals Did Not Decide All Of The Issues Raised By Camicia On Appeal.**

The Court of Appeals failed to address the other significant issues raised by Camicia on appeal that require reversal of the trial court's summary judgment and a remand for trial. For one, RCW 4.24.210 does not apply to tort claims of non-recreational users who are injured on lands open to the public for both non-recreational and recreational purposes: *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 664, 27 P.3d 1242 (2001) ("We affirm [that RCW 4.24.210 does not apply] because Nielsen... was not a 'recreational user' within the meaning of the recreational use statute.") Under *Nielsen*, there is, at a minimum, a fact question whether Susan Camicia was a "recreational user" to whom RCW 4.24.210 would apply because there was evidence that she was commuting from her job in Seattle

to her home in Mercer Island when she was injured. The Court of Appeals did not need to address this issue. *App. 23 n.3.*

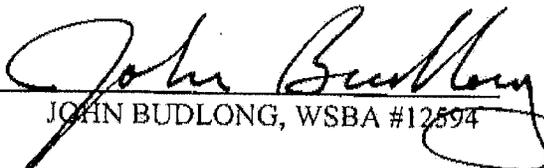
The Court of Appeals also did not decide if the City, which charged WSDOT to maintain the I-90 trail for "all street and landscape maintenance and operation," CP 508-510, was "charging a fee of any kind therefor" under RCW 4.24.210(1), and thus also was ineligible for immunity on that basis. *App. 21, n. 9.* In the event this Court accepts review and ultimately holds that the City did have the authority to close the I-90 trail, it should decide these issues, or pursuant to RAP 13.7(b), remand to the Court of Appeals with directions to resolve these other alternative grounds for reversing the trial court's dismissal of Camicia's claim.

IV. CONCLUSION

This Court should deny the City of Mercer Island's petition for review.

RESPECTFULLY OFFERED this 22nd day of February, 2011.

LAW OFFICES OF JOHN BUDLONG

By 
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Attorneys for Appellant Susan Camicia

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(King County Superior Court Cause No. 07-2-29545-3 SEA)

CITY OF MERCER ISLAND

Petitioner,

vs.

SUSAN CAMICIA,

Respondent.

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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 the Answer to Petition for Review was sent via e-mail for filing with the court identified below and delivered via e-mail and legal messenger to the following attorneys:

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Case Name: City of Mercer Island v. Susan Camicia
Case No.: 85583-8
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The following documents are attached for filing with the court -

1. Answer to Petition for Review; and,
2. Certificate of Service.

Thank you.

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